

# BODY

# POLITICS

A PRIMER ON CRIMINALIZATION  
OF SEXUALITY AND REPRODUCTION

AMNESTY  
INTERNATIONAL



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People take part in a demonstration in support of abortion rights in front of the Polish Parliament, Warsaw, 13 January 2018.

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A woman stands outside the kitchen at Foceb shelter in central Ouagadougou, Burkina Faso. © Sophie Garcia/Corbis for Amnesty International.



## FOREWORD

There is a long history of states criminalizing sexuality and reproductive decisions relating to health. Unfortunately, despite increasing attention paid to the protection of human rights in the last few decades, the criminalization fever shows no signs of cooling. In some areas this trend appears to have gained renewed strength. Throughout much of the Americas, for example, women and health professionals can be punished for seeking, obtaining or providing abortion services. In certain states in Africa, opportunistic politicians have pumped life into antiquated statutes or passed new laws punishing same-sex activity with dire penalties. Notably, this rush to criminalization is not limited to developing or least developed states. The last few years has also seen a rise in women in the USA being jailed for otherwise legal acts conducted during pregnancy, and in many rich and poor states alike, individuals can still be prosecuted for transmission of HIV.

Criminalization of sexual and reproductive health-related activity, in particular, stands as a significant impediment to the realization of human rights, particularly the right to health. Although such criminalization is justified by some as a “public health” measure, in most cases it exacerbates the underlying public health concern by driving risk behaviour underground and preventing the provision of effective health services; contributing to preventable illness and death. Criminalization of consensual reproductive and sexual behaviours also violates autonomy, which is the foundation on which an individual’s ability to realise their right to health is built.

In addition to implicating human rights adversely, criminalization of sexuality and reproductive decisions engenders stigmatization, discrimination and even violence against people engaged in (or suspected of engaging in) the prohibited behaviour, which can further place the health of vulnerable people at risk. Indeed, the individuals facing punishment tend to be members of poor, marginalized and vulnerable groups, as opposed to wealthy individuals engaging in the same behaviour. Moreover, such criminalization affects not just those against whom the law is directed, but negatively impacts the rights of entire populations by giving states power to interfere with individuals’ private decision-making and forcing people to conform to strict sexual and gender norms. Using the force of state machinery to achieve illegitimate aims relating to the public morality can further lead to an environment generally permissive of arbitrary arrests and detention, harassment, stigmatization, discrimination and violence. Such use of power also weakens respect for the rule of law.

Unfortunately, all too often criminalization of sexual and reproductive decisions and behaviours can be a means to gain political support from voters, especially when the targets of such punitive regulation are politically disenfranchised or socially marginalized. It is therefore crucial to highlight the depth and extent of this problem and to empower activists worldwide to challenge laws directly or indirectly criminalizing sexual and reproductive decisions and behaviours.

Amnesty International's Primer and Toolkit - *Body Politics: Criminalization of sexuality and reproduction* - is a timely, meaningful and welcome contribution that can enable activists to both comprehend and challenge illegitimate criminalization of sexuality and reproductive decisions. It is vital to understand the extent to which criminalization has permeated states today and the damage which is done by such measures masquerading as legitimate public health or public morality initiatives. This Primer details the major areas of concern and the harm which both direct and indirect criminalization inflict on an individual's human rights and the health of society as a whole. It is not enough, however, to simply understand the problem of criminalization of sexuality and reproductive decisions; steps must also be taken to challenge it. The Toolkit provides concrete campaigning techniques such as mapping stakeholder participation and power, identifying advocacy targets, and building capacity. The Training Manual can be used to build understanding and capacity around these issues for a range of audiences and activists.

Considering the wave of criminalization of sexuality and reproductive decisions which appears to be sweeping over states worldwide, it is my hope that Amnesty International's Criminalization of Sexuality and Reproduction series will help stem the tide by providing advocates and activists with a full understanding of the damage produced by such criminalization and the tools with which to fight it.

### **Anand Grover**

Former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

# GLOSSARY

## **Age of sexual consent**

The age at which a person is deemed legally capable of consenting to sexual activity. Similarly, it is the minimum age of a person with whom another is legally permitted to engage in sexual activity.

## **Criminalization of sexuality and reproduction**

The process of criminally prohibiting particular sexual and/or reproductive actions, decisions or gender expression for which individuals can be subject to punishments in law. It also refers to the discriminatory use of general criminal law against people involved in the particular sexual and/or reproductive conduct, decisions and/or gender expression which can in practice work as a de facto prohibition, and the application of other types of laws and policies that have the effect of punishing people for particular sexual and/or reproductive actions, decisions or gender expression.

**This broad definition includes direct criminalization, indirect criminalization, and the forms of penalization listed below:**

- **Direct criminalization**  
Passing and/or implementing criminal laws that specifically target and punish sexual and/or reproductive actions, decisions or gender expression.
- **Indirect criminalization**  
Implementing general criminal law, or punitive civil or religious laws in a discriminatory way to sanction particular sexual and/or reproductive actions, decisions or gender expression.
- **Penalization**  
Refers to laws, policies and administrative rules that have the same intent or effect as criminal laws in punishing, controlling and regulating people based on their proscribed sexual and/or reproductive actions, decisions or gender expression.

## **Presumed criminality**

The process of assuming a person is a “criminal” and treating them as such because they are (or perceived to be) a member of a stigmatized group regardless of whether they have actually engaged in “unlawful” behaviour. This puts people at risk of increased surveillance, discrimination, violence and extortion by law enforcement officials and the public.

## **Punitive laws and policies or punitive regulation**

Both criminal and non-criminal laws, policies and practices that have the effect of punishing people for particular sexual and/or reproductive actions, decisions or gender expression.

## **Gender**

Socially constructed characteristics of people commonly based on their assigned sex. This varies from society to society and can change or be changed. When individuals or groups do not “fit” or act in accordance with established gender norms, they often face stigma, discriminatory practices or social exclusion.

## **Gender expression**

The means by which individuals express their gender identity. This may or may not include dress, make-up, speech, mannerisms, surgical or hormonal treatment.

## **Gender identity**

One’s deeply felt internal and individual experience of gender, which may or may not correspond with their sex assigned at birth.

## **Gender non-conforming**

Describes individuals whose gender identity, role, or expression differs from what is normative for their assigned sex in a given culture and historical period.

## **Intersectional discrimination**

Intersectional discrimination is discrimination on a combination of grounds that combine to produce disadvantages distinct from any one ground of discrimination standing alone.

**Pregnancy criminalization**

The process of attaching punishments or penalties to women for actions that are interpreted as harmful to their own pregnancies.

**Sexual orientation**

Each person's capacity for profound emotional, affectionate and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

**Sex outside marriage**

Sex between people who are not married, often referred to in criminal law as "adultery" or "fornication".

**Sex work**

The exchange of sexual services between consenting adults for some form of remuneration, with the terms agreed between the seller and the buyer. Sex work takes different forms, and varies between and within countries and communities.

**Transgender**

Transgender is a term used to describe individuals whose gender expression and/or gender identity differs from conventional expectations based on the sex they were assigned at birth.



Demonstrators in Warsaw march against the new restrictions in abortion law being proposed in the Polish parliament, 17 January 2018. © Grzegorz Żukowski



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# INTRODUCTION

**“We all share sexuality, with its capacity for erotic pleasure, fantasy, exploration, creation, and procreation, as well as for danger and abuse. We all share a body, with its capacity for health and wellbeing as well as disease, deterioration, violence, and death. The idea of dignity and rights in the body is powerful and can unify coalitions across groups that for too long have worked in fragmented ghettos”**

Rosalind P. Petchesky, “Rights of the body and perversions of war: Sexual rights and wrongs ten years past Beijing”, *International Social Science Journal* 2 (2005)

Sexuality is an intrinsic part of being human and we should all be able to decide how we express our sexuality, sexual orientation and gender identity. We should be free to decide whether and when we become pregnant and if, when or who we marry. The ability to make decisions about our bodies, our sexuality and reproduction is essential to human dignity, to the enjoyment of physical, emotional, mental and social wellbeing; and to the realization of the full range of human rights.

The criminalization of sexuality and reproduction around the world is a major barrier to the realization of our rights and denies millions of us our human dignity. Sometimes direct regulation through laws and policies is used to target our sexual and reproductive actions and decisions, such as criminal bans on abortion, sex outside marriage or same-sex sexual conduct. At other times, indirect regulations use a range of criminal, civil and religious laws and policies relating to public order or “morality” in order to police and punish particular sexual and reproductive choices or gender expression.

States are obliged under international human rights laws to provide a functioning and accountable legal and policy system for our safety and public health. However, they do not have unlimited power to regulate our lives. When states criminalize consensual sexual and reproductive actions, decisions or gender expression, they overstep legitimate limits and breach international human rights norms and infringe upon our dignity.<sup>1</sup>

While criminal justice systems vary across countries, in general, governments proscribe certain acts against the public or another person by imposing penalties through criminal or penal law. Punishment can also be meted out through civil, administrative and/or religious or customary law. For the purposes of this document, “criminalization” refers to the process of criminally prohibiting particular sexual and/or reproductive actions and decisions or gender expression for which individuals can be subject to punishments in law. It also refers to the discriminatory use of general criminal law against people involved in the particular sexual and/or reproductive actions, decisions and/or gender expression which can in practice work as a de facto prohibition. “Penalization” refers to laws, policies and administrative rules that have the same intent or effect as criminal laws in punishing, controlling and regulating people based on their proscribed sexual and reproductive actions and decisions or gender expression.

Criminalization can lead to arbitrary arrests, investigations, prosecutions and severe punishment. It can sanction discrimination, harassment, extortion and violence towards us by state officials in the criminal justice system and by the wider public. This can lead to social and economic marginalization and to the exclusion of individuals and groups from vital services.

The extent of criminalization of sexuality and reproduction varies from country to country but it has been documented in varying forms in every region. In some Latin American countries<sup>2</sup> and many US states,<sup>3</sup> for example, there are increasing restrictions on abortion access and laws that punish women for their actions during pregnancy. In Europe and North America, the actions of people living with HIV<sup>4</sup> have attracted increasing attention from legislators and prosecutors. In many African states, the use of laws to criminalize same-sex sexual conduct<sup>5</sup> has intensified. In parts of Asia and the Middle East and North Africa, criminal prohibition of sexual activity outside marriage,<sup>6</sup> and restrictions on access to basic sexual health information<sup>7</sup> or services, continue to undermine the sexual and reproductive rights of whole groups.

Everyone loses when states criminalize consensual sexual and reproductive behaviour or the expression of sexual and gender identities. Restrictions on the freedoms of one particular group, such as criminal bans on same-sex sexual conduct, undermine everyone’s human rights. They allow the state too much scope to interfere in the most personal aspects of people’s lives and limit their individual decision making. They force everyone to conform to the gender, sexual or reproductive norms set out by the state and ensure punishment for those who do not conform.

Such laws and policies often disproportionately affect people who do not or cannot conform to dominant social norms because of their identities or because of decisions they make in relation to their economic circumstances, their sex, race, gender expression, sexual orientation, or their immigration, health or disability status. Most people who face sanctions or imprisonment for sexual and reproductive “crimes” are in reality being punished for actions and decisions related to poverty, social exclusion, identity or their status in society.<sup>8</sup> They are not more “criminal” but as the following chapters detail, they are more criminalized.

Those who support criminalizing sexuality and reproduction often claim that it protects “morality”, increases safety, reduces harm, or encourages health-promoting behaviour. However, these assertions are increasingly challenged around the world, particularly by human rights defenders and health professionals. In fact, criminalization increases the risks to individuals and communities and obstructs the provision of effective health services.<sup>9</sup> Complete criminal bans on abortion, for example, do not prevent abortions or unplanned pregnancies but they do deny women access to adequate reproductive services and information and lead to higher levels of unsafe, illegal abortions.<sup>10</sup> Similarly, criminalizing the sexual behaviour of those living with HIV is more likely to isolate them and discourage their meaningful interaction with health services and threatens healthy behaviours and decision making.<sup>11</sup>

Legitimate efforts to protect people from sexual violence are also undermined when states focus on criminalizing sexuality and reproduction. For example, laws criminalizing “adultery” can put women who have been raped at risk of prosecution for sexual activity outside marriage and perpetuate impunity for their attackers.<sup>12</sup> Similarly, criminalizing same-sex sexual conduct makes it harder for lesbian, gay or bisexual people to report sexual and other violence against them because of the risk of arrest or discriminatory treatment. In some instances people living with HIV who have been raped, have been the subject of police investigations for “placing the perpetrator at risk” because of laws criminalizing HIV exposure or transmission.<sup>13</sup>

Amnesty International’s *Body Politics: Criminalization of Sexuality and Reproduction* series, comprised of a Primer (Index: POL 40/7763/2018), a Campaigning Toolkit (Index: POL 40/7764/2018) and a Training Manual (Index: POL 40/7771/2018), aims to equip the organization’s global movement, as well as its partners and activists worldwide, to challenge unjust criminalization of sexual and reproductive actions and decisions and gender expression. The series primarily focuses on application of criminal law to sexuality and reproduction since it is the ultimate punitive and policing power of states. Nevertheless, the series also addresses broader punitive regulation and presumptions of criminality that further lead to stigmatization, punishment and a range of human rights violations.

## AN INTERNATIONAL MANDATE FOR CHANGE

Between April 2010 and August 2011, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Special Rapporteur on the right to health) issued two reports on how criminal sanctions for same-sex sexual conduct; sexual orientation and gender identity; sex work; HIV transmission; abortion; conduct during pregnancy; and access to contraception, education and information breached human rights standards and caused significant and ongoing harm to individuals.<sup>14</sup> The Special Rapporteur called for the decriminalization of abortion; sex work; consensual same-sex sexual conduct; the unintentional transmission of, or exposure to HIV; and the provision of contraception and sexual and reproductive health information.

In 2011, the UN High Commissioner for Human Rights called for the repeal of discriminatory laws criminalizing people on grounds of their sexuality and gender, specifically those criminalizing same-sex sexual conduct or enforcing higher age of consent thresholds for sex between same-sex partners.<sup>15</sup> More recently, the Global Commission on HIV and the Law, sponsored by the UN Development Programme, identified that using the criminal justice system to police sex and sexuality increases the risk of HIV infection and is a key driver in fuelling the global HIV epidemic.<sup>16</sup> The Commission made comprehensive recommendations, including the repeal of laws that criminalize same-sex sexual conduct or LGBTI identities; the unintentional transmission of, or exposure to, HIV; and to provide sexual and reproductive health information for young people.

In 2014, the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) called on states to fully decriminalize abortion and – at the very least – legalize it in cases of rape, incest, threats to the life and/or health of the mother, or severe foetal impairment.<sup>17</sup> The UN Human Rights Committee (HRC) has indicated that imposing “a legal duty upon doctors and other health personnel [including through criminal law provisions] to report cases of women who have undergone abortion”<sup>18</sup> is a violation of a woman’s right to privacy.

In 2016, the UN Committee on Economic, Social and Cultural Rights (CESCR) stipulated that states are obliged to repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine an individual’s or a particular group’s access to health facilities, services, goods and information. Under its General Comment 22, laws criminalizing abortion or restricting its access must be repealed or reformed; access to abortion is acknowledged as an integral component to the right to health.<sup>19</sup>

Also in 2016, the UN Working Group on discrimination against women in law and practice recommended repealing restrictive laws and policies on termination of pregnancy, especially in cases of risk to the life or health, including the mental health, of the pregnant woman, rape, incest and fatal foetal impairment.<sup>20</sup> It added that states should allow women to terminate a pregnancy on request during the first trimester or later in the specific cases listed above.<sup>21</sup> Moreover, the UN Committee on the Rights of the Child (CRC) adopted General Comment 20 on the implementation of the rights of the child during adolescence, which explicitly takes up the issue of criminalization by urging states to decriminalize abortion and review legislation with a view to guaranteeing the best

interests of pregnant adolescents, and to ensure that their views are always heard and respected in abortion-related decisions. It further noted that there should be no barriers to commodities, information and counselling on sexual and reproductive health rights, such as requirements for third-party consent or authorization.<sup>22</sup>

In his report to the 2016 High-Level Meeting on HIV and AIDS, the UN Secretary-General recognised the negative health and human rights impact of criminal law:

**Misuse of criminal law often negatively impacts health and violates human rights. Overly broad criminalization of HIV exposure, non-disclosure and transmission is contrary to internationally accepted public health recommendations and human rights principles. Criminalization of adult consensual sexual relations is a human rights violation, and legalization can reduce vulnerability to HIV infection and improve treatment access. Decriminalizing possession and use of injecting drugs and developing laws and policies that allow comprehensive harm reduction services have been shown to reduce HIV transmission. Similarly, decriminalization of sex work can reduce violence, harassment and HIV risk. Sex workers should enjoy human rights protections guaranteed to all individuals, including the rights to non-discrimination, health, security and safety.**<sup>23</sup>

In light of this recognition, the UN Secretary-General called on states to:

**Leave no one behind and ensure access to services by removing punitive laws, policies and practices that violate human rights, including the criminalization of same-sex sexual relations, gender and sexual orientation diversity, drug use and sex work, the broad criminalization of HIV non-disclosure, exposure and transmission, HIV-related travel restrictions and mandatory testing, age of consent laws that restrict adolescents' right to health care and all forms [of] violence against key populations.**<sup>24</sup>

This Primer gives an overview of sexual and reproductive rights that states must respect, protect and fulfil and how states punish and prevent people from exercising these rights. The Primer looks at these issues from a human rights perspective, in particular through the lens of “bodily autonomy” - the entitlement to decide what we do with our bodies, what we allow, desire and/or forbid others to do with our bodies, and to make essential decisions about our bodies. The Primer includes discussion of seven issue areas where overreaching laws and policies criminalize sexual and reproductive actions, decisions and gender expression thereby violating our bodily autonomy and denying us our dignity and human rights.

The Primer aims to motivate and empower Amnesty International's global movement to challenge criminalization of sexuality and reproduction. It should be read in conjunction with the accompanying Toolkit (Index: POL 40/7764/2018) which provides guidance for activists on planning a strategic campaign to challenge states' unjust criminalization in the areas of sexuality and reproduction. The Training Manual (Index: POL 40/7771/2018) is a resource to introduce the Primer and Campaigning Toolkit and to build capacity around criminalization, sexual and reproductive rights and campaigning.

It is important to recognise that activists around the world have already been undertaking criminalization-related advocacy, often at great personal risk. Here, we recognise their excellent work and struggle and we seek to motivate our global movement to join them in ensuring that everyone can fully enjoy their rights as guaranteed under international human rights law.

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**22** UN CRC, General Comment 20 (Implementation of the rights of the child during adolescence), UN Doc. CRC/C/GC/20, 2016, para. 60

**23** Report of the UN Secretary-General on the fast track to ending the AIDS epidemic, UN Doc. A/70/811, 2016, para. 53

**24** Report of the UN Secretary-General on the fast track to ending the AIDS epidemic, UN Doc. A/70/811, 2016, para. 75(f)

**25** World Health Organization, *Working Definition of Sexuality*, [www.who.int/reproductivehealth/topics/sexual\\_health/sh\\_definitions/en/](http://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/); see also World Health Organization, *Defining sexual health: Report of a technical consultation on sexual health*, 28–31 January 2002, [www.who.int/reproductivehealth/topics/gender\\_rights/defining\\_sexual\\_health.pdf?ua=1WHO](http://www.who.int/reproductivehealth/topics/gender_rights/defining_sexual_health.pdf?ua=1WHO)



CONCENTRACION X

POR LA VIDA  
Y LA SALUD



X CONCENTRACION

POR LA VIDA  
Y LA SALUD DE LA  
MUJERE.



**ROMPAMOS  
EL SILENCIO**

Women take part in a demonstration to demand the decriminalization of abortion, outside the Legislative Assembly in San Salvador, 23 February 2017.  
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POR LA VIDA  
Y LA SALUD DE LAS  
MUJERES



**ROMPAMOS  
EL SILENCIO**

QUE EL DERECHO DE  
DECIDIR POR LA VIDAS  
Y LA SALUD DE LAS  
MUJERES SEA ESCUCHADO

# BACKGROUND

## WHAT DO WE MEAN BY SEXUAL AND REPRODUCTIVE RIGHTS?

Sexual and reproductive rights are human rights. They allow us to make choices about our lives and personal relationships; to choose if, when and with whom we have sex; to protect ourselves from sexual ill-health and HIV; and to enjoy our sexuality free from the threat of prosecution, discrimination, coercion or violence. They allow us to decide whether and when to become pregnant and who, when or if we marry. They ensure adequate protection from sexual violence and preventable pregnancy-related illness and death.

## SEXUAL RIGHTS, REPRODUCTIVE RIGHTS: WHAT'S THE DIFFERENCE?

While sexual rights and reproductive rights are often interlinked, there are distinctions. Most people who have sex do so for reasons other than reproduction alone. In fact, sexuality is far more than a matter of physiological or sexual activity. Additionally, the development of assisted reproductive technologies means that reproduction can occur outside of the context of sexual activity. Nevertheless, sexual and reproductive rights are indivisible and must be upheld and protected equally by states. Realization of sexual and reproductive rights is an essential component to the realization of human rights more broadly.

**Sexuality:** Sexuality is a “central aspect of being human... [encompassing] sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, legal, historical, religious and spiritual factors.”<sup>25</sup>

**Sexual rights:** “Sexual rights embrace human rights that are already recognised in national laws, international human rights documents and other consensus statements. They include the right of all persons, free of coercion, discrimination and violence, to: the highest attainable standard of sexual health, including access to sexual and reproductive health care services; seek, receive and impart information related to sexuality; sexuality education; respect for bodily integrity; choose their partner; decide to be sexually active or not; consensual sexual relations; consensual marriage; decide whether or not, and when, to have children; and pursue a satisfying, safe and pleasurable sexual life”.<sup>26</sup>

Sexual health is a state of physical, emotional, mental and social well-being in relation to sexuality.<sup>27</sup> It includes the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence.

**Reproductive rights:** Reproductive rights include the “right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.”<sup>28</sup>

The denial of sexual and reproductive rights has profoundly negative implications for individuals and society. Where these rights are violated or harshly regulated, sexuality and personal freedom is suppressed and health, wellbeing and safety compromised. Restrictive regulation of sexual and reproductive rights can also perpetuate inequality, placing women and girls at greater risk of discrimination, gender-based violence, socio-economic inequality and pregnancy-related illness and death. Similarly, when sexual or reproductive rights are not respected, people whose sexuality, sexual orientation or gender identity does not conform to dominant social and gender norms, such as lesbian, gay, bisexual, transgender or intersex (LGBTI) people, are at particular risk of discrimination, marginalization and aggression.

States have an obligation to foster an environment in which everyone can enjoy their sexual rights and to ensure that everyone has access to adequate information and services that support their reproductive rights and ensure their reproductive and maternal health.

## LEGITIMATE AND ILLEGITIMATE USE OF CRIMINAL LAW

Criminal law enforcement is the strongest expression of a state’s power over its population, as it punishes, through imprisonment or fine, people who violate the law. Criminal justice systems are built on the notion that criminal law enforcement can provide redress for specific injuries, deter future harm, and punish and/or rehabilitate offenders. States criminalize particular behaviour they deem threatening or harmful to the health, safety, property or moral welfare of people and to pursue criminal justice initiatives to regulate such conduct. However, this power has limits. International human rights standards and international criminal law provide some guidance on what states can criminalize; how they should enforce criminal law and what constitutes appropriate punishment.

Criminal law can lead to infringements on liberty, and in application, can violate a range of human rights. Determining whether criminalization of sexual and reproductive behaviour and decisions is just largely depends on the facts and circumstances surrounding the particular conduct. Initial factors that should be considered include whether the conduct is wrongful, harmful and/or intentional. Definitions of “wrongful” and “harmful” are ambiguous, inconsistent and difficult to apply. In many countries, the concept of “harm” incorporates notions of “morality” which is a subjective concept. There are also questions regarding whether harm should be direct or indirect or intentional in order to merit punishment.

Even in cases where such criteria are met, questions arise regarding whether taking a criminal approach to particular behaviour achieves justice. It may be the case that other non-punitive approaches can achieve the same aim. In other words, when various approaches can be taken, criminal law should be the “last resort.”<sup>29</sup> For example, criminalizing pregnant women because of drug dependence can threaten their health and human rights. In many circumstances, providing counselling, medical care and other services may more effectively help the pregnant woman to have a healthy pregnancy while also respecting her rights. Additionally, in areas of public health such as HIV prevention, it is more effective to develop responsive health and education programmes than to impose penal sanctions.

States are required to ensure that standards of fairness are met when developing or enforcing criminal law, in order to protect human rights. When enacting criminal laws, states must both respond to victims and prevent future harms, while protecting the accused’s rights. There is much at stake when resorting to criminalization. Thus, states must ensure measures are subject to human rights scrutiny. While there is no set of agreed principles to specifically assess the use of criminal law in the realms of sexuality and reproduction, there are longstanding international legal principles that guide states to avoid unwarranted and unnecessary criminalization.<sup>30</sup>

An overarching limit is the principle of ultima ratio - criminal law as a “last resort” (see above).<sup>31</sup> It is based on the understanding that criminal sanctions are one of the most severe forms of state intrusion on individuals’ lives and thus should be used with great caution and in limited circumstances.

Some fundamental principles of human rights law which limit the unrestricted use of criminal law include:

**Legitimate aim or purpose:** Restrictions on human rights (including through criminal law) must be for a legitimate purpose or aim.<sup>32</sup> The list of what may constitute a legitimate aim is not open-ended and is restricted to specific grounds like: protection of national security, public order, public health or morals or the rights and freedoms of others. In order to be lawful, any restrictions on human rights, in addition to serving a legitimate aim or purpose, would also need to meet the principle of necessity and proportionality (see below). Invoking morality alone as a reason to criminalize particular conduct is never enough.<sup>33</sup>

The law should only penalize acts that cause harm and should not criminalize behaviours that do not cause or carry significant risk of harm. Criminalizing inherent human behaviour, such as consensual sex that does not cause or pose a significant risk of harm, is not legitimate. In recent years, human rights bodies and experts have increasingly spoken out against human rights violations resulting from criminalizing particular consensual sexual and reproductive actions or choices.<sup>34</sup>

**Legality:** Crimes and punishments must be defined by law in a manner that is accessible to the population.<sup>35</sup> People must be able to foresee what conduct is criminalized and the scope of possible penalties.<sup>36</sup> If the law is vague or ambiguous, it should be interpreted in favour of the accused.<sup>37</sup> Laws, such as generic public morality laws that aim to prevent unclear “social harms”, often serve to punish a wide range of harmless behaviours and are often misinterpreted or used deliberately in a discriminatory and abusive manner against certain groups.<sup>38</sup> Accordingly, retrospective application of criminal law is prohibited when it is used to an accused’s disadvantage, both in terms of the criminalized conduct itself and the severity of punishment imposed.<sup>39</sup>

**Necessity:** Restriction of an individual’s human rights can only be justified when other less restrictive responses would be inadequate and are unable to achieve the legitimate aim or purpose.<sup>40</sup> Thus, the criminal law should not be used where other non-punitive measures would equally or better achieve the aim.

**Proportionality:** State policies must be proportionate and suitable to pursue the legitimate aim.<sup>41</sup> Deprivation of liberty which results from the application of criminal law may not always meet the proportionality requirement, especially if other less harsh measures could be similarly effective.

**Non-discrimination:** Criminal laws and policies must be applied equally to everyone and must not be discriminatory in impact on particular groups of people.<sup>42</sup> Laws and policies that have an unequal impact on particular individuals or groups should be viewed as suspect, requiring specific human rights scrutiny.

## PROCEDURAL PROTECTIONS

To some extent, procedural safeguards under international law limit how states should enforce criminal and other laws. For example, in enforcing criminal law, states must ensure the right of all individuals to a fair trial, including the right of anyone facing a criminal charge to a fair and public hearing by a competent, independent and impartial tribunal; a presumption of innocence until proven guilty; prompt information on the nature and cause of the charges in a language which the accused understands; adequate time and facilities to prepare a defence; access to legal representation; language assistance in court; and access to appeal procedures.<sup>43</sup>

States' criminal justice processes must adhere to principles of equality and non-discrimination also. Therefore, criminal procedure and standards for evidence must be applied equally to all. However, people facing prosecution for consensual sexual activity or reproductive choices are frequently subjected to biased and unfair prosecutorial processes. These include being denied the opportunity to mount an adequate defence, such as women facing "adultery" charges whose testimonies are considered to be worth far less than those of male accusers.

Acceptance of biased, incorrect or badly interpreted medical or scientific evidence also features in some prosecutions for abortion, HIV transmission or exposure and actions during pregnancy. Around the world this has meant that women have been prosecuted for abortion or for harming their pregnancy when they have in fact miscarried. In the case of people living with HIV, vital evidence which demonstrates a low level of risk of HIV transmission has been omitted or ignored. In some cases, particularly those involving charges for same-sex sexual conduct, statements obtained through torture and other ill-treatment, such as forced anal examinations, have been used against individuals during trial.

The right to a fair trial also extends to how punishments are determined and what punishments may be imposed. Neither the punishment itself nor the manner in which it is imposed may violate international law and standards. Additionally, sentencing decisions should be gender-sensitive, taking into account, for example, a woman's pregnancy or care responsibilities.<sup>44</sup> Finally, groups with special needs, including people who use drugs, should have prompt access to legal aid and the tools necessary to claim their rights<sup>45</sup> (see below).

More detailed information about international and regional standards that protect fair trial rights is available in Amnesty International's *Fair Trial Manual* – Second Edition, (Index: POL 30/002/2014).

## LIMITS ON STATE PUNISHMENT

There are also limits on how states should punish people for prohibited behaviours. Punishing acts that should not be criminalized in the first place violates international standards.<sup>46</sup> Exercising our sexual and reproductive rights should never be considered a crime. Beyond this, states are prohibited from punishing people in a manner far greater than the alleged “harm” done. The human rights principle of proportionality (as discussed earlier) requires that punishment generally corresponds with the severity of the crime and the circumstances of the offender.<sup>47</sup>

States must not impose punishments that breach human rights standards. For example, the death penalty violates the right to life and is the ultimate cruel, inhuman and degrading punishment. Flogging and other forms of corporal punishment violate the prohibition of torture and other ill-treatment. Despite these prohibitions, people are sentenced to death for having sex outside marriage or with a person of the same sex. In particular, women have been disproportionately convicted for “adultery” which in some countries is punishable by stoning to death.<sup>48</sup> In addition, people convicted of crimes related to sex work, adolescent sexual activity or HIV transmission, exposure or non-disclosure are required to register as “sex offenders” as a part of their punishment.

States are also prohibited from enforcing law or punishing particular behaviour or expression in a manner that is arbitrary or discriminatory. In other words, states cannot enforce the law in a way that disregards the facts, evidence and circumstances presented or demonstrates prejudice towards a person based on their actual or perceived membership of a certain group.

Therefore, sentencing that punishes us for something other than the crime itself would be contrary to the right to liberty and security of person and to protection from arbitrary arrest or detention.<sup>49</sup> For example, where same-sex sexual conduct is criminalized, people who are or are perceived to be lesbian, gay or bisexual frequently find themselves subjected to criminal punishment for expressing their identity regardless of whether they have undertaken same-sex sexual activity. Transgender people also regularly experience arrest and detention under same-sex sexual activity and sex work laws because law enforcement officials interpret their gender identity and/or gender expression as “evidence” of their being gay, bisexual or sex workers.<sup>50</sup>

States cannot punish people more harshly than others for the same type of crime based on who they are or for expressing their identity.<sup>51</sup> In other words, they cannot use general laws as a proxy to disproportionately or arbitrarily restrict the freedoms of certain groups who do not conform to social norms, such as in cases where “debauchery” laws are applied almost exclusively against gay and bisexual men or where “adultery” laws are used primarily to prosecute women and girls.

## LEGITIMATE USE OF THE CRIMINAL LAW - CHECKLIST

States must ensure their use of criminal law meets certain criteria.

The law must:

- Not be arbitrary
- Have a legitimate aim or purpose
- Clearly outline in writing what behaviour is criminalized in a manner accessible to the population
- Be necessary on the basis that there are no other less restrictive responses which would achieve the legitimate aim or purpose
- Be proportionate and suitable to pursue their legitimate aim
- Be non-discriminatory and apply equally to all people and not have an unequal impact on particular groups of people
- In enforcing the law, states must ensure that:
  - Anyone accused has access to the full range of fair trial guarantees
  - Any associated punishment is proportionate
  - is not applied in a discriminatory or arbitrary manner

-

## NOTES BACKGROUND

**26** World Health Organization, *Working Definition of Sexual Rights*, [www.who.int/reproductivehealth/topics/sexual\\_health/sh\\_definitions/en/](http://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/); The International Planned Parenthood Federation (IPPF) has also published a comprehensive Declaration of Sexual Rights. See IPPF, *Sexual rights: An IPPF declaration*, 2008, [ippf.org/sites/default/files/sexualrightsippfdeclaration\\_1.pdf](http://ippf.org/sites/default/files/sexualrightsippfdeclaration_1.pdf)

**27** World Health Organization, *Sexual health, human rights and the law*, 2015, [apps.who.int/iris/bitstream/10665/175556/1/9789241564984\\_eng.pdf?ua=1](https://apps.who.int/iris/bitstream/10665/175556/1/9789241564984_eng.pdf?ua=1)

**28** Programme of Action of the International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, UN Doc. A/CONF.171/13/Rev.1, 1995, para. 7.3; see also Beijing Declaration and the Platform for Action, Fourth World Conference on Women, Beijing, China, September 4-15 1995, UN Doc. A/CONF.177/20, 1996, para. 95

**29** See D. Husak, "The criminal law as last resort", 24 *Oxford Journal of Legal Studies*, 2004, p. 207-235, [ssrn.com/abstract=815084](http://ssrn.com/abstract=815084)

**30** See UN Commission on Human Rights, 41st Session, "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights", UN Doc. E/CN.4/1985/4, 1984, Annex. The Siracusa Principles lay out the extent to which states can limit and/or derogate from individual human rights to promote the "public good." They were initially adopted in relation to the International Covenant on Civil and Political Rights (ICCPR), but over time have been applied to analyse state restrictions on rights more broadly. See S. Abiola, "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant for Civil and Political Rights (ICCPR): History and Interpretation in Public Health Context" (Research Memorandum Prepared for the Open Society Institute's Public Health Program Law and Health Initiative), 2011; see also UN Commission on Human Rights, 43rd Sess., 1987, Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, 1987, Annex (providing interpretive guidance regarding states' compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR)); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (expert guidelines), 2012, (elaborating on the Limburg Principles regarding the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies). For additional expert and scholarly analysis of limits on states' policing power, see N. Jareborg "Criminalization as Last Resort (Ultima Ratio)", 2 *Ohio State Journal of Criminal Law*, 2005, p. 521; D. Husak, "The Criminal Law as a Last Resort", 24 *Oxford Journal of Legal Studies*, 2004, p. 207

**31** See generally N. Jareborg, "Criminalization as Last Resort (Ultima Ratio)", 2 *Ohio State Journal of Criminal Law*, 2005, p. 521; D. Husak, "The Criminal Law as Last Resort", 24 *Oxford Journal of Legal Studies*, 2004, p. 207

**32** See ICCPR, adopted 16 December 1966, G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) Arts. 19, 21 and 22; ICESCR, adopted 16 December 1966, G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) Art. 4; Council of Europe, European Social Charter (revised) signed May 3, 1996, E.T.S. No 163 (entered into force 1 July 1999) Art. 31.1; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), adopted 17 November 1988, O.A.S.T.S. No 69, O.A.S. Off. Rec. OEA/Ser.L.V/II.82doc.6 rev.1 (1992) (entered into force 16 November 1999) Art. 5

**33** Human rights law recognizes that states have a legitimate interest in promoting public security, safety or order, public health, morals, or the protection of the rights and freedoms of others. See UN Commission on Human Rights, 41st Session, "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights", UN Doc. E/CN.4/1985/4, 1984, paras. 27-28. The Siracusa Principles affirm, however, that states' "margin of discretion" as it relates to morality, does not apply to the rule of non-discrimination as defined under the ICCPR. See also, *Toonen v Australia*, UN Human Rights Committee, UN Doc. C/PR/C/50/D/488/1992, 1994, para. 8.6 (rejecting Tasmania's argument that "moral issues" were "exclusively a matter of domestic concern, as this would open the door to withdrawing from the [Human Rights] Committee's scrutiny a potentially large number of statutes interfering with privacy"); *Naz Foundation (India) Trust v Government of NCT of Delhi and Others*, Writ Petition (Civil) No. 7455/2001, Delhi High Court (2 July 2009), para. 91; *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Constitutional Court of South Africa, CC 11/98, 9 October 1998, paras. 79, 86; *Lawrence v Texas*, 539 US 558, 582 (2003) (J. O'Connor, Concurrence); *Ang Ladlad LGBT Party v Commission on Elections*, Republic of the Philippines Supreme Court, 8 April 2010

**34** See UN Human Rights Council, Resolution 15/23 (Elimination of discrimination against women), UN Doc. A/HRC/RES/15/23, 2010; see also *Toonen v Australia*, UN Human Rights Committee, UN Doc. C/PR/C/50/D/488/1992, 1994; UN Human Rights Council, Resolution 17/19 (Human rights, sexual orientation and gender identity), UN Doc. A/HRC/RES/17/19, 2011; Report of the UN OHCHR, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, UN Doc. A/HRC/19/41, 2011; UN Human Rights Council, Resolution 19/37 (Rights of the child), UN Doc. A/HRC/RES/19/37, 2012

**35** See S. Lamb, "Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law" in A. Cassese & P. Gaeta et al. (eds); *The Rome Statute of the International Criminal Court*, 2002, p. 19; Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002) Art. 22(1); Universal Declaration of Human Rights, adopted 10 December 1948, G.A. Res. 217A (III), UN Doc A/810, Art. 11; European Convention for the Protection of Human

- Rights and Fundamental Freedoms, signed 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953) Art. 7; American Convention on Human Rights, 22 November 1969, O.A.S.T.S. No. 6, O.A.S. Off. Rec. OEA/Serv.L/V/II.23, doc. 21, rev. 6 (entered into force July 18 1978) Art. 9; African Charter on Human and Peoples' Rights, adopted 27 June 1981, O.A.U. Doc CAB/LEG/67/3, rev.5, 21 I.L.M 58 (1982) (entered into force 21 October 1986) Art. 7; League of Arab States, Arab Charter on Human Rights, May 22, 2004, reprinted in 12 International Human Rights Rep. 893 (2005) (entered into force March 15, 2008) Art. 15
- 36** *Del Rio Prada v Spain* (42750/09), European Court of Human Rights, Grand Chamber Judgment, 2013, para. 91; *Kafkaris v Cyprus* (21906/04), European Court of Human Rights, Grand Chamber Judgment, 2008, para 150
- 37** The International Criminal Court, Rome Statute, UN Doc. A/CONF.183/9, 1998, Art. 22(2)
- 38** *Suresh Kumar Koushal and another v NAZ Foundation and others*, Civil Appeal No.10972 of 2013, India: Supreme Court, 11 December 2013
- 39** *Del Rio Prada v Spain* (42750/09), European Court of Human Rights, Grand Chamber Judgment, 2013, para 116
- 40** Both the Siracusa Principles and the Limburg principles require that a state's limitation or restriction on human rights be proportionate and no more restrictive than necessary. Read in conjunction with the principle of *ultima ratio* - states should thus only resort to criminal law if no other less punitive measures suffice. See UN Commission on Human Rights, 41st Session, "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights", UN Doc. E/CN.4/1985/4, 1984, paras. 10-14; UN Commission on Human Rights, 43rd Sess., 1987, Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, 1987, paras. 60-61
- 41** See UN Commission on Human Rights, 41st Session, "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights", UN Doc. E/CN.4/1985/4, 1984, paras. 10(d) and 51; UN Human Rights Committee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004, para. 6; UN CESCR, General Comment 20 (Nondiscrimination in economic, social and cultural rights (Art. 2, para. 2, of the ICESCR)), UN Doc. E/C.12/GC/20, 2009, para. 13
- 42** See UN Commission on Human Rights, 41st Session, "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights", UN Doc. E/CN.4/1985/4, 1984, paras. 9, 28; UN Commission on Human Rights, 43rd Sess., 1987, Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, 1987, paras. 35-41, 49
- 43** See UN ICCPR, Art. 9
- 44** UN General Assembly, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), UN Doc. A/RES/65/229, 2011, Rules 57, 58, 61 and 64; Report of the UN Special Rapporteur on the independence of judges and lawyers, UN Doc. A/66/289, 2011, para. 102; Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/7/3, 2008, para. 41; UN CEDAW General Recommendation 33 (Women's access to justice), UN Doc. CEDAW/C/GC/33, 2015, paras. 13, 15(c), 37(b), 48, 51(m) and 51(n)
- 45** Report of the UN Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/23/43, 2013, para. 82
- 46** See Amnesty International, *Fair Trial Manual (2nd Edition)* (Index: POL 30/002/2014), p. 176
- 47** See, among others, UN General Assembly, United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) Resolution 45/110, 1990, Rules 2.3, 3.2 and 8.1; UN CRC, Art. 40(4); UN CAT, Art. 4(2); UN Convention on Enforced Disappearance, Art. 7; Council of Europe, Convention on Trafficking in human beings, Arts. 23-26; Council of Europe, Convention on Violence against Women, Arts. 45-48; see also Report of the 8th UN Congress on The Prevention of Crime and Treatment of Offenders, UN Doc. A/Conf.144/28/Rev.1, 1900, Res. 1(a), 5(c), (punishments imposed upon conviction following a fair trial must be proportionate to the gravity of the crime and the circumstances of the offender)
- 48** See Amnesty International, *Fair Trial Manual (2nd Edition)*, (Index: POL 30/002/2014), p. 212
- 49** See UN ICCPR, Art. 9
- 50** Amnesty International, *United States of America Stonewalled: Police abuse and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (Index: AMR 51/122/2005); see also UNAIDS, The Gap Report, 2014, p.192, 217, [www.unaids.org/en/resources/documents/2014/20140716\\_UNAIDS\\_gap\\_report](http://www.unaids.org/en/resources/documents/2014/20140716_UNAIDS_gap_report)
- 51** See E. Blower, K. Donald and S. Upadhyay, "The human rights implications of contemporary patterns of social control", 4 *Journal of Human Rights Practice* 2, April 2012, p. 207, [jhrp.oxfordjournals.org/content/4/2/187.abstract](http://jhrp.oxfordjournals.org/content/4/2/187.abstract)



Amnesty International France action against homophobia in Chechnya, marking the state visit of Vladimir Putin to Paris, 29 May 2017. © Christophe Meireis

A photograph of two young men kissing in a public square. They are holding a large black banner with white text and a rainbow stripe. The man on the left is wearing a black t-shirt and jeans, while the man on the right is wearing a black polo shirt, white shorts, and a black cap. The background shows a clear blue sky and some greenery.

**STOP À L'HOMOPHOBIE  
EN TCHÉTCHÉNIÉ**

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# **WHAT IS CRIMINALIZATION OF SEXUALITY AND REPRODUCTION?**

Governments around the world use criminal or other punitive laws and policies to limit or control who we choose to have sex with and why; how we access sexual and reproductive health information or support; and the decisions we make regarding pregnancy and while pregnant.<sup>52</sup>

Same-sex sexual activity, sex outside marriage, abortion, the sexual choices of people living with HIV and conduct during pregnancy are some of the sexual and reproductive actions and decisions that are criminalized, often in violation of our human rights.

## **WHAT ABOUT CRIMINALIZATION OF SEXUAL VIOLENCE?**

For the purposes of this Primer and the Toolkit, “the criminalization of sexuality and reproduction” refers to the criminalization of consensual sexual activity and autonomous reproductive choices. It is essential to distinguish between sex to which there is voluntary and ongoing agreement and sexual abuse and violence, and to ensure that sexual and reproductive decisions are made autonomously, as opposed to being forced and/or uninformed. This is a key factor for advocates to consider when determining whether a state has legitimately or illegitimately criminalized or punished particular sexual and reproductive activity or decisions.

For example, laws that prevent and punish sexual violence, such as rape or sexual abuse of children, do not constitute problematic criminalization of sexuality or reproduction when they are passed and enforced in accordance with human rights standards. Having sex with a person without their consent constitutes rape or sexual assault and is a clear violation of their human rights. Notably, rape and sexual violence are about power and domination, not sexuality and sexual choices. Along similar lines, coercing an individual to take an HIV test or “agree” to sterilization also violates human rights and should be investigated and potentially punished.

By contrast, when individuals freely consent to sexual activity and/or exercise independent decisions about their lives and bodies, these decisions should be respected and not criminalized, even if others do not like or agree with the decisions. Given the complexities of consent there is no clear test, applicable in every situation, to measure consent. Therefore, advocates need to undertake a case-by-case analysis of each situation.

## WHAT ABOUT SEXUAL CONSENT?

The concept of consent is often used to distinguish between the voluntary and ongoing agreement to engage in sexual activity from sexual violence, abuse and exploitation. There is no clear definition of consent under international law.<sup>53</sup> From a human rights perspective, consent analysis must be situated in a broader understanding of individual autonomy.

Respect for consent is essential to protect people from harm and ensure their human rights are realised. However, when the state or others intervene to determine whether a person's consent is valid because of factors such as their age or other potentially coercive circumstances surrounding their decision, it is vital that they do not violate human rights in the process. For example, the state has a legitimate role in preventing the sexual abuse of children and therefore can determine an "age of consent." Where someone is under that age, any suggestion of "consent" will be considered invalid. However, this does not mean that the state is free to restrict or punish consensual sexual activity between adolescents without any consideration of the evolving capacities and rights of young people. Additionally, states have an obligation to combat human trafficking for the purpose of sexual exploitation, but they cannot presume that it is impossible to consent to selling sex and violate sex workers' rights in overbroad anti-trafficking efforts.<sup>54</sup> By contrast, states and law enforcement bodies should not presume that sex workers always consent to sex, and therefore do not face sexual violence.

Individuals' decisions about their bodies and their reproduction are based on countless influences within their particular life circumstances. Therefore, efforts to clearly define sexual consent are often complicated by the fact that sexual intimacy is complex, can be influenced by emotions and, to some extent, involves risks and vulnerability. For example, systemic factors and personal circumstances like poverty, discrimination, drug dependence, homelessness, mental health conditions and gender inequality can to varying degrees limit or influence individuals' options and decision making and, specifically, their consenting to sex. Nevertheless, constrained circumstances do not eliminate individuals' ability to make decisions about their own lives,<sup>55</sup> except under particular circumstances that amount to coercion – where someone faces threats, violence or abuse by authority.

## WHY STATES CRIMINALIZE

Given that so many consensual sexual and reproductive activities are criminalized, it raises the question of why states seek criminal justice approaches. Advocates have argued that a growing preoccupation with risk and fear is leading governments to rely increasingly on criminal justice responses to a wide range of difficult social and political issues. Factors such as the threat of “terrorism,” periods of civil unrest, economic crisis or public scandal create political environments where lawmakers often introduce new criminal sanctions that punish a wider range of people or behaviour under the pretext of “maintaining social order” or “protecting the population”.<sup>56</sup> In these circumstances, the marginalized or stigmatized may find themselves vulnerable to scapegoating, blame or demonization by governments, the media or wider society, increasing their risk of criminalization.<sup>57</sup>

There is no single reason why states criminalize sexuality and reproduction. Sometimes the aims expressed are legitimate, such as reducing Sexually Transmitted Infection (STI) rates. However, the measures taken can be disproportionate and discriminatory, sometimes due to poorly worded or overly broad laws. At other times, discrimination, persecution or political objectives such as maintaining power, winning elections, reinforcing a gender hierarchy or controlling populations are the underlying reasons behind measures adopted. It is therefore useful to look beyond the public justifications offered to support criminalization and consider the underlying reasons and motivations for these approaches.

### COMMON JUSTIFICATIONS

States use a range of justifications when passing and enforcing laws and policies criminalizing sexuality and reproduction. The foremost are:

#### **Morality**

States worldwide adopt laws and policies, at times, to police and control “morality”. Sometimes this legal aim is explicit, for example, in laws that specifically control women’s bodies and sexual behaviours or punish same-sex sexual conduct. At other times, it is masked by other more benign justifications like “public health and safety”, as in HIV criminalization. Nevertheless, the concept of “morality” is too often used as a pretext to conceal prejudice.<sup>58</sup>

Morality-based law making is often difficult to challenge because lawmakers and community leaders claim ownership of “morality” as a singular, fixed public good. Additionally, human rights standards, to some extent, permit morality-based limitations on rights.<sup>59</sup> However (as referenced earlier), human rights standards have confirmed that “morality” alone is not enough to justify criminalizing particular sexual and reproductive actions or decisions.<sup>60</sup>

Morality-based laws come in various forms and can be influenced by a range of factors such as religion, “protection” of women, adolescents and children, tradition, nationalism and political rhetoric that demonize marginalized groups among others.

## Religion

Religious teaching or doctrine and related narratives on “morality” are often used by states to justify regulation and punishment of sexuality and reproduction.

The clearest example of how religion influences criminalization is seen in countries that enforce religious legal frameworks that prohibit and punish a wide range of consensual sexual behaviour. For example, several countries have used interpretations of religious law - in some cases Islamic religious law<sup>61</sup> - codifying them into their civil and criminal legal frameworks.

In states with secular legal codes, religious viewpoints can also influence the criminalization of sexuality and reproduction. Some religious groups wield political and electoral power that enables them to exert considerable influence over law and policy makers. It can be damaging to human rights when states’ laws and policies are enforced in a way that violates sexual and reproductive rights in order to appease religious authorities or groups. For example, the robust legal restrictions on abortion in many countries throughout the Americas, including the USA, are heavily influenced by a range of predominantly Christian groups.

In Nicaragua, a highly contested 2006 election campaign provided leading Catholic Church members and some other Christian groups with the political opportunity to demand a complete abortion ban. A highly emotive and far-reaching publicity campaign followed that used media and political rallies to characterize abortion as murder and portray medical professionals as complicit in the purported “crimes”. Prohibiting therapeutic abortion – abortion where a woman’s health or life is threatened by her pregnancy – became a key campaign issue with both leading candidates eventually backing a total criminal ban. Shortly before the general election, the National Assembly voted to approve the legislation providing for lengthy prison sentences for women and girls who seek abortions and for health professionals who provide abortion services.<sup>62</sup>

In some countries, religious leaders have campaigned for the criminalization of same-sex sexual conduct, most notably in Africa and the Caribbean. The Interfaith Rainbow Coalition against Homosexuality (representing Catholic, Protestant, Muslim and Baha’i groups) in Uganda played a key role in pressurizing politicians to take a hard line against same-sex sexual conduct in rallies and public statements.<sup>63</sup> Religious leaders also urged the Ugandan Parliament to expedite the enactment of its Anti-Homosexuality Act.<sup>64</sup>

Some global religious movements also support campaigning efforts for the criminalization of sexuality and reproduction across borders. For example, the Family Life Network, a Ugandan evangelical Christian group and one of the most active proponents of Uganda’s Anti-Homosexuality Act, have been influenced by and collaborated with evangelical groups in the US. In 2009, the Family Life Network hosted a conference in Uganda that featured representatives of Exodus International, a US-based Christian organization with the stated aim of “converting” gay and lesbian people to heterosexuality, and Scott Lively, a US-based religious minister who has campaigned in several countries for the criminalization of the “public advocacy of homosexuality”. Speakers at the conference claimed that western LGBTI activists paid young people in Uganda to “recruit” others to homosexuality.<sup>65</sup>

More recently, conservative politicians and activists coined the misleading phrase “gender ideology” to frame advances in sexual and reproductive rights as impositions that threaten “Christian values” and corrupt morality.<sup>66</sup> In a startling example, Paraguay’s Ministry of Education and Science passed a resolution banning the dissemination and use of materials on what the ministry calls “gender theory and/or ideology.”<sup>67</sup> In reality, information about sex, reproduction, equality and discrimination are suppressed.

## RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

For many people, using religious tenets to guide their sexual and reproductive decisions is of huge personal significance. These teachings are often closely aligned with traditional norms of heterosexual marriage and family life. In some instances, religious doctrines forbid, or are interpreted as forbidding, specific sexual or reproductive conduct, though this is often the subject of significant theological debate.

From a human rights perspective, states have an obligation to respect, protect and fulfil the right of every person to freedom of thought, conscience and religion, including the right not to follow or adhere to a religion. Thus, people should always be supported in basing their sexual and reproductive decisions on their own beliefs, whether or not these align with an established religion.

The right to freedom of thought, conscience and religion cannot be used to justify violations of other people’s human rights. For example, while governments may allow medical professionals to “conscientiously object” to directly participating in activities that they consider to be in conflict with their religious beliefs – such as abortion or providing contraception – they cannot allow this practice to compromise our rights to access sexual and reproductive services. Laws or punitive measures that restrict the exercise of our sexual and reproductive rights on religious grounds violate our human rights.<sup>68</sup>

## **“Protecting” women, adolescents and children**

Some states justify the criminalization of consensual sexual and reproductive acts and decisions as necessary to “protect” women, adolescents or children. Unfortunately, these laws are not evidence-based or properly justified and are frequently discriminatory. They are commonly designed without consulting those whom the law seeks to “protect”. Laws aimed at protecting adolescents from sexual harm are essential and in some cases positive and effective, but they can also be vague or far-reaching, opening them up to misinterpretation and abuse. Consequently, adolescents can be penalized under such laws simply for consensual sexual activity with their peers.

In recent years, a specific concern has been raised in several African countries about laws that criminalize HIV exposure and transmission. Although originally conceived with the support of some women’s groups and as a measure to protect women from “reckless” infection by “irresponsible” male sexual partners, these laws have criminalized women disproportionately.<sup>69</sup> The fact that women are more likely than men to seek testing and know their HIV status, together with the additional risk of potentially passing on HIV during pregnancy, means that women living with HIV are far more likely to be held legally culpable for HIV transmission or exposure under these laws.

## **Tradition and nationalism**

In many countries, support for criminalizing same-sex sexual conduct is premised on the notion that homosexuality is a “western”, liberal construct that poses a threat to the traditional values of particular countries. In some African countries, including Kenya, Uganda and Zimbabwe, political and religious leaders, for example, former Zimbabwean President Robert Mugabe, have regularly asserted that same-sex sexual conduct or relationships are “un-African” and never existed in their countries until they were imported from “the West”. The irony underlying this argument is that many of the laws that prohibit and punish same-sex conduct are a relic of these countries’ colonial past.<sup>70</sup> Laws in Kenya and Uganda that criminalize “carnal knowledge against the order of nature” and “gross indecency,” for example, are based on a British model law first introduced in India in 1860 which was thereafter used to impose a “moral and religious” code on Britain’s colonized populations.<sup>71</sup>

In Eastern and Central Eastern Europe, governments are increasing punishments for, and limiting access to, abortion and sexual and reproductive health information and education. The trend has arisen, among others, from a concern for declining birth rates which are presumed to lead to diminishing economic stability and productivity due to a decreased labour force to support an increasingly ageing population.<sup>72</sup> Several governments, including in Poland, Hungary, Albania and Russia, have responded by promoting pro-natalist policies which encourage child bearing among particular segments of the population,<sup>73</sup> and depict sex education and contraception as “immoral and unpatriotic”.

## Public health

***“Although securing particular public health outcomes is a legitimate State aim, measures taken to achieve this must be both evidence-based and proportionate to ensure respect of human rights. When criminal laws and legal restrictions used to regulate public health are neither evidence-based nor proportionate, States should refrain from using them to regulate sexual and reproductive health, as they not only violate the right to health of affected individuals, but also contradict their own public health justification.”*<sup>74</sup>**

Anand Grover, Special Rapporteur on the right to health, 2011

In addition to morality-based legislation, public health is a common justification for criminalizing sexuality and reproduction. In many instances, states assert that criminal and other punitive laws and policies are necessary to promote public health and protect the population from harm. For example, laws that criminalize HIV exposure, non-disclosure and transmission are often promoted as a mechanism to help protect people from acquiring HIV. Similarly, the criminalization of women who use drugs or alcohol during pregnancy is portrayed as essential to deter drug use.<sup>75</sup>

While protecting public health is a legitimate aim, state measures to promote health should always be evidence-based and non-discriminatory and should not be applied in a way that denies sexual and reproductive rights or broader human rights. For example, most prosecutions of people living with HIV for exposing another person to the virus take little or no account of scientific evidence that demonstrates that effective HIV treatment can render the virus untransmittable.<sup>76</sup> In the case of mother to child transmission of HIV during pregnancy and childbirth, criminalization approaches rarely recognise the difficulty many pregnant women face in securing adequate treatment to prevent transmission. In recent years, international human rights bodies, UN entities, independent experts and commissions such as the Global Commission on HIV and the Law, as well as civil society organisations, have expressed concern that HIV criminalization not only infringes on human rights, but also impedes HIV treatment and prevention and related public health efforts.<sup>77</sup>

Similarly, laws that criminalize pregnant women who use drugs are not evidence-based.<sup>78</sup> While government officials who promote and interpret pregnancy criminalization laws may be doing so with the intention of promoting maternal and infant health, the laws do not achieve their stated aim. The threat of criminal punishment for drug use during pregnancy can drive pregnant women away from health care.<sup>79</sup> To make matters worse, these laws tend to be disproportionately enforced against women living in the most challenging circumstances such as those facing racial discrimination and those in rural areas without access to health care.

Criminal law requires that issues be considered in absolute terms: legal or illegal. This can make it a crude and ineffective tool for dealing with complex health issues. The criminalization of consensual sexual behaviours and reproduction-related decision making often forces people to forego medical treatment if they suspect they will be reported for a crime or discriminated against by health care workers. Criminal bans on

reproductive services also leave women and girls with little choice but to rely on dangerous alternatives such as clandestine abortions which are usually unsafe. Unsafe abortion is the third largest cause of maternal mortality worldwide and also leads to short and long-term health problems for around 5 million women and girls every year.<sup>80</sup>

Compelling health professionals to report patients for sexual or reproductive behaviours classified as “illegal” can breach patient confidentiality and medical ethics and compromise access to health services. In some cases the law may be so unclear, or health care providers may lack understanding of what it requires, that they feel they must report people to the police to avoid being implicated in a “crime.” In other instances they may be compelled under the law to report patients.<sup>81</sup>

This uncertainty ultimately leads to greater health problems. Punitive regulation of pregnant women who use drugs may discourage them from accessing antenatal care or drug dependence treatment services for fear of being reported by staff and prosecuted, negatively impacting their health and rights. Similarly, criminalization of HIV exposure or transmission can discourage people living with HIV from discussing safer sex options with their doctor fearing that their medical records could be used against them in a criminal action. This can force people living with HIV to cope without effective support,<sup>82</sup> leading to an increased risk of HIV transmission.

Many states also seriously underestimate or misunderstand the public health risk posed by criminalization. Evidence shows, for example, that criminalizing same-sex sexual conduct significantly increases the risk of STI and HIV transmission among men who have sex with men.<sup>83</sup> It discourages gay and bisexual men, in particular, from accessing vital HIV services for fear of being reported to law enforcement agencies. In some cases law enforcement officials confiscate condoms from sex workers or use them as evidence of sex work “crimes.” These approaches violate the right to health and undermine efforts to stem the HIV epidemic and protect public health more broadly.

### **Control and oppression**

Social norms are most commonly constructed by the individuals and institutions with power. These norms dictate what are viewed as acceptable choices, behaviours or identities. The problem is that these norms almost always reflect the interests of those in power and are frequently used to prop up their authority and to control or oppress any group or individual that does not conform and therefore threatens the status quo.

Powerful state and private institutions tend to reinforce social norms. When individuals fail to conform through expression of their identities or essential decision-making related to their economic circumstances, race, ethnicity, gender, sexual orientation, or their immigration, health or disability status among other things, they become vulnerable to marginalization.

### **Politics of demonization**

Human rights advocates have observed a rise in “us versus them” rhetoric in many contexts that is fuelling a pushback against human rights.<sup>84</sup> This is not new or limited to any one region or context. The rhetoric is associated with a racist, xenophobic and/or

sexist backlash to advances in racial and gender equality. Some individuals or groups may believe they are losing out as a result of advances in women and minorities' rights. These grievances are used by those who demonize feminists, LGBTI activists and advocates for racial justice.

What appears to be new is that in much of the world, many groups in society are enthusiastically accepting or encouraging demonizing rhetoric by political leaders who openly make calls that flagrantly contravene human rights. Such narratives have become increasingly overt, widespread and popular, posing a serious challenge to human rights and advocates.

The Special Rapporteur in the field of cultural rights has observed that: "Fundamentalist and extremist ideologies and the movements and governments that espouse them seek to roll back the advances achieved in securing women's equality, aim to block further advances and try to penalize and stigmatize the women human rights defenders promoting such critical efforts."<sup>85</sup>

## **STIGMATIZATION, STEREOTYPING AND BLAME**

The principal ways in which marginalization occurs is through stigmatization, stereotyping and blame. If a person's identity or behaviour does not conform to society's dominant social norms, an individual can be labelled as abnormal, immoral, a disgrace, inferior, dangerous or even criminal. The stigmatization process is created and fuelled in multiple ways, for example through the promotion of negative stereotypes in the media, in educational institutions and in popular culture; through condemnation from political or religious leaders, or crucially, in the case of criminalization of sexuality and reproduction, through the status they are given or through law.

Stigmatization and stereotyping is evident, for example, in the homophobic and, in some cases, transphobic attitudes that drive and underpin the criminalization of same-sex sexual conduct. Similarly, the criminalization of HIV transmission, exposure and non-disclosure is frequently motivated by negative stereotyping of people living with HIV as a "threat" to society. The criminal punishment of women for "adultery" or "fornication," or of women who need an abortion, or who have used drugs during pregnancy, is a response to the perception of them as "fallen" or "disgraced" women who have failed to conform to "virtuous" and "nurturing" feminine ideals.

## **INTERSECTIONAL DISCRIMINATION**

Intersectionality is an approach that is concerned with the way in which different aspects of peoples' identity combine to affect the form and level of discrimination they face. All individuals have many aspects to their identity that may affect the way they are treated and their ability to access their rights. The term was coined through Black feminist criticism of antidiscrimination law, which in the USA tends to see race and sex as mutually distinctive categories and as a result misses the complexity of Black women's experiences.<sup>86</sup>

Criminalization of sexuality and reproduction is similarly intertwined with structural inequalities such as unequal access to resources, gender discrimination and institutional racism. The range of sexual and reproductive actions and decisions that are criminalized can impose multiple layers of criminalization or discrimination on people, punishing them for various, intersecting aspects of their identity and their choices – magnifying and compounding the disadvantages they experience. For example, men who sell sex to other men and are living with HIV may face multiple degrees of stigmatization, marginalization and criminalization based on their sexual orientation, sex worker status and their HIV diagnosis.

Individuals with fewer financial resources are less able to avoid criminal regulation of their bodies and their lives because they lack resources and private space, and are dependent on public assistance and services. For example, in countries where abortion is completely banned or heavily restricted, it is most often women and girls living in poverty and lacking resources who are reliant on illegal abortion and therefore face criminalization. Women with greater access to resources, whilst also discriminated against in law, are more likely to be able to travel to another country or state for a legal abortion or to pay for contraception without punishment.

Racial or ethnic profiling or immigration status also compounds criminalization of sexuality and reproduction. For example, laws restricting the wearing of certain clothing and religious symbols may have a disproportionate impact on Muslim women who wear full face veils, and restrict their freedom of expression and religion, and their rights to education and to work.<sup>87</sup> In several northern European countries, activists have expressed concern about the disproportionate numbers of migrants or asylum-seekers prosecuted for HIV transmission or exposure.<sup>88</sup> A landmark study on the criminalization of pregnant women in the US, accused of risking harm to their fetus through actions and conditions such as drug dependence, found that the criminalized women were predominantly living in poverty and were from minority ethnic backgrounds. Nearly 60% of them were women of colour, with African-American women accounting for 52% of all cases. Pregnant African-American women also faced the most serious criminal sanctions and were significantly more likely than white women to be arrested, reported by hospital staff and subjected to felony charges.<sup>89</sup>

Amnesty International research has highlighted that sex workers who are migrants or from ethnic or racial minorities may experience the brunt of criminalization laws. In Norway for example, initiatives to enforce sex work laws, which involved raids on apartments and massage parlours/brothels and resulted in the forced evictions of many sex workers from their places of work and/or homes, principally targeted migrant women; initially women of Thai origin working in the massage parlours of Oslo, and later, Nigerian women working in the streets and in apartments.<sup>90</sup> Ethnically Norwegian sex workers were more likely to own their own homes and therefore were also more empowered to avoid eviction and secure a safe working space, than migrant women- particularly Nigerian migrants. Additionally, Nigerian and other migrant women were frequently profiled and excluded from hotels on the assumption that they were sex workers. While many sex workers reported having very low levels of trust or faith in the police, Nigerian women in particular frequently spoke of their belief that the police would not take reports of crimes against them seriously because of their status as migrant sex workers.

## GENDER-BASED DISCRIMINATION AND VIOLENCE

Power inequalities between men and women, combined with harmful gender stereotypes and cultural narratives around the dangers of female sexuality,<sup>91</sup> have led to the social, legal and cultural regulation of women's sexual and reproductive lives throughout history. These entrenched gender hierarchies also ensure the oppression of people who do not conform to gender norms.

Despite the advancement of women's rights and gender equality in many parts of the world, control over female sexuality is still often seen as central to maintaining social order and is used to ensure patriarchal social structures. Overt control of female sexuality can take the form of human rights abuses carried out by private individuals or communities (non-state actors). Such abuses include female genital mutilation, which is physically and emotionally harmful and restricts women's enjoyment of sex; gender-based killings (so-called "honour" killings), where male (and sometimes also female) relatives murder women whom they believe have transgressed boundaries of acceptable sexual behaviour bringing shame on the family; the rape of lesbian women under the guise of "correcting" their sexual orientation; and the forced marriage of women and girls. However, sometimes more subtle forms of control are also used. For example, women and girls who have been raped or sexually assaulted often encounter suspicion, censure or blame at the hands of the criminal justice system. Similarly, arguments are made that suggest access to sexual health information, contraception or abortion leads to reckless sexual activity. Such arguments are based on a fear of uncontrolled female sexuality.<sup>92</sup>

States also perpetuate and enforce gender inequalities and patriarchal dominance over those who do not conform to dominant sexual or gender norms, by controlling or limiting their ability to make informed decisions about their sexual lives or reproduction.<sup>93</sup> Women's ability to control their own reproduction is crucial to their empowerment and to gender equality. Having autonomy over their reproduction gives women control over their bodies and lives, reducing their exposure to poverty and pregnancy-related illness and death. It also increases educational opportunities, personal development and financial independence. Similarly, women's ability to engage in consensual sexual intimacy, free from violence, coercion and punishment, requires respect for and protection of women's bodily autonomy. Where states regulate sexuality and reproduction through criminal law or other punitive mechanisms, they deny women control over their own bodies, limit their life choices and – when they do not conform – force a criminal status upon them.

In some circumstances, efforts to control women's sexual and reproductive actions and decisions are carried out by families and communities, and target certain women in particular ways. Amnesty International has highlighted how women and girls with disabilities in Somalia have been subjected to forced marriages by family members looking to rid themselves of a perceived "burden". Women living with disabilities in forced marriages also experienced high levels of domestic violence. Internally displaced women and girls in Somalia reported being specifically targeted for rape and other forms of sexual violence because of their disability and their gender.<sup>94</sup>

Indigenous women, women facing discrimination based on race or ethnicity, or women with disabilities may, for example, be targeted by programmes which limit their reproductive capacities, such as forced sterilization. Women from more privileged

communities may not be free from these forms of control – they might face additional pressure to conform to societal expectations by having more children and can encounter increased barriers to contraception and abortion. Different groups of women can also experience stigmatization, stereotyping and blame differently. For example, younger women might face censure or stigma for engaging in sexual relations, particularly unmarried women and/or women from poor or minority communities. They may also be less able to access information about sexuality and reproduction and more likely to encounter negative or hostile attitudes from those who provide assistance and services like health care providers.

Whilst entrenched gender norms and social hierarchies undoubtedly work to the detriment of women and those who do not or cannot conform to dominant norms because of their gender identity or sexual orientation, it is important to recognise that they also have a damaging impact on whole populations. Gender stereotypes and hierarchies confine everyone, regardless of gender identity, expression or sexual orientation, to strictly defined gender roles and “acceptable” behaviours and deny everyone their ability to express their true selves.

## **CRIMINALIZATION AS EXPERIENCED BY TRANSGENDER AND INTERSEX PEOPLE**

Legislation criminalizing same-sex sexual conduct is often used to enforce strict “male” and “female” gender roles in societies and to punish those who do not conform to such gender “norms.” Early drafts of Uganda’s Anti-Homosexuality Act refuted the existence of a gender identity beyond male or female and contained a clause forbidding the use of definitions of “gender identity” to “legitimize homosexuality, gender identity disorders and related practices in Uganda”.<sup>95</sup>

There are many examples around the world of transgender people being harassed by police, arrested and/or detained under laws criminalizing same-sex sexual conduct or sex work, regardless of whether they are lesbian, gay or bisexual, have had sex with a partner of the same sex or are sex workers.<sup>96</sup> There is less documented evidence that such punitive legislation discriminates against people with variations in sex characteristics, including those who identify as intersex. However, such legislation promotes bias against intersex people and places pressure on individuals to conform to strict gender roles. Thus, intersex individuals are also at risk of human rights violations as a result of some of these statutes.<sup>97</sup>

In addition to being affected by criminal laws prohibiting same-sex sexual acts, transgender individuals’ rights are affected in most countries by the absence of legal recognition of their gender identities and the lack of ability to express themselves freely in most countries. Government failure to enable transgender people or people with intersex conditions to independently determine and legally confirm their gender identities is a pressing human rights concern. While this issue is beyond the scope of this Primer, Amnesty International campaigns on gender recognition issues internationally. Individuals who have variations of sex characteristics, including those who identify as intersex, face

additional human rights violations, including being subjected to non-emergency, invasive and irreversible medical treatment in an attempt to “normalise” their bodies and which could carry lifelong harmful effects.

## **POLITICAL OR ELECTORAL EXPEDIENCY**

Sexual and reproductive rights issues generate emotional debate and media attention. Proposing legislation that criminalizes sexuality and reproduction can attract public support for politicians. To seek political advantage and win favour with some voters, politicians and governments may use gender stereotypes or homophobic or transphobic attitudes in order to say they are “cracking down” on particular sexual or reproductive “problems”. Criminalization, in turn, can position governments as the “protectors” of the population.

Some governments introduce criminal legislation when they want to distract voters from failed social, political or economic policies – and when legislation criminalizing sexuality and reproduction elicits relatively positive media attention and little public antagonism. For example, Uganda’s Anti-Homosexuality Act, which sought to increase penalties for same-sex sexual activity, was reintroduced at various times that coincided with periods of widespread unrest about rising fuel and food prices. Similarly, former President Mugabe has regularly used denunciations of homosexuality to secure popular support and distract from the failure of his government’s economic policies.<sup>98</sup>

In most instances, the groups most negatively affected by criminal or other punitive approaches to sexuality or reproduction do not hold significant political or electoral power. For example, across the globe, women are underrepresented in politics and generally hold less political power than men. Criminalization of sexuality and reproduction issues can, therefore, be a useful vehicle for politicians who want to build their public profile or for governments who want to appeal to powerful groups or the media. Conversely, politicians who oppose criminalization publicly may fear losing votes or attracting media criticism.

# HOW STATES CRIMINALIZE

## DIRECT CRIMINALIZATION

States can pass and/or implement criminal laws that specifically target and punish sexual and/or reproductive behaviours and decisions or gender expression, for example, through laws that prohibit:

- Some or all sexual conduct between people of the same sex
- Sexual conduct outside marriage
- The consensual selling or buying of sex
- Abortion
- Consensual sex between adolescents
- Potential exposure to HIV, non-disclosure of HIV status, or transmission of HIV

Under such laws people who attempt to assert their basic sexual and reproductive rights can face investigation, prosecution, criminal or financial sanctions, loss of liberty and public judgement or disgrace.

## INDIRECT CRIMINALIZATION

States can implement general criminal laws or punitive civil or religious laws in a discriminatory way to sanction particular sexual and/or reproductive behaviours and decisions or gender expression. Examples may include disproportionate enforcement of vagrancy, public order or loitering laws against sex workers or LGBTI homeless youth. The marginalized and/or those who do not conform to dominant social norms are the most likely targets for indirect criminalization. Selective enforcement of such laws against certain groups often demonstrates a state's wish to oppress or control that group.

## POORLY WORDED OR OVERLY BROAD LAWS

In some instances, a state may pass or implement a general law, including public health or public order provisions, without intentionally seeking to punish particular sexual or reproductive activities or decisions. However, in effect, overly broad or poorly drafted laws are open to misinterpretation and discriminatory application by the police, prosecutors and the judiciary.

General criminal, civil or religious laws that can be used to indirectly criminalize sexuality or reproduction include:

- Vagrancy or loitering: Police officers often misuse these regulations and use them disproportionately against sex workers or LGBTI people to deny their right to gather in public spaces, even where there is no evidence of a crime being committed.

- **Public indecency, order or morality:** Charges associated with these laws range from minor offences carrying fines or short prison sentences, to “debauchery” or “contempt for religion” which can carry harsh sentences, including in some cases, the death penalty. Such offences are most commonly used against people who identify as or are suspected of being LGBTI, or sex workers. They can also be used by states to impede distribution of vital sexual or reproductive health information.
- **Public health:** Regulations intended to manage public health emergencies such as the HIV epidemic or the “opioid crisis” are sometimes misused to control or punish sexual or reproductive behaviour, decisions and identities. People living with HIV, sex workers or pregnant women can face punishment under these regulations based on the assertion that they could pose a risk to others or a fetus. Such regulations are often relied upon by prosecutors even when there is little or no scientific evidence of a genuine public or individual health risk.
- **Assault or serious injury:** Assault, reckless injury, or even murder charges have been used in some countries to prosecute people for purportedly causing harm to others or to a fetus because of their sexual or reproductive behaviour or choices. These laws are most often used against people living with HIV accused of exposing or transmitting the virus to another person. They have also been used in the USA and parts of Europe and South America in recent years to prosecute pregnant women accused of harming their fetus through drug use, suicide attempts, self-induced abortion or, in some instances, following miscarriage<sup>99</sup>.
- **Sexual offences:** Sexual offence laws designed to protect children from abuse or harm are sometimes used to punish adolescents for consensual activity with another person of a similar age. A small number of countries also misuse sexual offences legislation to prosecute same-sex sexual activity and sex work. People convicted under these statutes often face prison sentences and/or statutory requirements to register as sex offenders.
- **“Propaganda” or obscenity:** In some countries charges relating to distributing materials or information considered to be “obscene” are effectively used to criminalize and suppress the expression of identities that do not conform to prevailing norms. These laws can also work to interfere with or prohibit the distribution of sexual health information. The European Court of Human Rights recently ruled that Russia’s “gay propaganda” law (which bans “propaganda of homosexuality among minors”) violates the rights to freedom of expression and to non-discrimination. Indonesia uses a law which defines pornography broadly as any material that “contravenes norms of community morality.” It carries a four to 15 year prison sentence for producing, disseminating, funding or using such material<sup>100</sup> and severely restricts the provision or dissemination of information on sexual and reproductive rights issues.<sup>101</sup>

Where badly worded or overly broad laws result in criminalization of sexuality or reproduction, states have an obligation to take action to prevent their misinterpretation or discriminatory application in order to protect human rights.

## **PENALIZATION AND PRESUMED CRIMINALITY**

Criminalization of sexuality or reproduction does not only result from punishment through criminal law. People can be punished through the process of penalization that results from the application of other laws, policies and administrative regulations which have the same intention or impact of punishing, controlling and regulating people based on their proscribed sexual and reproductive behaviours and decisions or gender expression. Measures may include fines, detention for the purposes of “rehabilitation”, deportation, loss of child custody, disentanglement to social benefits and infringement on rights to privacy and autonomy.

Criminalization also enables presumptions of criminality to be imposed on people who challenge sexual and gender norms or otherwise fail to follow “community morals or standards.” People are assumed to be “criminals” and treated as such because they are (or perceived to be) members of a stigmatized group regardless of whether they have actually engaged in “unlawful” behaviour. This presumed criminality puts them at risk of increased surveillance, discrimination, violence and extortion by law enforcement officials and the public. It also perpetuates stigma and normalizes prejudice. In many countries, those who do not conform, such as unmarried or LGBTI people (or those perceived to be LGBTI), may face suspicion and judgement. Equally, people involved in sex work or living with HIV are often stigmatized or presumed to be criminals.

Presumptions of criminality by law enforcement officials may lead to heavy and unjust policing and punishment. Those who are stigmatized may be routinely suspected and/or accused of criminal behaviour and face arbitrary and repeated investigations, arrests, detention and harassment by police. This may lead to an environment where police are able to engage in abuse or extortion with impunity. In many countries, for example, sex workers say they are routinely subjected to abuse, extortion and, in some cases, sexual violence by police officers.<sup>102</sup> Presumptions of criminality can further prevent people from seeking justice when they encounter physical or sexual violence or extortion for fear that they, and not their abusers, will be the focus of criminal investigation. It also means that their aggressors can intimidate and physically abuse them with relative impunity.

To some extent, penalization and presumptions of criminality have a reciprocal relationship. In addition to punitive laws and policies leading to presumptions of criminality, these presumptions can also contribute to the process of penalization. For example, people may experience restrictions on their access to public services or civic or legal entitlements because of their perceived criminality. Sex workers and LGBTI individuals, in many countries, report discrimination and poor treatment in health services or exclusion from other social benefits like housing and education, regardless of whether they have criminal records. Equally, where “adultery” is criminalized, women thought to have had sex outside marriage may lose custody of their children or property rights.<sup>103</sup> Women who have had, or are suspected of having had, illegal abortions can also be refused vital medical interventions because health workers, concerned that they could be implicated, are either legally required to report them to the police or because they prioritize reporting the “crime” over the woman’s need for urgent medical care.

## NOTES WHAT IS CRIMINALIZATION OF SEXUALITY AND REPRODUCTION?

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**59** See, for example, UN ICCPR, Art. 12. See also, UN Commission on Human Rights, 41st Session, "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights", UN Doc. E/CN.4/1985/4, 1984, paras. 27-28

**60** Human rights law recognizes that states have a legitimate interest in promoting public security, safety or order, public health, morals, or the protection of the rights and freedoms of others. UN Commission on Human Rights, 41st Session, "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights", UN Doc. E/CN.4/1985/4, 1984, paras. 27-28. The Siracusa Principles affirm, however, that states' "margin of discretion", as it relates to morality, does not apply to the rule of non-discrimination as defined under the ICCPR. See also *Toonen v Australia*, UN Human Rights Committee, UN Doc. CCPR/C/50/D/488/1992, 1994, para. 8.6 (rejecting

Tasmania's argument that "moral issues" were "exclusively a matter of domestic concern, as this would open the door to withdrawing from the [Human Rights] Committee's scrutiny a potentially large number of statutes interfering with privacy"); *Naz Foundation (India) Trust v Government of NCT of Delhi and Others*, Writ Petition (Civil) No. 7455/2001, Delhi High Court, at para. 91 (2 July 2009); *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Constitutional Court of South Africa, CC 11/98 (9 October 1998) paras. 79, 86; *Lawrence v Texas*, 539 US 558, 582 (2003) (J. O'Connor, Concurrence); *Ang Ladlad LGBT Party v Commission on Elections*, Republic of the Philippines Supreme Court, 13 (8 April 2010)

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A sex worker in Madaripur,  
Southern Bangladesh, 14 July 2012.  
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# **CRIMINALIZING SEXUALITY AND REPRODUCTION: A HUMAN RIGHTS ISSUE**

Human dignity – the foundation on which human rights are based – is built on the premise that all humans have intrinsic worth and, in turn, are entitled to certain fundamental rights. Human dignity is based on the understanding that people are capable of making rational decisions about their lives, including what they do with their bodies and, by extension, how they experience their sexualities and complex identities. In other words, everyone is entitled to “bodily autonomy.”

This chapter explores the concept of “bodily autonomy” and its relationship to the realization of the full range of human rights. It outlines the way in which our civil, political, economic, social and cultural rights are violated when sexuality and reproduction are criminalized. Overarching these rights are the fundamental principles of freedom, equality and non-discrimination. All state actions (and in some cases inactions) must seek to promote equality and not result in discrimination - this is a key component to respecting our human dignity.

## **STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL**

When states ratify human rights treaties, they take on the obligation to respect, protect and fulfil the human rights contained in those treaties for everyone in their territory, without discrimination. These obligations are indivisible and interdependent.

States are obliged to respect human rights and they must create a legal and policy environment in which people are able to claim their rights. Many laws criminalizing sexuality and reproduction run counter to the respect for human rights.

The obligation to protect human rights requires the state to prevent abuse by state officials or third parties. Again, the criminalization of sexual and reproductive actions and expression is more likely to contribute to abuse than to protect human rights. Where individuals' sexual or reproductive actions are punishable by the state, agents of the state and private individuals feel justified in treating them as “criminals”. Those who are subject to state control and punishment because they do not conform to dominant “norms” find themselves at greater risk of extortion, harassment and violence by state actors and third parties. Even if they live in countries where such abuse is prosecuted, they may not report it for fear that they will be arrested and prosecuted. Where consensual sexual activity and identity and reproductive decision making is punitively regulated, states will be unable to effectively implement their obligation to protect the human rights of all without discrimination.

The obligation to fulfil human rights can be viewed as the service provision aspect of state obligations. This might include the provision of legal support services for those who are in contact with the criminal justice system or the provision of adequate health care services that meet the needs of those who rely on them. States have additional obligations to provide for those who are unable to provide for themselves, including because they are detained by the state or otherwise excluded from providing for themselves, and to ensure redress for rights violations. The criminalization of sexuality, identity and reproductive decision making creates a barrier to services and care and to seeking justice.

## **BODILY AUTONOMY**

Bodily autonomy is fundamental to the promotion of human dignity and freedom. While bodily autonomy is not a singular, free-standing human right, it is based on the realization of a wide range of civil, political, economic, social and cultural rights. Therefore, infringements on individuals' bodily autonomy may undermine their human rights and vice versa. For example, the right to life is essential to ensuring that individuals' bodies are not physically violated; the right to freedom of expression is essential to ensuring that they can use their bodies to physically express views and identities without threat of state reprisal; the right to health is essential to ensuring that they can enjoy and protect their bodies from illness; the right to access information is essential to ensuring that they can make informed decisions about their bodies; and the right to privacy is essential to ensuring that they can use and enjoy their bodies in their private lives without state interference.<sup>104</sup>

Adults are entitled to full bodily autonomy, so long as they can consent to their actions. States should implement measures to protect everyone against sexual exploitation and other types of violence, including by creating mechanisms to assess and ensure an individual's ability to consent. For adolescents, this assessment is more nuanced because, depending on their situation, they may be less able to understand the implications of their actions and therefore less capable of giving consent.<sup>105</sup> This, however, does not mean that adolescents do not have bodily autonomy but rather that states must take into account their evolving capacity to consent when developing laws and policies to safeguard bodily autonomy. Safeguards should ensure that laws on the "age of consent" do not unjustly suppress, regulate or prosecute consensual sex between adolescents close in age.

Everyone's bodily autonomy may be at stake when states criminalize sexuality and reproduction. However, the bodily autonomy and sexuality of women and individuals who do not conform to prevailing social and or gender norms are, in many cases, specifically targeted and policed by law enforcement, state and private institutions over the course of their lifetimes.

Laws and policies that criminalize sexuality and reproduction amount to a violation of some or all of these intersecting human rights and deny individuals their complete bodily autonomy. They not only prevent individuals from determining how they use their bodies as an expression of love or sexual fulfilment in their private lives but also stop them from expressing their personal identity and realizing their individual human potential and ability to make decisions. Human rights violations that affect bodily autonomy are a direct assault on human dignity.

## CRIMINALIZATION AND HUMAN RIGHTS VIOLATIONS

Laws and policies which criminalize sexuality and reproduction can amount to a violation of a wide range of civil, political, economic, social and cultural rights. Below is an overview of the human rights and key issues most commonly violated by this criminalization.

### THE RIGHT TO PRIVACY

The use of the criminal law or other punitive mechanisms to regulate or limit people's decisions about their sexualities, sexual behaviour and reproduction may violate their right to privacy. If people are engaging in conduct consensually and not coercing or forcing others to do something they do not want to do, they have the right to realise their sexual and reproductive potential as a private matter, without state scrutiny or control.

Privacy is essential to individuals' sense of dignity and self. In addition, when states punish people for sexual or reproductive actions, decisions, or gender expression, or otherwise arbitrarily interfere with their private lives, they send a message that others are free to do the same. These violations of privacy affect other human rights, including the rights to life, equality before the law and non-discrimination.

### DAVID KATO, UGANDA

In Uganda, “carnal knowledge against the order of nature” is punishable with life imprisonment. In 2009, parliamentarians attempted to make homosexuality a crime punishable by death. At the same time, tabloid newspapers *Red Pepper*<sup>106</sup> and *Rolling Stone*<sup>107</sup>, several times published photographs, names and, in some instances, addresses and personal details of people suspected of being lesbian, gay or bisexual, along with incitements to violence against these people. In October 2010, *Rolling Stone* published the names and personal details of 100 such people in an article headed “Hang them!” A picture of LGBTI human rights defender David Kato was published next to the headline on the front page. Less than four months later, in January 2011, he was brutally murdered in his home in Kampala.<sup>108</sup>

## **THE RIGHTS TO FREEDOM OF EXPRESSION AND ASSEMBLY AND TO THOUGHT, CONSCIENCE AND RELIGION**

The rights to freedom of expression and assembly and to thought, conscience and religion are compromised when individuals are forced to hide their sexual orientation or gender identity, to dress or express themselves in ways that do not reflect who they are, or to subject their sexual behaviour and reproductive decisions to laws that are based on beliefs they do not share. Prohibiting individuals from talking openly about their sexuality or gender identity, or preventing them from advocating law reform or to reduce or eliminate penalties for abortion and “adultery” or same-sex sexual activity, is an attack on these rights.

The criminalization of same-sex sexual conduct in some countries in sub-Saharan Africa limits LGBTI people’s freedom to communicate with others; to organize for the purpose of advocating LGBTI rights; to dress in a manner of their choosing; to write for, appear in, or possess literature or media; and to have access to, or distribute materials relating to, sexual health, including HIV prevention and treatment.<sup>109</sup> Additionally, Russia’s “foreign agents” law, which requires groups to register with the Justice Ministry as “foreign agents” if they receive even a minimal amount of funding from any foreign source, governmental or private, and engage in “political activity”, imposes legal penalties for failure to comply such as fines and closures.<sup>110</sup> This law seeks to stigmatize alternative views and silence critical voices, severely hampering freedom of expression and association in particular for groups working on stigmatized issues such as LGBTI rights and HIV. More recently, new legal restrictions on the internet, on freedom of expression, on the rights of LGBTI people and on other fundamental freedoms have been enshrined in Russian law.<sup>111</sup>

## **THE RIGHTS TO LIFE AND TO FREEDOM FROM TORTURE AND OTHER ILL-TREATMENT**

At the most basic level, respect for bodily autonomy means no one is allowed to physically harm, wound, or kill another individual.<sup>112</sup> Many states contribute to violations of the rights to life and freedom from torture and other cruel, inhuman or degrading treatment or punishment directly, for example by making “adultery” punishable by flogging or stoning, or by subjecting those suspected of same-sex sexual conduct to the death penalty. Police practices including the use of anal examinations to “prove” someone is gay<sup>113</sup> constitute a violation of this right.

The criminalization of abortion services can also lead to violations because it forces women to resort to unsafe abortions, in some cases leading to preventable deaths. In El Salvador, the absolute criminal ban on abortion services causes severe suffering and pain to women and girls forced to carry pregnancies to term that are unwanted, forced and/or which have been diagnosed with a fatal or severe foetal impairment.<sup>114</sup> Human rights organizations have documented the abuse of women who come to public hospitals for life-saving post-abortion care, including by carrying out curettage (the removal of foetal

tissue from the uterus by scraping with a sharp object, a curette) without anaesthetic, or denying life-saving treatment unless the woman confesses her “crime”.<sup>115</sup> In other instances pregnant women have been denied life-saving cancer treatment on grounds it could harm their fetus.<sup>116</sup> In Chechnya, men believed to be gay are abducted, humiliated, tortured or even killed as part of a co-ordinated campaign for which the perpetrators enjoy impunity.<sup>117</sup> They have also been forced to name other LGBTI individuals. Very few people in Chechnya are willing to speak to human rights monitors or journalists, even anonymously, because of the threatening environment where filing an official complaint would lead to retaliation by local authorities.<sup>118</sup>

## THE RIGHT TO HEALTH

The criminalization of sexual and reproductive behaviour and decisions acts as a barrier to the enjoyment of the right to health. It can compromise individuals’ access to care by allowing, and in some cases encouraging, discrimination against them in the provision of services by health care workers. Some women and girls have been denied post-abortion care or ignored by workers who prioritize reporting them to the police over providing immediate health care because they fear prosecution under abortion laws. Those who know or suspect that they have been mistreated in the health care system may avoid necessary, even potentially life-saving treatment. People living with HIV and LGBTI people often report discriminatory treatment by health care workers and lack of privacy and confidentiality in health care settings as the major reasons for delaying treatment - they fear they will be “outed”, reported to police, arrested or harassed.

Criminalization of sexuality has also been recognised as a major factor contributing to HIV transmission around the world. For example, if same-sex sexual conduct is illegal, it is extremely difficult to secure state funding for targeted HIV prevention interventions for men who have sex with men. It may even be considered illegal to provide such services. By actively stigmatizing groups who are most at risk of HIV, such as men who have sex with men, transgender people and sex workers, laws criminalizing sexuality make it more difficult for these groups to openly discuss their sexual lives and manage their risk of HIV.

Such barriers to health care can have serious consequences for the community as public health often depends on building trust between service providers and communities. Criminalizing HIV exposure, non-disclosure or transmission discourages people living with HIV from finding out about their HIV status – the first step to treatment and prevention of new infections – because they fear being investigated or prosecuted. Also, if drug use during pregnancy can lead to punishment and/or detention, pregnant women who use or are dependent on drugs are likely to avoid essential health care.

## EQUALITY AND NON-DISCRIMINATION

The principle of non-discrimination is fundamental to the realization of all human rights. All core international human rights treaties reiterate this general principle, as well as the UN Charter and the Universal Declaration of Human Rights.<sup>119</sup> In short, everyone is entitled to the full range of human rights without distinction, such as on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>120</sup>

Under international law, states have an obligation to refrain from passing laws that are discriminatory and whose impact could be discriminatory against certain groups or individuals, even where there is no clear intention to discriminate. States must also prohibit deliberately discriminatory policies and practices.

Many laws that criminalize sexuality and reproduction focus on behaviour associated with particular groups and are applied selectively to target the most stigmatized or disadvantaged groups. For example, laws criminalizing “cross-dressing” explicitly target transgender individuals, violating their rights to freedom of expression and non-discrimination. These laws are often applied disproportionately against transgender people involved in sex work,<sup>121</sup> and gender non-conforming people more broadly, adding an additional layer of inequality and discrimination. Likewise, laws that criminalize abortion theoretically target anyone who has an abortion and impacts women and girls in general but are predominately used against those with limited resources who depend on the public system for care.

The right to equality is also violated in many instances by the way individuals are treated in the criminal justice system. For example, people who are routinely profiled by law enforcement agencies because of who they are or how they look, as opposed to evidence they have committed a crime, are often treated unequally under the law. At the same time, prejudiced views about drug use, same-sex sexual conduct, gender expression, or HIV status can be used to discriminate against individuals in criminal proceedings.

Discrimination and inequality within criminal justice systems often contribute to a culture of impunity, where police, justice officials and the general public feel justified (or protected) when they mistreat members of stigmatized groups, particularly those discriminated against for their race, ethnicity or immigration status. Where same-sex sexual conduct is criminalized, those who do not conform to gender norms, even if they do not engage in the criminalized activity, are often arbitrarily arrested, harassed, or subject to extortion. In many cases, the criminalization of sexual conduct leads to criminalization of entirely legal and desirable behaviour, for example police officers using the possession of condoms as evidence of sex work, same-sex sexual conduct, “adultery” or other stigmatized sexual behaviour.

## STATE OBLIGATIONS TO COMBAT STEREOTYPES BASED ON SEX AND GENDER

The criminalization or stigmatization of sexual and reproductive acts and decisions or gender expression which does not conform to society's social, sexual or gender norms happens in all countries in one way or another. Legal sanctions are a way of signalling society's disapproval of behaviour which defies societal expectations of "propriety," "chastity," and "purity" – expectations most often imposed on women and girls - and perceived as a sign of moral and social decay. These laws and their application perpetuate stigmatization, stereotyping and discrimination.

International human rights law requires states to combat stereotyping.<sup>122</sup> Article 5.a) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) calls upon states to confront stereotyping by requiring them to take "all appropriate measures" to "modify the social and cultural patterns of conduct of men and women" in an effort to eliminate practices that "are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."<sup>123</sup> Article 5 covers gender stereotypes that are based on the view of women's inferiority and on sex-role stereotypes.<sup>124</sup> Additionally, Article 2(f) reinforces Article 5 by requiring state parties to take "all appropriate measures" to "modify or abolish ... laws, regulations, customs and practices which constitute [discrimination] against women."<sup>125</sup>

The UN CEDAW Committee confirmed that the protections under the Convention and state obligations apply not only to cisgender women – who identify as female and were assigned female at birth – but also to transgender women, particularly given the specific forms of gender discrimination they face.<sup>126</sup> While transgender people are not explicitly referenced in CEDAW, the CEDAW Committee has affirmed that their gender identity works with sex to create a prohibited form of gender discrimination. As such, CEDAW prohibits the full range of gender-based discrimination<sup>127</sup> and obliges states to combat gender stereotypes including of transgender and other gender non-conforming people and to confirm that culture and tradition is not used to violate or limit human rights.<sup>128</sup>

## STATE OBLIGATIONS TO ADDRESS INTERSECTIONAL DISCRIMINATION

The Convention on the Rights of Persons with Disabilities (CRPD) is the first human rights treaty to explicitly acknowledge intersectional discrimination and to require that state parties take measures to ensure that those affected by discrimination at the intersection of disability and gender can access their rights.<sup>129</sup> Likewise, General Comments and Recommendations issued by human rights treaty bodies are increasingly recognizing intersectional forms of discrimination and calling on States to protect and promote the rights of those facing multiple levels of discrimination. For example, the UN CEDAW Committee has recognised intersectional forms of discrimination that affect women on numerous grounds, and stated that state parties may need to “take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.”<sup>130</sup> The Committee also said that “States parties must legally recognise such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.”<sup>131</sup> The UN Committee on Economic Social and Cultural Rights<sup>132</sup> and the UN Committee on the Elimination of all forms of Racial Discrimination have likewise adopted relevant General Comments and Recommendations requiring states to recognise and address intersectional discrimination.<sup>133</sup>

## NOTES CRIMINALIZING SEXUALITY AND REPRODUCTION: A HUMAN RIGHTS ISSUE

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# ANNEXES





George, a model and leader of the LGBTI group 'Out in Kenya', in his shop in downtown Nairobi, 15 April 2013.  
© Pete Muller

# ANNEX 1

# CRIMINALIZING SAME-SEX SEXUAL ACTIVITY

**“We should all speak out when someone is arrested and imprisoned because of who they love or how they love. This is one of the great, neglected human rights challenges of our times.”**

Former UN Secretary-General, Ban Ki-Moon, 18 April 2013

Consensual sex between men is treated as a criminal offence in approximately 71 countries worldwide.<sup>134</sup> Around 45 of these countries also have criminal statutes that prohibit sexual activity between women.<sup>135</sup> States offer various justifications for this ranging from religious observance to tradition, “morality” and culture. However, homophobia and the wish to enforce dominant norms of heterosexual sexuality and strictly defined gender roles generally underlies behind these justifications.

Criminalization of consensual same-sex sexual activity – and its enforcement through prosecution and sentencing – is a serious human rights violation. The right to privacy ensures that people are free to have consensual sex in private without state interference. Amnesty International considers anyone imprisoned solely for having consensual sex with a same-sex partner to be a “prisoner of conscience” and calls for their immediate and unconditional release. However, prosecutions and prison sentences represent only a fraction of the damage that such criminalization inflicts on people around the world.

Laws that prohibit same-sex sexual conduct do not simply criminalize acts of sex between people. They enable the stigmatization, policing and punishment of people whose sexual orientation or gender identity do not conform to strict norms, regardless of their actual sexual behaviour. These laws also criminalize the identities of people who are lesbian, gay or bisexual or otherwise gender nonconforming by denying them the freedom to express who they are or to pursue love, relationships and/or sexual fulfilment freely. In many instances, those who are, or are suspected of being, transgender or intersex may also face criminalization and/or prejudice and discrimination under these laws, purely because of who they are, their sex characteristics or how they look, or express their identities, regardless of their sexual orientation.

There are many examples around the world of transgender people being harassed by police, arrested and/or detained under laws which prohibit same-sex sexual conduct or sex work, regardless of whether they are in fact lesbian, gay or bisexual, have had sex with a partner of the same sex or are sex workers.<sup>136</sup> While there is less documented evidence of discrimination towards people who are intersex under such laws, the bias that these laws promote and the pressure they place on people to conform to strict gender roles, may place intersex individuals at risk of human rights abuses.<sup>137</sup>

## DIRECT CRIMINALIZATION

A wide-range of terminology and concepts are used in legislation to directly criminalize consensual same-sex sexual activity. Some countries have criminal laws prohibiting “sodomy”, “homosexual acts”, “indecent practices”, “promotion of non-traditional values,” “debauchery” or “acts against the order of nature.”<sup>138</sup> Shari’a (Islamic law), which directly forbids same-sex sexual activity (liwat), is applied in approximately 10 countries, as well as regions of Nigeria, Malaysia and in Aceh province, Indonesia.<sup>139</sup> In many countries, laws that directly criminalize same-sex sexual activity are a legacy of their colonial past.<sup>140</sup> For example, many of the laws in Africa and the Caribbean that punish and stigmatize same-sex sexuality, sexual orientation, and gender expression are remnants of a legal framework imposed under the British Empire during the 19th century.<sup>141</sup> In some cases, state laws fail to distinguish between consensual sex and rape.

Punishments for consensual same-sex sexual activity in private range from fines, corporal punishment and imprisonment for up to 30 years to the death penalty, which is provided for in four countries and in provinces of two other countries. There are also reports that the death penalty is carried out by non-state actors in at least two more countries. Moreover, there are five other countries where interpretation of Shari’a law, or where criminal law, technically permits the death penalty, but where it does not seem to be invoked.<sup>142</sup>

In some instances, the penalties for consensual same-sex conduct are inequitable under the law. Under the Islamic Penal Code of Iran, men who have same-sex anal intercourse may face different punishments depending on whether they are the “active” or “passive” participant and whether their conduct is characterized as consensual or non-consensual. If it is deemed consensual, the “passive” partner will be sentenced to death while the “active” partner is sentenced to death only if he is married, or if he is not a Muslim and the “passive” partner is a Muslim. If the intercourse is deemed non-consensual, the “active” partner receives the death penalty but the “passive” partner is exempted from punishment and treated as a victim. This legal framework risks creating a situation where the consenting “recipients” of anal intercourse feel compelled to characterize their consensual sexual activity as rape to avoid the death penalty.<sup>143</sup>

Transgender people are also impacted by direct criminalization when states and communities conflate same-sex sexual conduct and gender non-conformity. This, combined with a lack of legal recognition of gender identity and of access to gender alignment treatment, leaves transgender people open to arrest, prosecution and harassment under the guise of laws criminalizing same-sex sexual activity.<sup>144</sup>

## CRIMINALIZATION OF SAME-SEX SEXUAL ACTIVITY – THE BIG PICTURE

Seventy one states explicitly criminalize same-sex sexual relations (32 in Africa, 10 in the Americas, 23 in Asia, and six in Oceania).<sup>145</sup> This has a particular impact on gay and bisexual men and other men who have sex with men. However, at least 45 of these states apply these criminal laws to both men and women. There is evidence that the death penalty is “allowed” and/or occurs in around eight states.<sup>146</sup> In contrast, there are 124 states<sup>147</sup> where legal penalties are not imposed for consenting same-sex sexual conduct between adults in private. In fact, in the past two decades, approximately 25 countries from every region took steps to decriminalize same-sex relationships between consenting adults.<sup>148</sup>

The UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (the Independent Expert) has confirmed that criminalization of consensual same-sex relations between adults violates states’ obligations under international law, including the obligation to protect privacy and to guarantee non-discrimination.<sup>149</sup> He further confirmed that “such violations occur even when the law is not enforced”,<sup>150</sup> and as such, “arrests and detentions on the basis of sexual orientation, gender identity or expression are to be considered arbitrary.”<sup>151</sup> The Independent Expert has explicitly called for decriminalization of same-sex relations and gender identity and expression.<sup>152</sup> (For further human rights analysis, see Human Rights Protections)

## INDIRECT CRIMINALIZATION

States also punish LGBTI people (or those perceived to be LGBTI) in less direct but similarly damaging ways. Criminal sanctions that do not directly criminalize same-sex activity per se, such as prohibitions on “cross-dressing”, “public indecency”, sex work and sex outside marriage, or laws broadly addressing public health and security, are often used disproportionately against people perceived as LGBTI. For example, transgender women are often targeted and prosecuted under laws criminalizing sex work, or “vagrancy”.<sup>153</sup> Additionally, while Egyptian law does not explicitly outlaw consensual sexual activities carried out in private, various laws with provisions concerning “contempt for religion”, “shameless public acts” and, most commonly, “debauchery” or “prostitution” have been used to disproportionately arrest, question or prosecute gay or bisexual men.

In recent years, some states have passed “anti-propaganda” laws which punish the dissemination of “propaganda” to minors that relates to non-traditional sexual relationships. Russia uses such a law, for example, which is justified as a necessary means to protect “morality” and carries steep fines. Similar legislation has followed throughout Eastern Europe and Central Asia.<sup>154</sup> The European Court of Human Rights found that the Russian law violates the right to freedom of expression, is discriminatory against gay people, and encourages homophobia.<sup>155</sup> In the USA, several states have enacted local laws (informally referred to as “No Promo Homo Laws”) which aim to restrict or place conditions on the discussion of same-sex sexual conduct and relations.<sup>156</sup>

While in some contexts, laws that indirectly criminalize or punish LGBTI individuals are not applied in practice, their existence and the threat of enforcement perpetuates and promotes bias and discrimination against those individuals. Such laws can also enable “extortion, persecution, multiple and intersectional phobia, and other forms of violence and discrimination, and violates international human rights norms and standards.”<sup>157</sup>

## DEBAUCHERY CHARGES – EGYPT

Arrests and prosecutions for “habitual debauchery” have increased in Egypt since 2013 and have been routinely used to police and harass gay and bisexual men, transgender persons and others, on the basis of discriminatory stereotypes about sexual orientation or gender identity and expression. Most recently, in September 2017, Egyptian authorities arrested 22 people over the course of three days after a rainbow flag was displayed at a concert in Cairo.<sup>158</sup> A total of 75 people were arrested as part of the Public Prosecutor’s investigation into the rainbow flag “incident.”<sup>159</sup> The Forensic Medical Authority has carried out anal examinations on at least five of those arrested. Such forced tests amount to torture.<sup>160</sup>

This was the worst crackdown against people in Egypt based on their perceived sexual orientation since the mass arrest of 52 people in 2001 in Cairo, the majority from the “Queen Boat” nightclub. Twenty one men were convicted and imprisoned for “habitual debauchery” and/or “contempt of religion.”

In November 2014, a court jailed eight men for three years after convicting them of taking part in what the Public Prosecution alleged was a “gay wedding” on a Nile riverboat. The court found the men guilty of “debauchery,” as well as making and publishing a “shameless” video.

In December 2014, security forces raided a bath house in Cairo and arrested at least 33 people. A court subsequently ordered their detention pending investigations by the Public Prosecution into accusations that they were involved in “habitual debauchery” and prostitution. As in previous cases documented by Amnesty International, the Public Prosecution ordered the men to undergo forced anal examinations.

Law enforcement and judicial authorities use provisions on “debauchery” under Law 10 of 1961 On the Combat of Prostitution to criminalize consensual sexual relations between men in private, as well as male prostitution. The UN Committee against Torture (CAT Committee) recommended that Egypt remove all ambiguity in legislation which might underpin the persecution of individuals because of their sexual orientation. Along similar lines, in relation to the arrest and subsequent conviction of four men on charges of so-called “debauchery” in Agouza, Egypt, the UN Working Group on Arbitrary Detention stated: “The vilification and persecution of persons for their sexuality violate the principles of international human rights law.”<sup>161</sup>

Notably, in June 2012, an Egyptian UN representative told the Special Rapporteurs on freedom of peaceful assembly and of association and on counter-terror and human rights that sexual orientation was “highly controversial” and “not part of the universally recognised human rights” adding that Special Rapporteurs should concentrate on the human rights of “real people.”<sup>162</sup>

## PENALIZATION AND PRESUMED CRIMINALITY

Laws that ban same-sex sexual activity also punish people because of their identities and because they do not conform to dominant gender roles. Criminal justice systems can investigate, harass, arbitrarily detain or punish people because of who they are, where they socialize or how they express themselves. People suspected of being LGBTI or gender non-conforming can find that their very existence and identities makes them a target for abuse, regardless of whether they are breaking any laws governing sexual behaviour or gender expression.

Laws that permit policing and punishment on such broad grounds embed homophobia and transphobia in the functions of the state; legitimize prejudice among public servants and communities; and place those suspected of being LGBTI at risk of discrimination and harm. For every person prosecuted under such laws, thousands more will be labelled “criminal”, subjected to harassment and abuse from the police and wider community and forced to live in secrecy and fear. They may also be denied access to vital social services such as health care and housing.

In the case of indirect criminalization, lack of clarity about the legality of same-sex activity gives state officials and the public broad discretion to interpret the law according to their own prejudices, creating a level of uncertainty that allows anti-LGBTI sentiment to perpetuate.

## HUMAN RIGHTS PROTECTIONS

Various international and regional human rights declarations and recommendations call for the decriminalization of consensual same-sex sexual activity.<sup>163</sup> In 1994, the Human Rights Committee (HRC) confirmed that criminalization of consensual sex between adults in private was a violation of the right to privacy (*Toonen v Australia*).<sup>164</sup>

The criminalization of private, consensual sexual relations between adults of the same sex breaches states’ international legal obligations, including the obligations to protect privacy and to guarantee non-discrimination. UN human rights experts have maintained this position since the Committee decided the *Toonen* case and confirmed that two provisions in Tasmania’s Criminal Code which punish various forms of sexual activities between men, including all forms of sexual activities between consenting adult homosexual men in private, was neither proportional nor necessary, that it did not achieve the aim of protecting public health, and that it was unnecessary to protect public morals.<sup>165</sup>

UN human rights bodies have since repeatedly urged states to reform laws criminalizing homosexuality and same-sex sexual conduct and have welcomed the legislative or judicial repeal of such laws.<sup>166</sup> The CEDAW Committee has recommended the abolition of laws that classify sexual orientation as a sexual offence.<sup>167</sup> At least 20 different judgments, rulings and decisions from various international, regional and sub-regional courts have also relied on the Yogyakarta Principles (international principles relating to sexual orientation and gender identity developed by a group of distinguished international

human rights experts) and found that the criminalization of same-sex sexuality and/or sexual orientation is incompatible with international human rights law.<sup>168</sup> The Yogyakarta Principles plus 10, released in 2017, identify freedom from criminalization arising directly or indirectly from actual or perceived sexual orientation, gender identity, gender expression or sex characteristics as an additional principle.<sup>169</sup>

In 2017, 12 UN agencies issued a joint statement calling for:

**Reviewing and repealing punitive laws that have been proven to have negative health outcomes and that counter established public health evidence. These include laws that criminalize or otherwise prohibit gender expression, same sex conduct, adultery and other sexual behaviours between consenting adults; adult consensual sex work... and overly broad criminalization of HIV non-disclosure.**<sup>170</sup>

In 2010, the Special Rapporteur on the right to health also called on states to take immediate steps to decriminalize consensual same-sex conduct, repeal discriminatory laws relating to sexual orientation and gender identity, and implement appropriate awareness-raising interventions on the rights of affected individuals.<sup>171</sup> In 2015, OHCHR issued a report at the request of the Human Rights Council that provided a global overview of the human rights violations faced by people who are or are believed to be LGBT. The report, called on all states to:

**Revis[e] criminal laws to remove offences relating to consensual same-sex conduct and other offences used to arrest and punish persons on the basis of their sexual orientation and gender identity or expression; ordering an immediate moratorium on related prosecution; and expunging the criminal records of individuals convicted of such offences... [and repeal] so-called ‘anti-propaganda’ and other laws that impose discriminatory restrictions on freedom of expression, association and assembly... among other things.**<sup>172</sup>

The Independent Expert has also explicitly called for decriminalization of same-sex relations and gender identity and expression.<sup>173</sup> Along similar lines, the Global Commission on HIV and the Law, an independent expert body created under the auspices of the UN Development Programme (UNDP), also called upon states to “[d]ecriminalize private and consensual adult sexual behaviours, including same-sex sexual acts.”<sup>174</sup>

Criminal law which punishes consensual same-sex sexual conduct, even where it is not enforced, violates individuals’ privacy and non-discrimination rights.<sup>175</sup> For example, the HRC noted in its concluding observations on Ethiopia, that its concerns were “not allayed by the information furnished by the State party that the provision in question is not applied in practice.”<sup>176</sup> Moreover, UN human rights bodies, experts and agencies have frequently called attention to the ways in which criminalization of consensual, same-sex sexual conduct legitimizes prejudice and exposes people to hate crime, police abuse, torture and family violence,<sup>177</sup> and perpetuates discrimination, including in the enjoyment of economic, social and cultural rights.<sup>178</sup> In his 2016 report, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Special Rapporteur on torture) stated that:

**States are complicit in violence against women and lesbian, gay, bisexual and transgender**

**persons whenever they create and implement discriminatory laws that trap them in abusive circumstances.**<sup>179</sup>

In addition, states that impose the death penalty (see above) for consensual same-sex activity violate the right to life under the International Covenant on Civil and Political Rights (ICCPR) (Article 6) and the UDHR (Article 3).<sup>180</sup> Article 6 of the ICCPR limits the death penalty to the “most serious crimes” and therefore should not apply to same-sex sexual conduct which should not be criminalized in the first place.

Notably, successive resolutions of the former Commission on Human Rights (predecessor of the Human Rights Council) have called on states to ensure that “the death penalty is not imposed for non-violent acts such as ... sexual relations between consenting adults”<sup>181</sup>, a call reaffirmed by UN treaty monitoring bodies and special procedures.<sup>182</sup>

The HRC has further affirmed that arrest or detention on discriminatory grounds is in principle arbitrary.<sup>183</sup> The UN Working Group on Arbitrary Detention has also regularly maintained that detaining someone on the basis of their sexual orientation is arbitrary and prohibited under international law.<sup>184</sup> For example, it found the arrest of 11 men in Cameroon under a Criminal Code provision criminalizing same-sex sexual relations, to be arbitrary.<sup>185</sup>

In some countries, different ages of consent are applied to homosexual and heterosexual sexual relations. This constitutes discrimination on the basis of sexual orientation.<sup>186</sup> (See more in Annex on Adolescent Sexual Activity)

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**175** *Toonen v Australia*, UN Human Rights Committee, UN Doc. CCPR/C/50/D/488/1992, 1994, para. 8.2

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**181** Former Commission on Human Rights resolutions on the question of the death penalty, UN Doc. E/CN.4/RES/2005/59, 2005, para. 5; UN Doc. E/CN.4/RES/2004/67, 2004, para. 4; UN Doc. E/CN.4/RES/2003/67, 2003, para. 4; E/CN.4/RES/2002/77, 2002, para. 4

**182** HRC: Concluding Observations to the Sudan, UN Doc. CCPR/C/79/Add.85, para. 8, 1997; Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/14/24/Add.1, 2010, paras. 450-451, UN Doc. A/HRC/8/3/Add.3, 2008, para. 76 (When Nigeria responded that there was a de facto moratorium on executions, the Special Rapporteur emphasized that "the "mere possibility" that it can be applied threatens the accused for years,

and is a form of cruel, inhuman or degrading treatment or punishment. Its status as a law justifies persecution by vigilante groups and invites abuse.); see also UN Doc. E/CN.4/2006/53/Add.2, paras. 2, 26, 35, 37 and 104; UN Doc. E/CN.4/2002/74, 2002, para. 65; UN Doc. E/CN.4/2000/3, 2000, para. 57

**183** See UN Human Rights Committee, General Comment 35 (Article 9: Liberty and Security of Person), UN Doc. CCPR/C/GC/35, 2014, para. 17

**184** See Working Group on Arbitrary Detention, Opinion No. 42/2008 on Egypt, UN Doc. A/HRC/13/30/Add.1, 2010; and No. 25/2009 on Egypt, UN Doc. A/HRC/16/47/Add.1, 2011; see also, Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/16/47, 2011, Annex para. 8(e)

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A woman is held by sharia police before receiving lashes in a public square in Banda Aceh, Indonesia 20 March 2017. The punishment is a result of the woman spending time with a man who is not her husband. © ULET IFANSASTI/Getty Images

## ANNEX 2

# CRIMINALIZING SEX OUTSIDE MARRIAGE

**“[T]he mere fact of maintaining adultery as a criminal offence, even when it applies to both women and men, means in practice that women mainly will continue to face extreme vulnerabilities, and violation of their human rights to dignity, privacy and equality.”**

Statement by the UN Working Group on the Issue of Discrimination Against Women in Law and in Practice

Criminal prohibitions on sex outside marriage commonly target heterosexual conduct (Also see Annex on Same-Sex Sexual Conduct). Where they punish consensual sex outside marriage, they violate a range of human rights. In about 50 countries, including Afghanistan,<sup>187</sup> Cameroon,<sup>188</sup> Indonesia,<sup>189</sup> Iran,<sup>190</sup> the Maldives,<sup>191</sup> Philippines,<sup>192</sup> Saudi Arabia,<sup>193</sup> Sudan,<sup>194</sup> United Arab Emirates,<sup>195</sup> parts of the US<sup>196</sup> and Taiwan<sup>197</sup>, extra-marital sex is treated as a crime and in some cases carries severe penalties. Sex between people who are not married, often referred to in law as “adultery” or “fornication,” can carry punishments ranging from lengthy prison sentences to flogging, or, in a small number of states, death by stoning.<sup>198</sup> There can also be implications in civil settings. For example, in states where “fault” is a factor in divorce proceedings, “adultery” may impact the division of assets after divorce.<sup>199</sup> Criminal laws may remain in place without being regularly enforced, for example in some states in the US.<sup>200</sup> Regardless of enforcement, these laws reflect the greater social stigma women face for having sex outside marriage and gender stereotypes about women’s roles.

“Adultery” laws are primarily used to punish women and compound the discrimination and violence they face. In many countries, the laws themselves are directly discriminatory, imposing criminal liability on women and girls in situations in which men would not face criminal sanctions.<sup>201</sup> Under many laws, penalties are harsher for women than for men.<sup>202</sup> In other cases, the laws themselves are gender-neutral, but they are applied in a discriminatory manner against women. Discriminatory laws or customs that allow men to have multiple wives,<sup>203</sup> the use of pregnancy as evidence of sex outside marriage,<sup>204</sup> discrimination against women within the court system<sup>205</sup> and the frequent use of “adultery” laws against individuals who have been raped<sup>206</sup> result in the oppression and punishment of women.

***“Conservative religious extremist movements impose strict modesty codes in order to subjugate women and girls in the name of religion, particularly in situations of political transition or conflict. For example, some branches of Islam have reintroduced forced and/or early marriage and some branches of Christianity prevent women from having access to therapeutic abortion. Religious extremism limits women’s rights, including their right to health and economic activity, and they are generally subject to harsh sanctions for crimes committed against the patriarchy, such as adultery.”***<sup>207</sup>

UN Working Group on the Issue of Discrimination against Women in law and in practice, 2015

## **CRIMINAL LAW, RELIGIOUS LAW AND CUSTOMARY PRACTICE**

Historically, prohibitions on “adultery” have been embedded in religious and cultural traditions throughout the world.<sup>208</sup> In Jewish Biblical law, “adultery” was defined as sexual intercourse between a man and a married woman, with the penalties directed only at women.<sup>209</sup> In some Christian sources, “adultery” was considered immoral and a sin.<sup>210</sup> Similar prohibitions have also been documented in Native American and Indian traditions.<sup>211</sup> In some instances, the penal laws used to criminalize sex outside marriage are heavily influenced by interpretations of Shari’a (Islamic law). Shari’a prohibits consensual sex outside marriage, including extramarital and premarital sex (both of which are known by the Arabic term Zina).<sup>212</sup> In a number of countries, principles from religious law become incorporated into the formal legal system.<sup>213</sup>

The criminalization of sex outside marriage can be carried out using both codified law and customary practice, which in some cases coexist. Some countries explicitly criminalize “adultery” or “fornication” through penal code provisions, which are enforced through formal criminal justice systems. Other countries criminalize the act largely through informal systems or customary practice where community leaders enforce cultural or religious “norms” and punish those who defy them. For example, Saudi Arabia has a system of customary law whereby justice is implemented by community judges, most commonly male local religious leaders, who enforce religious “norms” interpreted under Shari’a. Because these customary laws are not codified they are open to local judges’ individual interpretations and prejudices, resulting in varied and discriminatory application.<sup>214</sup>

## DIRECT CRIMINALIZATION

“Adultery” laws explicitly criminalize sex between a married person and a person who is not their spouse. Depending on the law, either one or both parties can be criminalized. Some of these laws are directly discriminatory and only criminalize women, while others are gender-neutral but disproportionately impact women in practice.

Article 239 of Taiwan’s criminal code allows for a married person who commits “adultery” to be imprisoned for up to a year.<sup>215</sup> Though this law is gender-neutral, advocates have shown that it leads to more harmful and negative outcomes for women because women are more likely to be economically dependent on their spouse and, therefore, twice as likely to drop charges as men, resulting in a higher conviction rate against women.

In some cases, “adultery” laws are British colonial vestiges of the Victorian era. For example, Section 497 of the Indian Penal Code makes it a crime for a man to have “sexual intercourse with a person who is and whom he knows or has reason to believe to be wife of another man.”<sup>216</sup> While women are not punished under this law, they are described as passive objects to be “enticed” or taken.<sup>217</sup>

## “ADULTERY,” GENDER DISCRIMINATION AND DEATH BY STONING - IRAN

Iran is one of few countries to sentence people to death by stoning for “adultery” (zена-ye mohsene). Under Article 225 of the 2013 Islamic Penal Code, the punishment of “adultery” for a woman and a man who meet the condition of *ehsan*<sup>218</sup> is stoning. If the condition of *ehsan* is not met, the punishment is 100 lashes.<sup>219</sup> The same punishment applies to a man and woman who are convicted of “fornication”.

Amnesty International documented the case of one woman, Fariba Khaleghi, who was sentenced to death by stoning in 2016.<sup>220</sup> Scores of individuals also faced up to 100 lashes for intimate relationships outside marriage which did not meet the definition of “adultery.”

Although both men and women have faced stoning, women are particularly at risk because of the entrenched discrimination they encounter in law and practice including in the area of family and criminal law.

Under Iran’s Civil Code, men are entitled to have at least two permanent wives in polygamous marriages<sup>221</sup> and as many wives as they wish in “temporary” (*sigheh*) marriages (Articles 1075-1077).<sup>222</sup> Men can also divorce their wives without reason, although certain conditions apply, such as paying alimony (Article 1133). This legal arrangement enables men accused of “adultery” to claim that they engaged in “adultery” within the bounds of a temporary marriage. This defence is not available to women.

Women may only have one spouse under Iranian law. In order to obtain divorce from their spouse, they must prove that they are living in conditions of severe hardship that make the continuation of marital life intolerable. Discrimination and bias against women within the legal system, including a ban on women judges, have often prevented women from obtaining divorce, even if they are subjected to domestic violence which is considered a ground for divorce under the law.<sup>223</sup> The Iranian authorities have failed to adopt laws criminalizing domestic violence and have therefore allowed for it to be committed on a widespread basis and with impunity.<sup>224</sup>

The majority of women sentenced to death by stoning in Iran have reported that they resorted to “adultery” after experiencing sustained gender-based violence and denial of access to a divorce. Many were also victims of early and forced marriages. The legal age of marriage for girls in Iran is 13 and fathers are allowed to obtain permission from courts to arrange that their daughters are married at an even younger age.

Women from disadvantaged socio-economic backgrounds are often disproportionately affected by the punishment of stoning as they generally have lower levels of literacy and can struggle to afford effective lawyers to defend them against criminal charges. Women belonging to ethnic minorities are also particularly vulnerable as they are less likely to be fluent in Persian, the official language of the courts, and may and may be pressured into signing “confessions” without having the legal process or the gravity of the punishment they face fully explained to them.

The authorities have said that “the criminalization of adultery is consistent with an interpretation of Islamic law, and that the punishments outlined in sharia law [including stoning] are effective in deterring crimes and protecting morality.”<sup>225</sup> Human rights defenders who have peacefully campaigned for the abolition of stoning have been described by the authorities as “un-Islamic” and faced harassment, arbitrary arrest and detention, torture and other ill-treatment. This is well-illustrated by the case of writer and human rights defender Golrokh Ebrahimi Iraee, who is serving a six-year prison sentence on charges that include “insulting Islamic sanctities” for writing an unpublished story about the practice of stoning.<sup>226</sup>

## PENALIZATION AND PRESUMED CRIMINALITY

Women perceived to be stepping outside social, sexual or gender norms are often presumed to be “criminals” regardless of whether they have broken any laws. A large proportion of women in prison or facing charges or punishment for sex outside marriage have had action taken against them solely on the basis of accusations made, often maliciously, by their husbands, male relatives, or, in the case of migrant domestic workers, by their male employers.<sup>227</sup> Young women who refuse to marry in accordance with their parents’ wishes, women who leave their husbands or who are seen as an obstacle to their husbands marrying another person and women who are victims of domestic abuse and sexual violence, are also at risk of accusations, arbitrary arrest and potential prosecution, particularly if they are living in poverty or facing other forms of discrimination. Women and girls who flee forced marriages or domestic violence may be presumed to be criminal for “running away.”<sup>228</sup>

In addition to criminal laws, many policies and practices penalize individuals for sex outside marriage depending on their circumstances and context. For example, unmarried women, in particular, face stigma and discrimination from sexual and reproductive health care providers when they access services. Women may even be subject to third party authorization requirements that prevent them from accessing sexual and reproductive health information and services without their spouse’s permission.<sup>229</sup> This contributes to ill-health.<sup>230</sup> Pregnant girls may be banned from attending state school or taking exams.<sup>231</sup>

Detained women have been subject to so-called “virginity tests” to humiliate and punish them.<sup>232</sup> Authorities have claimed that these tests are carried out to respond to allegations of sexual assault or to investigate charges of “illegitimate sexual relations.”<sup>233</sup> Such tests are discriminatory in purpose and in effect and there is absolutely no legitimate justification for such violence and abuse. Coerced “virginity tests” are a form of cruel, inhuman or degrading treatment and violate women’s rights to privacy, dignity, physical and mental integrity.

## EXTRAJUDICIAL PUNISHMENT

In some states, customary dispute resolution practices are used by religious and community leaders (usually men) to subject women to extrajudicial punishment, including flogging or public humiliation, for alleged sex outside marriage.<sup>234</sup> Such punishment has been enforced regardless of whether extramarital sex is considered a crime under the country’s codified law and, in some cases, against women who have been raped or sexually assaulted.<sup>235</sup> In July 2010, for example, the High Court Division of the Supreme Court of Bangladesh issued a judgment acknowledging that:

**Primarily poor and vulnerable women and men in rural areas across the country have been subjected to whipping, lashing and beating in imposition and execution of certain penalties, by private individuals acting without any authority of law...The kind of offences for which women have been subjected to lashing and beating are “talking to a man”, “pre-marital relations”, and “having a child out of wedlock.” None of these are offences under Bangladesh law.** <sup>236</sup>

## SO-CALLED “HONOUR CRIMES” AS HARMFUL PRACTICES

Gender based violence against women in the name of patriarchal notions of “honour” (so called “honour crimes”) are violent acts that are “disproportionately, though not exclusively, committed against girls and women, because family members consider that certain suspected, perceived or actual behaviour will bring dishonour to the family or community.”<sup>237</sup>

In a number of countries, accusations of “adultery” or “fornication” are used as a pretext and defence for so-called “honour crimes.”<sup>238</sup> Violence, threats and coercion are often used to enforce informal social codes of “honour” (patriarchal morals around purity, chastity and ownership) which function in many parts of the world and are sometimes reinforced by discriminatory laws.

For example, the Jordanian penal code allows a man who kills or attacks a spouse or female relative for allegedly committing “adultery” to receive a reduced sentence.<sup>239</sup> In other countries, such as Pakistan, although so-called “honour crimes” are technically illegal, the state is complicit and fails to hold perpetrators accountable, allowing impunity for perpetrators.<sup>240</sup> So-called “honour crimes” may be considered torture or cruel, inhuman or degrading treatment.<sup>241</sup>

The criminalization of “adultery” poses an additional burden on women and girls who have been raped. Those who attempt to press charges risk punishment for “adultery” when they are unable to meet stringent evidence requirements of sexual assault<sup>242</sup> or where the law does not distinguish between sexual assault and other extramarital sex. This discourages women from reporting rape for fear of prosecution.<sup>243</sup> Instead of being treated as a victim of a crime, women are charged with committing an offence themselves. Prosecution for “adultery” after reporting rape commonly leads to incarceration of women. In some instances, women who have been raped have been forced by the court or community leaders to marry the rapist to avoid the “dishonour” connected with committing “adultery” or “fornication.”

Both criminalization of “adultery” and its use as defence for so-called “honour crimes” can be understood as “harmful practices.” “Harmful practices” result from gender inequality and discriminatory social, cultural and religious norms and traditions which relate to women’s position in the family, community and society and to control over women’s freedom, including their sexuality.”<sup>244</sup> It’s not that religion, culture or tradition are fundamentally discriminatory; in fact, they are always changing. However, “harmful practices” are a manifestation of historically unequal power relations and are a violation of human rights. Under international law, culture, custom, religion, tradition or so-called “honour” cannot ever be considered a justification for any act of violence against women. States are obligated to take appropriate measures to modify social and cultural practices that discriminate against women.<sup>245</sup>

## HUMAN RIGHTS PROTECTIONS

Criminal “adultery” laws violate a range of human rights, including the rights to privacy, equality and non-discrimination, health and, in some cases, the rights to life and to be free from torture and cruel, inhuman and degrading treatment or punishment. The disparate enforcement of “adultery” laws against women has also been shown to violate fair trial rights, including discriminatory evidentiary standards, biased judicial decisions and lack of “due process”, among other things.

Under international law, criminalizing consensual sex between adults, whether inside or outside marriage, is a human rights violation, specifically the right to privacy. As referenced earlier, the HRC confirmed that criminalization of private consensual sex between adults violated Article 17 of the ICCPR as detailed in (*Toonen v. Australia*).

Following the *Toonen* decision, the HRC, the CEDAW Committee and the CESCR Committee expressed concern regarding the discriminatory nature of “adultery” and “fornication” laws and their disproportionate impact on women.<sup>246</sup> Notably, the HRC called for the repeal of “adultery” laws “so that women are not deterred from reporting rapes for fear their claims will be associated with the crime of adultery.”<sup>247</sup> The CEDAW Committee has also consistently criticized the discriminatory nature of “adultery” laws,<sup>248</sup> describing them as “obsolete,”<sup>249</sup> and has called for their repeal.<sup>250</sup> Specifically, it called for the repeal of:

**“Provisions that allow, tolerate or condone forms of gender-based violence against women, including... adultery or any other criminal provisions that affects women disproportionately including those resulting in the discriminatory application of the death penalty to women.”<sup>251</sup>**

Under CEDAW, states are obligated to take appropriate measures to modify social and cultural patterns that discriminate against women, including customary and other practices “which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”<sup>252</sup>

The Special Rapporteur on extrajudicial, summary or arbitrary executions recommends that states “repeal all laws that support the patriarchal oppression of women, including laws that punish sexual relationships outside marriage...and laws that criminalize adultery”<sup>253</sup>

The Working Group on Discrimination against Women in Law and Practice concluded that there was no “cure” to the discriminatory features of penalizing “adultery” short of full decriminalization for both women and men.<sup>254</sup> The Working Group has called on governments to end the use of fines, imprisonment, and physical punishment for “adultery”<sup>255</sup> and has encouraged member states to decriminalize “adultery” as a means of eliminating gender-based violence.<sup>256</sup> The Special Rapporteur on violence against women, its causes and consequences (Special Rapporteur on violence against women) criticizes the use of religion to justify actions of violence against women,<sup>257</sup> and condemns “adultery” laws as a way of “policing women’s sexuality.”<sup>258</sup>

The CESCR Committee has also expressed concern that women receive more severe punishment under “adultery” laws<sup>259</sup> and has criticized states for not making progress in repealing discriminatory provisions in relation to sex outside marriage.<sup>260</sup> This Committee has further identified criminalization of consensual sexual activity between adults as a violation of the right to sexual and reproductive health.<sup>261</sup>

The UN Special Rapporteur on the Independence of Judges and Lawyers has expressed concern that criminalizing sex outside marriage discriminates against women, as well as in regard to the nature of criminal proceedings in relation to these charges, noting that judges and prosecutors who uphold these laws “become parties to the violation of the State’s international obligations.”<sup>262</sup> The Special Rapporteur also confirmed that women accused of all crimes have the right to a fair public hearing by a competent, independent and impartial tribunal. This requires judges, prosecutors and lawyers to challenge gender stereotyping and discrimination in the form of wrongful charging of suspects and to refrain from “detracting from women’s testimony or discounting their credibility,” regardless of whether they are the accused or are victims.<sup>263</sup>

In 2009, the UN Division for the Advancement of Women published the recommendation that state legislation “mandate the repeal of any criminal offence related to adultery.”<sup>264</sup> More recently, the UN Working Group on Discrimination against Women has called upon governments to repeal laws criminalizing “adultery,” stating that:

“Previously, human rights mechanisms have made urgent appeals to commute criminal sentences for adultery in specific cases, on grounds of unfair trial or because application of the death penalty for the crime of adultery is contrary to international standards. However, the Working Group considers that commuting sentences, though welcome, is not enough and the offence of adultery must not be regarded as a criminal offence at all.”<sup>265</sup>

CEDAW has also criticized the failure of states to grant women equality before the law. Specifically with regard to so-called “honour crimes” and killings, CEDAW General Recommendation 19 recommends “[I]nvestigation to remove the defence of honour in regard to the assault or murder of a female family member”<sup>266</sup>

The CAT Committee also expressed concern at the disproportionate role these laws play in women's detention, acknowledging that sentences are applied in a discriminatory way against women.<sup>267</sup> In addition to violations of the right to privacy and non-discrimination, states that impose the death penalty (as referenced earlier) for consensual sexual activity violate the right to life under the ICCPR (Article 6) and the UDHR (Article 3). Successive resolutions of the former Commission on Human Rights have called on states to ensure that "the death penalty is not imposed for non-violent acts such as... sexual relations between consenting adults."<sup>268</sup>

With regard to the grave punishment that often results from enforcement of "adultery" and "fornication" laws, the Committee on the Rights of the Child (CRC) has deemed sentences like whipping, amputation and stoning to be a form of torture or cruel, inhuman or degrading treatment.<sup>269</sup> In 2017, the Human Rights Council resolution on the death penalty condemned the imposition of the death penalty for adultery and expressed "serious concern that the application of the death penalty for adultery is disproportionately imposed on women".<sup>270</sup> Moreover, the UN Special Rapporteur on torture has specifically recognised stoning as torture which is "beyond dispute, a violation of the prohibition of cruel, inhuman and degrading treatment."<sup>271</sup> The HRC concluded that stoning to death for adultery is a punishment that is grossly disproportionate to the nature of the "crime."<sup>272</sup>

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A person living with HIV from the Support and Care Centre of the Sumanahalli Society prepares 'red ribbons' on the eve of World Aids Day in Bangalore, 30 November 2015.

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## ANNEX 3

# CRIMINALIZING HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION

## “HIV is a virus, not a crime.”

Justice Edwin Cameron, Constitutional Court of South Africa

Over the last 20 years there has been a dramatic increase in the number of countries using criminal laws and other civil sanctions to punish people living with HIV for passing on or allegedly exposing others to the virus. In some cases, people living with HIV have been investigated or prosecuted simply for not disclosing their status to a sexual partner, even if they had no intention of harming them and took risk reducing measures such as using a condom. In some countries, such as Switzerland and Sweden, people have been prosecuted even if their sexual partner consented to unprotected sex.<sup>273</sup> What began as a reactive and untested approach adopted in a handful of countries in the early years of the epidemic, has become widespread in many regions, attracting concern and condemnation from HIV and human rights activists worldwide and from UN experts.<sup>274</sup>

Seventy two countries have adopted criminal laws that specifically permit HIV criminalization, and 61 have used either HIV-specific laws or general criminal or civil laws to prosecute or otherwise punish people.<sup>275</sup> Of the 61 countries, 26 have applied HIV criminalization laws, 32 have applied general criminal or public health laws, and three (Australia, Denmark and the US) have applied both HIV criminalization and general laws.<sup>276</sup> In the mid-1990s, only a small number of countries, including Australia, Canada, Germany and the USA, had used the law in this way.<sup>277</sup> By 2005, however, 21 European countries had prosecuted individuals for HIV transmission or exposure, and by 2010, at least 600 people had been convicted globally.<sup>278</sup> Since the beginning of the 21st century, 30 countries in Africa have introduced HIV-specific criminal laws.<sup>279</sup>

This increasing reliance on the criminal law in response to HIV non-disclosure, exposure and transmission is particularly marked in high-income countries where HIV prevalence has remained relatively contained since the early years of the epidemic. During the 30-month period between April 2013 and October 2015, the HIV Justice Network recorded the highest numbers of arrests and prosecutions in Russia (115) and the USA (104), followed by Belarus (20), Canada (17), France (seven), UK (six), Australia (five) and Germany (five).<sup>280</sup> Prosecutions and convictions in countries where HIV prevalence is higher, such as in countries across sub-Saharan Africa, remain relatively rare, but are now beginning to increase.

Some lawmakers promote these criminal laws and policies as a legitimate state response to deter or punish cases of deliberate and malicious HIV transmission or to promote disclosure as an HIV-prevention measure. However, in reality, such overly broad HIV criminalization is based on discriminatory law-making or the opportunistic and prejudiced application of existing laws. Research has failed to demonstrate that criminalization has any positive impact on HIV prevention or on the individual behaviour of people living with or at risk of HIV.<sup>281</sup> In fact, criminalization can further discourage HIV testing and disclosure, as well as create additional barriers to accessing health care.<sup>282</sup>

Criminalized approaches can damage and impede HIV prevention efforts by promoting fear and disincentives for undiagnosed people with HIV to test or diagnosed people with HIV to openly discuss their HIV status. This includes recommending post-exposure prophylaxis (PrEP) following a potential exposure for fear of being reported to the police. Criminalization can also create a false sense of security for HIV-negative people who believe the law will protect them.<sup>283</sup> Criminal prosecutions, and the often inflammatory media coverage that they attract, have also contributed to stigma and discrimination against people living with or affected by HIV.<sup>284</sup> Such stigma has a profoundly negative effect on HIV prevention and on the lives of people living with HIV, increasing vulnerability to scapegoating, blame and marginalization within communities.

In some cases, the call to apply criminal law to HIV non-disclosure, exposure and transmission is well-intentioned with the aim of protecting women and responding to serious concerns about the rapid spread of HIV in many countries, coupled with the perceived failure of existing HIV prevention efforts. While these concerns are legitimate and must be urgently addressed, closer analysis reveals that criminalization does not reduce HIV transmission (as referenced earlier) or women's exposure to HIV. For example, it can lead women to avoid testing or accessing care, including essential prenatal care, out of fear of receiving a positive HIV diagnosis. As women are often first diagnosed with HIV during routine prenatal care for example, they can be more exposed to being accused of being responsible for transmitting HIV, regardless of whether this is in fact the case. Criminalization of HIV also fails to address the deep economic, social, and political inequalities that are at the root of women's and girls' disproportionate vulnerability to HIV. Rather, it is likely to heighten the risk of violence and abuse women face, strengthen prevailing gendered inequalities in health care and family settings, further promote fear and stigma, increase women's risks and vulnerabilities to HIV and to HIV-related rights violations and have other negative outcomes for women.<sup>285</sup>

## **'PROVING' CRIMINAL LIABILITY**

In general, a key element of establishing liability in criminal cases is proving the accused's "intent" in committing the alleged crime. However, many HIV-related cases worldwide are prosecuted with little or no indication that the accused intended to transmit or expose someone to HIV. Despite this reality, mainstream media coverage of HIV cases often give the impression that people are being prosecuted for intentionally or maliciously transmitting HIV.<sup>286</sup>

In some jurisdictions, the prosecution is required to prove "malicious intent" to expose or transmit HIV to secure a conviction.<sup>287</sup> However, in others intent can simply be inferred and a person held criminally liable because they knew they had HIV and did not disclose their status. In other jurisdictions, prosecutors must only prove that a person was "reckless" or "negligent" with regards to their HIV.<sup>288</sup>

The concept of recklessness or negligence, however, is subjective and can be widely interpreted. When this subjectivity is combined with lack of knowledge about HIV-related risks and harms within criminal justice systems and pervading HIV stigma and prejudice, people can be accused of "recklessness" or "negligence" based on various actions that

may or may not pose any “substantial” or “justifiable” or, in fact, actual, risk of transmission. For example, prosecutions can occur even when accused individuals have used condoms or have an undetectable load. People living with HIV have also been prosecuted and in some cases jailed, for spitting, biting, scratching or engaging in oral sex, which constitute no or very little risk of transmission.<sup>289</sup>

HIV criminalization laws have also failed to take into account recent advances in HIV treatment, both in terms of reducing the harm of HIV and its role as an effective form of preventing new infections. People with HIV who take Antiretroviral Therapy (ART) and in whom the virus is suppressed to low or undetectable levels cannot transmit the virus.<sup>290</sup> Understanding that successful treatment prevents transmission can help reduce HIV-related stigma related to fears of transmission and encourage people with HIV to initiate and adhere to a successful treatment regimen. However, access to treatment is unequal and factors such as discrimination, stigma, racism and poverty exacerbate these inequalities and for a variety of reasons not everyone is able to reach an undetectable viral load.<sup>291</sup> Thus, criminalization and prosecution of people for not having a low or undetectable viral load in effect penalized people who may be unable to secure treatment.

## **DIRECT CRIMINALIZATION**

Laws that specifically criminalize HIV non-disclosure, exposure and transmission were first introduced in US states in 1987. As of 2016, a total of 72 countries had enacted such laws.<sup>292</sup>

A minority of countries only prosecute people when HIV transmission is alleged. However, there is no simple or conclusive way to prove that HIV has been passed between two people.<sup>293</sup> Testing does not establish beyond a reasonable doubt the source, route or timing of transmission.<sup>294</sup> Law enforcement officers, judges and attorneys may misunderstand the limitations of this technology. Consequently, people facing prosecution often find that the charges against them are based on weak, scientifically inaccurate or circumstantial evidence.

Women can be more likely to be blamed for HIV transmission. They are often the first to know their HIV positive status; particularly as governments move towards “opt-out” HIV testing and counselling in antenatal care settings. For example, in 2012, a woman was convicted under Section 79 of Zimbabwe’s Criminal Law Act for deliberately transmitting the virus to her husband. The woman learned her HIV status following routine antenatal care and testing. The court found her guilty without any apparent exploration of whether her husband had already contracted HIV from previous sexual partners before or during his marriage and despite the woman having apparently disclosed her HIV status to her husband following her diagnosis.<sup>295</sup> The woman testified that her husband filed the charges in revenge for her own complaint against gender-based violence inflicted upon her during marriage. This case went to Zimbabwe’s Constitutional Court, which reaffirmed her “guilt” and sentenced her.<sup>296</sup>

In most instances, states prosecute both alleged HIV transmission and perceived or potential exposure. This means that the charges can be brought regardless of whether

HIV transmission has occurred. Such prosecutions are often speculative about the harm caused to individuals and regularly ignore the actual probability of whether HIV would have been transmitted between two people given that different sexual acts carry different degrees of risk.<sup>297</sup>

Accusations of HIV exposure can have a severe impact on health care providers living with HIV. For example, in Uganda, pediatric nurse Rosemary Namubiru was convicted for negligence associated with the insertion of an intravenous needle. The parent of a pediatric patient complained that the nurse had used a needle on her son after the nurse had accidentally pricked herself with the needle. Despite the prick being an accident that did not result in HIV transmission, the media demonized her as a “Killer Nurse” maliciously attempting to pass on HIV.<sup>298</sup>

Article 122 of Russia’s criminal code punishes HIV transmission and exposure with prison sentences. While this law was supposedly introduced to protect women from HIV, in practice it is being enforced against women, as well as men.<sup>299</sup> Moreover, evidence of prior knowledge of HIV-status in cases under Article 122 generally comes from medical records, which has implications for medical confidentiality.

In some cases, the law requires proactive disclosure of their status by people living with HIV to every potential sexual partner prior to an act of consensual sex regardless of the kind of sex undertaken. Under these provisions, people can be prosecuted whether or not a condom or other safer sex methods were used and/or even if there was no possibility of HIV exposure or transmission.<sup>300</sup> HIV exposure and non-disclosure laws are often so vague and sweeping that they effectively create “strict liability” for people with HIV and criminalize their sexual expression. Criminal exposure and non-disclosure laws can cover a broad range of activities, impacting the activities of people who are already marginalized and criminalized such as sex workers and people who use drugs.

In 2006, the Joint United Nations Programme on HIV/AIDS (UNAIDS) recommended that “criminal and/or public health legislation should not include specific offences against the deliberate and intentional transmission of HIV” and that general criminal penalties are only applied in exceptional cases where “the elements of foreseeability, intent, causality and consent are clearly and legally established.”<sup>301</sup>

More recently, UNAIDS has noted that:

**Overly broad criminalization of HIV non-disclosure, exposure or transmission refers to the application of criminal law in relation to HIV that (i) is not guided by the best available scientific and medical evidence relating to HIV, (ii) fails to uphold the principles of legal and judicial fairness,<sup>302</sup> and (iii) infringes upon the human rights of those involved in criminal law cases.<sup>303</sup>**

## CRIMINALIZATION OF HIV IN THE USA

Thirty-two states and two US territories have HIV-specific criminal laws, many of which allow for the prosecution of people living with HIV for a range of acts including consensual sex, biting, spitting, donating blood and engaging in sex work.<sup>304</sup> HIV can also be considered an “aggravating factor” which results in “sentencing enhancements,” meaning that people living with HIV may be subject to more severe penalties for engaging in behaviours that are already criminalized. For example, soliciting for sex work can be prosecuted as a felony instead of a misdemeanour. In addition to HIV-specific laws, both criminal and public health laws regulating sexually transmitted infections (STIs) can be applied to people living with HIV.<sup>305</sup> In some states, people who violate exposure laws must also register as sex offenders.

Prosecutions are often critiqued for being unfair and propelled by racism and/or homophobia. In 2017, a case in the state of Missouri against Michael Johnson, a Black gay man who was a college student at the state, was vacated due to prosecutorial misconduct that, according to the court, made the first trial “fundamentally unfair.”<sup>306</sup> The first trial in 2013 resulted in a 30 year prison sentence and was highly publicised by advocates and the media. Some advocates critiqued the law because criminal liability hinges on whether the defendant can prove they disclosed their HIV status before sex, which is rarely possible, and a guilty verdict can mean a sentence of up to 96 years in prison. Facing this risk, Michael Johnson decided to enter a plea and is serving a 10-year sentence despite never having been proved guilty.

## “LEGISLATION CONTAGION” IN AFRICA

In 2004, a model law that included a number of problematic HIV criminalization laws and policies was developed at a workshop funded by the United States Agency for International Development (USAID) held in N’Djamena, Chad.<sup>307</sup> The model text was replicated and between 2004 and 2008, 13 African countries introduced HIV-specific laws based on the N’Djamena template.<sup>308</sup>

The model law was initially envisioned as a tool to bolster and protect the human rights of people living with HIV. It contains a number of protective provisions, including anti-discrimination protections and policies that promote access to services for people living with HIV.<sup>309</sup> However, the model law also introduced mandatory HIV testing, involuntary partner notification by physicians and the overly broad criminalization of HIV non-disclosure, exposure and transmission.<sup>310</sup> The model law also codified the concept of “wilful transmission” of HIV.<sup>311</sup>

“Wilful transmission” was defined as transmission “through any means by a person with full knowledge of his/her HIV/AIDS status to another person,”<sup>312</sup> failing to differentiate between intentional and unintentional transmission, whether an HIV-positive person disclosed their status to a sexual partner, obtained consent from an HIV-negative sexual partner, or used a condom.<sup>313</sup> These overly broad provisions have led to sweeping interpretations of what constitutes “wilful” behaviour, inadvertently criminalizing a wide range of actions and giving licence for further sanctions.

The law has also been criticized for its failure to account for gender inequalities. Many women may have a limited capacity to negotiate sex or condom use within relationships and women are more likely to seek testing and therefore receive a positive diagnosis. They are consequently more likely than men to be blamed for HIV transmission regardless of whether they in fact transmitted the virus or whether they had any control over prevention.<sup>314</sup> In some countries, the vague definition of “wilful transmission” has also allowed for the criminalization of exposure or transmission through childbirth or breastfeeding.<sup>315</sup>

Despite the proliferation of HIV-specific laws throughout Africa, prosecutions for HIV transmission or exposure remain relatively rare. Nevertheless, these laws effectively criminalize large swathes of the population in countries with a high HIV prevalence. This, together with the fact that it is extremely difficult to effectively prove that one person transmitted HIV to another, means that in many countries these laws are virtually unenforceable. Nevertheless, their mere existence enables discriminatory investigations and prosecutions and affects public perceptions of people living with HIV, increasing stigma and marginalization.

## INDIRECT CRIMINALIZATION

In addition to HIV-specific laws, a variety of general criminal or civil laws are used to criminalize HIV non-disclosure, exposure and transmission. Such laws range from public health provisions aimed at controlling the spread of all communicable diseases, to assault laws and, in a small number of cases in the US, charges relating to bio-terrorism and making terrorist threats.<sup>316</sup>

Prejudice, fear and misconceptions about HIV also promote unjust punishment and prosecution of people living with HIV because these biases are shared by law enforcement officials and reflected in criminal justice settings. As a result, individuals can face investigation, prosecution and conviction on the basis of fears about transmission that have little or no scientific basis.

### ASSAULT AND RECKLESS ENDANGERMENT

Some countries use general assault or public order laws to prosecute people living with HIV for passing on, or allegedly exposing someone to, HIV or failing to disclose their HIV status. For example, in Scotland the common law offence of “Culpable and Reckless Conduct” has been used to prosecute individuals accused of recklessly injuring another person by passing on HIV or, in the case of exposure, “recklessly endangering” another person.<sup>317</sup> In England and Wales, prosecutors have used the Offences Against the Person Act (1861) to bring charges against individuals in cases of unintentional transmission.

### ATTEMPTED MURDER

Other countries use offences relating to homicide, serious injury, attempted murder, manslaughter or even poisoning to criminalize HIV non-disclosure, exposure and transmission. The USA, Brazil, Canada and South Africa<sup>318</sup> have prosecuted cases as attempted murder.<sup>319</sup> In 2009, a man was convicted in Canada of murder for recklessly transmitting HIV.<sup>320</sup> In March 2011, a man was convicted under poisoning laws of transmitting HIV to his wife and sentenced to 15 years’ imprisonment in the Republic of Congo.<sup>321</sup> The prosecution described the defendant’s actions as “an administration or inoculation of substance in the body that cause damage or death.”<sup>322</sup> People living with HIV have been charged with attempted murder in many US states.<sup>323</sup>

### PUBLIC HEALTH LAWS

Some countries criminalize HIV non-disclosure, exposure and transmission through disease control laws. Public health laws that allow the state to quarantine individuals are often used to respond to outbreaks of communicable diseases such as influenza. Temporary measures can be justified in exceptional circumstances, such as in the case of some highly contagious airborne diseases, but these responses must be consistent with human rights laws and standards including proportionality.<sup>324</sup> Such laws may call for fines, behaviour orders or even detention, quarantine and prosecution. In Australia, the Public Health Act (2010) of New South Wales is so far reaching that it criminalizes non-disclosure of most STIs,<sup>325</sup> meaning that one act of sex involving a person living with HIV

(or other STI) who has not disclosed their status can be considered a public health threat.<sup>326</sup> This law was amended in 2017 to remove the mandatory notification requirement, only to require that a person with a “notifiable disease, or a scheduled medical condition, that is sexually transmissible” to take “reasonable precautions” against spreading the disease or condition, under the threat of “100 penalty units or imprisonment for 6 months, or both”.<sup>327</sup> Critics of the amended law note that it is vague as it fails to define “reasonable precautions”, it imposes a heavy-handed sentence which have been shown to be ineffective, and it will discourage people from getting tested, “because if you don’t get tested you can’t get charged.”<sup>328</sup>

## **PENALIZATION AND PRESUMED CRIMINALITY**

HIV criminalization laws have a far-reaching impact, beyond prosecutions and convictions. Criminalization based on HIV status uses a person’s health and/or knowledge of their positive status against them and conceives of them as a perpetual threat to their sexual partners and community. Upon acquiring HIV, individuals often cannot escape presumptions of criminality and the ongoing threat of criminalization. Additionally, the vague and excessive scope of these laws often means that police have wide discretion to determine what constitutes an HIV risk, leading to arbitrary, invasive and discriminatory arrests. Moreover, orders requiring individuals convicted under these laws to be added to sex offender registers subjects them to stigmatization and exclusion for years beyond their initial conviction.

Health professionals who may be uninformed about their ethical duties under competing laws relating to confidentiality, third party disclosure, and HIV criminalization laws,<sup>329</sup> may feel compelled to report patients living with HIV to the police when they suspect what is perceived to be “risky” behaviour. This can lead to violations of people’s right to privacy. In turn, HIV criminalization acts as an obstacle to the enjoyment of the right to health where people living with, or at risk of HIV, feel reluctant to test, access treatment, or discuss difficulties in managing treatment or condom use with their medical providers for fear it could be used as evidence against them in court.

HIV criminalization also intersects with gender inequality and gender-based violence against women. While laws may be introduced with the intention to “protect” women, they are also used against women who may not disclose HIV status due to fear gender-based violence (as referenced earlier). Fear of prosecution prevents women from getting tested and obtaining treatment because many laws, such as in Russia, are applied against those who know their status.<sup>330</sup>

Media coverage of HIV non-disclosure, exposure and transmission cases frequently confuses and conflates issues of “intentional”, “reckless”, “knowing” or “negligent” potential or perceived exposure or transmission and often portray accused or convicted individuals as predatory or callous, regardless of whether they intended to place their partner(s) at risk, or indeed did so. HIV advocates around the world have expressed concern that irresponsible media coverage promotes dangerous stereotypes and compounds HIV stigma and discrimination more generally, and leads, in some instances, to people living with HIV being treated as potential criminals. In the USA and in Greece, mandatory testing of arrested sex workers has resulted in the dissemination of information about their HIV status in stigmatizing media coverage.<sup>331</sup>

## HUMAN RIGHTS PROTECTIONS

Criminalization of HIV non-disclosure, exposure and transmission has wide-ranging health and human rights impacts. In recent years, international human rights bodies, UN entities, independent experts and commissions such as the Global Commission on HIV and the Law, as well as civil society organisations, have expressed concern that HIV criminalization not only infringes human rights, but also impedes HIV treatment and prevention and related public health efforts.<sup>332</sup> The UN Special Rapporteur on the right to health has also affirmed that criminalizing consensual sexual conduct between adults or HIV transmission not only infringes the right to health but also on other rights, including the rights to privacy and equality and non-discrimination.<sup>333</sup>

Those facing HIV criminalization are often subject to punishment not only under related laws that punish sexual conduct, gender identity and expression, consensual same-sex conduct, sex work, dissemination of sexual and reproductive health information and adolescent sexuality – all of which can have detrimental impacts on HIV prevention and treatment. For example, the Human Rights Committee has confirmed that criminalizing same-sex conduct “cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV.”<sup>334</sup>

Along these lines, during the 2016 UN high-level meeting on HIV and AIDS, the former UN Secretary-General highlighted the connections between and intersecting effects of the range of criminal and otherwise punitive laws and policies that violate the human rights of those living with HIV and HIV prevention and treatment. He noted that:

**Misuse of criminal law often negatively impacts health and violates human rights. Overly broad criminalization of HIV exposure, non-disclosure and transmission is contrary to internationally accepted public health recommendations and human rights principles. Criminalization of adult consensual sexual relations is a human rights violation, and legalization can reduce vulnerability to HIV infection and improve treatment access.**<sup>335</sup>

Over the years, HIV criminalization has been a key issue of focus for many human rights experts and UN agencies, and multiple forms of guidance have been issued. For example, the UN Special Rapporteur on the right to health has called on states to:

**Immediately repeal laws criminalizing the unintentional transmission of or exposure to HIV, and to reconsider the use of specific laws criminalizing intentional transmission of HIV, as domestic laws of the majority of States already contain provisions which allow for prosecution of these exceptional cases.**<sup>336</sup>

The Committee on the Rights of the Child has noted that states must ensure adolescents have access to confidential HIV testing, counselling, prevention and treatment from health care providers who respect their rights to privacy and non-discrimination. As such, the committee has recommended that:

**Consideration should be given to reviewing HIV-specific legislation that criminalizes the unintentional transmission of HIV and the non-disclosure of one’s HIV status.**<sup>337</sup>

In 2006, OHCHR and UNAIDS issued International Guidelines on HIV/AIDS and Human

Rights which aimed to ensure that governments promote, protect and fulfil human rights in the context of HIV. Among other things, these guidelines specifically call upon states to “review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV or targeted at vulnerable groups.”<sup>338</sup> The Guidelines emphasize that “states should not use coercive measures including isolation, detention or quarantine” as they violate the right to liberty and security of the person, guaranteed in Article 9 of the ICCPR.<sup>339</sup>

In 2008, UNAIDS and the UNDP issued a detailed policy brief which outlined a number of recommendations regarding states’ use of both HIV-specific criminal laws and general laws to punish HIV non-disclosure, exposure and transmission. They called on states to “repeal HIV-specific criminal laws, laws directly mandating disclosure of HIV status, and other laws which are counterproductive to HIV prevention, treatment, care and support efforts, or which violate the human rights of people living with HIV and other vulnerable groups.”<sup>340</sup>

In 2012, the Global Commission on HIV and the Law (an independent expert body created under UN auspices to develop actionable, evidence-informed and human rights-based recommendations for effective HIV responses that promote and protect the human rights of people living with and most vulnerable to HIV), issued a report following a two-year consultation recommending that:

**Countries must not enact laws that explicitly criminalize HIV transmission, HIV exposure or failure to disclose HIV status. Where such laws exist, they are counterproductive and must be repealed.**

**Law enforcement authorities must not prosecute people in cases of HIV non-disclosure or exposure where no intentional or malicious HIV transmission has been proven to take place.**

**The convictions of those who have been successfully prosecuted for HIV exposure, non-disclosure and transmission must be reviewed. Such convictions must be set aside or the accused immediately released from prison with pardons or similar actions to ensure that these charges do not remain on criminal or sex offender record.**<sup>341</sup>

In 2013, UNAIDS issued a comprehensive guidance note out of concern regarding the continued application of criminal law beyond intentional transmission. In addition to reaffirming its position on HIV criminalization. UNAIDS makes key recommendations for governments, parliamentarians, the judiciary, civil society and international partners (including donors).<sup>342</sup> The 2013 guidance lays out a position that criminal law in relation to HIV should be based on medical and scientific principles, legal and judicial fairness (including legality, foreseeability, intent, causality, proportionality and proof) and protection of human rights.<sup>343</sup>

UN human rights bodies and specialized agencies such as UNAIDS have confirmed that the only circumstance in which the use of general criminal law may be appropriate in relation to HIV is in extreme cases involving intentional, malicious transmission of the virus.<sup>344</sup> States are thus urged to limit criminalization to those rare cases of intentional transmission, where a person knows his or her HIV-positive status, acts with the intent to transmit HIV, and does in fact transmit the virus. International guidance also suggests that such laws should be consistent with states' international human rights obligations<sup>345</sup> and that instead of applying criminal law to HIV transmission, governments should expand programmes that have been proven to reduce HIV transmission while protecting the human rights both of people living with HIV and those who are HIV-negative.<sup>346</sup>

In 2012, civil society came together to adopt the Oslo Declaration on HIV Criminalization which calls for the repeal of HIV-specific criminal law in accordance with UNAIDS recommendations, among other things.<sup>347</sup> This led to the HIV JUSTICE WORLDWIDE movement, a global campaign to abolish criminal and similar laws, policies and practices that regulate, control and punish people living with HIV based on their HIV-positive status.<sup>348</sup>

## **RIGHT TO HEALTH**

HIV criminalization acts as an obstacle to the enjoyment of the right to health where people living with, or at risk of HIV, feel reluctant to test, access treatment, or discuss difficulties in managing treatment or condom use with their doctor for fear it could be used as evidence against them in court.<sup>349</sup>

In recent years, scientific and medical advancements have helped to shift perspectives towards and resort to criminal law, in relation to HIV non-disclosure, exposure and transmission. First, effective HIV treatment has significantly reduced AIDS-related deaths and greatly extended the life expectancy of people living with HIV to near-normal lifespans. Second, effective HIV treatment significantly reduces the risk of transmission from people living with HIV to their sexual partners. In this context, UNAIDS released its 2013 guidance note calling on countries to take steps to end the overly broad application of criminal law in the context of HIV.<sup>350</sup>

To protect the human rights of people living with HIV, states agreed in a political declaration to implement laws that help to ensure that persons living with HIV/AIDS can access health services, including antiretroviral therapy.<sup>351</sup> Criminalization of HIV can discourage HIV testing, increase mistrust of health professionals and impede access to care because “people may fear that information regarding their HIV status will be used against them in a criminal case or otherwise.”<sup>352</sup> The Special Rapporteur on the right to health has confirmed that “any laws that discourage testing and diagnosis have the potential to increase the prevalence of risky sexual practices and HIV transmission.”<sup>353</sup>

In 2016, the Committee on Economic, Social and Cultural Rights issued a general comment that affirms states' obligation to respect, protect and fulfil the right to sexual and reproductive health of all people, including people living with HIV. To meet this obligation, states must “refrain from directly or indirectly interfering with individuals' exercise of the right to sexual and reproductive health” and must not “limit or deny

anyone access.”<sup>354</sup> The Committee further called on states to “remove and refrain from enacting laws and policies that create “barriers” to accessing services.<sup>355</sup> The Committee then ultimately stated that: “States must reform laws that that impede the exercise of the right to sexual and reproductive health,” including laws criminalizing HIV non-disclosure, exposure and transmission.<sup>356</sup>

## **RIGHT TO NON-DISCRIMINATION**

The principle of non-discrimination in international human rights law is enshrined in Article 2 of the Universal Declaration, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Each of these instruments prohibits distinctions “of any kind, such as... sex... or other status.”<sup>357</sup> The term “other status” is interpreted and applied to include health status, including one’s HIV status.<sup>358</sup> Along these lines, human rights bodies have called on states to ensure that a person’s actual or perceived health status, including HIV status, is not a barrier to realizing human rights.<sup>359</sup>

HIV criminalization laws have been regularly critiqued from the standpoint of freedom from discrimination. A Joint United Nations Statement on Ending Discrimination in Health Care Settings specifically raised these issues stating that:

**Discrimination, power imbalances, unequal opportunities and violations of human rights, including violence inside and outside the home, make women and girls more vulnerable to HIV, for example, by creating an environment in which women are unable to negotiate when and how they have sex. . . . Fear of violence, discrimination, abandonment and loss of economic support are [also] commonly cited factors that keep women from learning their HIV status and accessing preventive methods, treatment, care and support.**<sup>360</sup>

Criminal laws or other punitive laws and policies can also reinforce existing prejudices and legitimize violence by community members or public officials. For instance, “the criminalization of HIV transmission also increases the risk of violence directed towards affected individuals, particularly women. HIV-positive women are 10 times more likely to experience violence and abuse than women who are HIV-negative.”<sup>361</sup> A report prepared by the UN Secretary-General for the Human Rights Council reported findings that “sensational reporting of criminal cases relating to transmission contributed to HIV-related stigma and undermined the right to confidentiality.”<sup>362</sup>

The UN Special Rapporteur on the right to health has confirmed that prosecutions disproportionately impact those in vulnerable social and economic positions.<sup>363</sup> Due to the history of association between HIV and the gay community, a general atmosphere of fear, stigma and discrimination has particularly impacted the right to health of people living with HIV.<sup>364</sup> The Special Rapporteur also found that HIV criminalization disproportionately impacts women and the laws do not take into account the fact that for many women, it is difficult or impossible to negotiate safer sex or disclose their status to a partner without fear of violence.<sup>365</sup> Along these lines, the Special Rapporteur has also recognised that gender-based discrimination increases women’s susceptibility to HIV, stating that:

**[D]iscrimination based on gender hinders women's ability to protect themselves from HIV infection and to respond to the consequences of HIV infection.**<sup>366</sup>

In this manner, gender-based discrimination and inequality based on HIV status are often interrelated.

The International Guidelines on HIV/AIDS and Human Rights specifically address discrimination against women living with HIV in Guideline 5(f), and discuss measures that states should enact to combat this form of discrimination:

**Anti-discrimination and protective laws should be enacted to reduce human rights violations against women in the context of HIV, so as to reduce vulnerability of women to infection by HIV and to the impact of HIV and AIDS.... Laws should also be enacted to ensure women's reproductive and sexual rights, including the right of independent access to reproductive and STD health information and services and means of contraception... the right to determine [the] number and spacing of children, the right to demand safer sex practices and the right to legal protection from sexual violence, outside and inside marriage, including legal provisions for marital rape....**<sup>367</sup>

## **RIGHT TO PRIVACY**

In the context of HIV/AIDS, the right to privacy was explicitly recognised by the International Conference on Population and Development (ICPD), which pledged in its Programme of Action to “ensure that the individual rights and the confidentiality of persons infected with HIV are respected.”<sup>368</sup>

Protection of the right to privacy and to informed consent is an essential element of HIV/AIDS prevention and treatment programmes because it encourages people to access testing and health services. People are more likely to seek health care services when they believe that health care workers will treat their HIV status confidentially. When the right to privacy is not properly safeguarded through informed consent, voluntary testing, and confidentiality, people avoid learning their status because they fear stigma and discrimination.<sup>369</sup> Those who access voluntary-testing services are better able to learn about HIV prevention and receive appropriate treatment; this is important not only for individuals, but also for the protection of the community, which “has an interest in maintaining privacy so that people will feel safe and comfortable in using public health measures, such as HIV prevention and care services.”<sup>370</sup>

The Human Rights Committee has recognised a state's obligation to protect the right of privacy against interferences from both public and private entities, including private hospitals, stating: “this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The right to privacy also encompasses the right to access files concerning medical treatment and status.”<sup>371</sup>

Finally, the World Health Organization (WHO) declared that “there is also growing international consensus that all patients have a fundamental right to privacy, to the confidentiality of their medical information, to consent to or to refuse treatment, and to

be informed about relevant risk to them of medical procedures.”<sup>372</sup> In 2015, the High Court of Kenya issued a ruling finding Kenya’s law criminalizing HIV transmission violated human rights.<sup>373</sup> The judgment found that the law was “vague and overbroad,” and that it discriminated against women, who are often subject to coercive practices and violations of informed consent and confidentiality when testing for HIV, particularly during pregnancy.<sup>374</sup> The law allowed for non-voluntary partner disclosure of HIV status and was “drafted so widely as to include women who transmit HIV to a child during pregnancy or during breastfeeding, thereby making pregnancy an offense.”<sup>375</sup> As a result, the court found the law “exacerbates existing stigma and discrimination against women and exposes women to the risks of prosecution which undermines the overall goals of the Act.”<sup>376</sup> Furthermore, the court recognised that such laws promote stigma and stereotyping suggesting that people living with HIV are immoral and dangerous. The right to privacy of Kenyan women living with HIV is violated when health providers do not use appropriate safeguards to secure women’s informed consent before testing them for HIV and breach confidentiality guarantees by disclosing the HIV status of women to hospital staff and other patients.

## LEARN MORE

- HIV Justice Toolkit to Support Advocacy Against HIV Criminalisation, 2017 <http://toolkit.hivjusticeworldwide.org/>
- Consensus Statement on HIV, “Treatment as Prevention”, Criminal Law Reform, 2017, [www.hivtaspcrimlaw.org/the-consensus-statement](http://www.hivtaspcrimlaw.org/the-consensus-statement)
- In Our Own Voice: National Black Women’s Reproductive Justice Agenda, *Our Bodies, Our Lives, Our Voices: The State of Black Women & Reproductive Justice*, 2017, [www.blackrj.org/wp-content/uploads/2017/06/FINAL-InOurVoices\\_Report\\_final.pdf](http://www.blackrj.org/wp-content/uploads/2017/06/FINAL-InOurVoices_Report_final.pdf)
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A blurred photograph of a woman sitting on a bench in a hallway. The woman is wearing a light-colored top and blue jeans. The background is a plain, light-colored wall. On the left side of the image, there is a vertical line, possibly a door frame or a wall edge. The overall image is out of focus, with the woman being the central subject.

An officer from the Los Angeles Police Department monitors a 17-year old woman before she's transported to a state agency for minors following her arrest on 16 May 2017, California, USA.  
© Robert Nickelsberg/Getty Images



## ANNEX 4

# CRIMINALIZING ADOLESCENT SEXUAL ACTIVITY

**“If one’s consensual sexual choices are not respected by society, but are criminalized, one’s innate sense of self-worth will inevitably be diminished. Even when such criminal provisions are rarely enforced, their symbolic impact has a severe effect on the social lives and dignity of those targeted.”**

Justice Sisi Khampepe, Constitutional Court of South Africa<sup>377</sup>

Adolescents around the world tend to have sex for the first time between the ages of 15 and 19.<sup>378</sup> However, the average age varies across regions and countries based on a range of factors. For young women, sexual activity tends to begin at an earlier age in regions where early marriage<sup>379</sup> is the norm, while for young men first sexual activity is generally not linked to marriage and happens at a later age.<sup>380</sup>

Most states set an age at which adolescents are deemed legally capable of consenting to sex through “age of consent” provisions. Often found in penal codes, these provisions generally define consent in the context of sexual violence, including rape and statutory rape. So while adolescents may freely choose to engage in sexual activity with each other, age of consent provisions generally operate under an assumption of violence and criminality. This focus on protection from harm rather than consent and empowerment can have unintended consequences and serious implications for adolescents’ ability to realise their human rights. Age of consent laws are often used to justify the denial of young people’s rights to sexual and reproductive health information and services, as well as their decision-making capacity.

In many countries, the age of consent is set between 14 and 16, most commonly 16.<sup>381</sup> However, it can range from 12 to 18 years.<sup>382</sup> Many set a lower age of consent for women than for men which can discriminate against women. Among countries that do not criminalize same-sex sexual activity, at least 16 enforce a higher age of consent for same-sex sexual activity than for heterosexual activity.<sup>383</sup> This discriminates against LGBTI adolescents and can subject them to increased penalties irrespective of consent.<sup>384</sup>

While age of consent provisions may be intended to provide protection from child sexual abuse or early marriage, they can also be used to unfairly suppress, regulate or prosecute consensual sex between adolescents. Additional complications arise when the age of consent to sex or sexual and reproductive health services is different from and/or higher than the age of consent to marriage. Interest in sex is an inherent part of human adolescent development. Having access to information on sex and sexuality and being free to explore and develop one's own sexuality without coercion or discrimination is fundamental to the enjoyment of bodily autonomy, and the rights to freedom of expression, privacy and health.

Where age of consent provisions are discriminatory, vague or overly broad, they can be used to limit or punish adolescents' sexual development and impose criminal sanctions for consensual sexual acts. Young women can be disproportionately punished under these provisions because of social expectations that they curtail their sexual expression and remain "chaste." These concepts are rooted in harmful gender stereotypes about women's and girls' proper roles in society. The consequences on women and girls are compounded by the fact that they often bear the burden of preventing unwanted pregnancies. Thus, age of consent provisions can present particular barriers to girls and young women seeking sexual and reproductive health information and services, contraception and safe abortion services. The CEDAW Committee specifically expressed concern that "the penalization of consensual sexual relations among young people between 15 and 18 years of age may have a more severe impact on young women, especially in the light of the persistence of patriarchal attitudes."<sup>385</sup>

## **DIRECT CRIMINALIZATION**

Most countries enforce specific age of consent provisions with a uniform age for legal consent to sexual activity. Sex with someone under the age of consent is often defined as statutory rape, regardless of whether the partners consider the activity to be consensual or not. Under some laws, when both partners are under the age of consent, both may be found guilty.<sup>386</sup> While the laws may be intended to protect children from sexual abuse by adults, they can be used to charge and convict young people for engaging in consensual sexual activity with someone who is of a similar age; for example, a 17-year-old and 15-year-old.

Age of consent law is often based on considerations of when adolescents are sufficiently capable of making informed decisions about their bodies and sexualities. However, these laws are also based on deeply embedded assumptions about what sort of sexual behaviour is socially unacceptable or should be discouraged and punished. For example, in the US, the introduction and enforcement of these laws has long been tied to racial discrimination and political attempts to reduce the costs associated with providing social services to young parents.<sup>387</sup>

Prosecution under statutory rape laws can have severe and long-term consequences for children and adolescents. Under some laws, consensual sex between adolescents may result in far more severe penalties than those against an adult who rapes another adult.<sup>388</sup> An adolescent who engages in consensual sexual conduct with another adolescent may be found delinquent and placed on a sex offender registry for the rest of their life.<sup>389</sup>

Inclusion on a sex offender registry can cause irreparable harm, impacting almost every aspect of a person's activities, including school, employment, housing, and even being able to live with one's family members if there are children in the home.<sup>390</sup>

## **AGE DIFFERENTIALS**

Some laws give prosecutors discretion to consider the relevant facts to determine whether sex between two young people of different ages constitute a criminal offence. Additionally, some laws take into account that young people engage in sex at different ages and do not criminalize sex between adolescents close in age. For example, the Sexual Offences Act (2003) in England and Wales does not criminalize sex between adolescents aged between 13 and 17. By contrast, individuals who are 18 or over may be guilty of an offence if they have sex with someone who is under 16 years.<sup>391</sup>

The problem with rigidly enforcing a specific age when people are considered legally capable of consenting to sex in all cases, is that it generally fails to acknowledge that people develop at different rates and the evolving capacities (particularly with regard to sexual decision making) of the individuals involved. This can lead to the unjust punishment of adolescents close in age to their sexual partners, who engaged in mutually agreed sexual activity. Such a strict application of criminal laws can violate the human rights of adolescents.

## **EVOLVING CAPACITIES**

Recognizing evolving capacities means that states have a responsibility to promote adolescents' rights in line with their stage of maturity, regardless of their specific age.<sup>392</sup> A human rights-based approach towards adolescent health requires that states respect adolescents' rights to autonomy, privacy and participation.<sup>393</sup> The concept of evolving capacities balances the requirements that adolescents be protected from harm with recognition that they are rights holders whose autonomy increases as they grow older.<sup>394</sup> Adolescents develop the capacity to take full responsibility for their own actions and decisions at different ages, and the individual rate of emotional development differs.

All children have the right to be heard<sup>395</sup> and, as they age, to make decisions according to their evolving capacities.<sup>396</sup> In recognition of their "evolving capacities," the CRC Committee has emphasized that children are entitled to "an increasing level of responsibility for the regulation of matters affecting them."<sup>397</sup> Adolescence is recognised as a period of "rapid physical, cognitive and social changes,"<sup>398</sup> during which individual identities and sexuality develop.<sup>399</sup> The Committee has called on states to ensure that adolescents' views are "given due weight" including in decisions relating to their health and sexuality.<sup>400</sup>

While states have a duty to protect adolescents from sexual harm, this must be balanced with their obligations to respect, protect and fulfil adolescents' rights to realise their sexual development without unjust interference and punishment. Therefore, when enforcing "age of consent" laws, states should consider the age and potential power differentials between adolescents engaging in sexual activity on a case-by-case basis, in accordance with principles of evolving capacities.

## CHALLENGING DISCRIMINATORY AGE OF CONSENT LAWS IN SOUTH AFRICA

In 2013, the South African Constitutional Court struck down legal provisions that criminalized consensual sexual activity among adolescents aged between 12 and 16 years.<sup>401</sup> The decision underlined the dignity of children and confirmed that children's rights are not dependent on the rights of their parents. The Court stated that:

***“Individually and collectively, children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood.”***<sup>402</sup>

The Court found that criminalizing sexual activity between adolescents infringed a number of rights, including the rights to dignity and privacy and the right of adolescents to have their best interests prioritized.

Its analysis can be applied to other laws that implicate adolescents' human rights, including public decency laws that are used to punish teenagers for posting pictures of themselves kissing online.<sup>403</sup>

## **PENALIZATION AND PRESUMED CRIMINALITY**

Laws criminalizing adolescent sexuality reinforce notions that it is fundamentally dangerous and those engaging in such activity are regarded with suspicion. This is magnified by the fact that age of consent provisions are frequently applied in a discriminatory manner. The police and prosecutors are more likely to punish individuals viewed as criminally suspect due to racial and other forms of discrimination. For example, same-sex sexual activity and sex between people of different ethnic groups may be specifically targeted for punishment through these laws.<sup>404</sup> In the US, scholars have shown how these laws are rooted in a history of harmful policies based on racial and gender stereotypes.

Myths and stigma surrounding adolescent sexuality can also have a harmful, punitive impact on pregnant girls and on young parents. Advocates have shown that initiatives geared towards preventing “teen pregnancy” have pushed young people away from necessary health care and support services.<sup>405</sup> In Sierra Leone, pregnant girls are banned from attending mainstream schools and taking exams, with long-term implications for their further education. The ban is discriminatory, stigmatizing, and is enforced through humiliating treatment.<sup>406</sup> For example, girls have had their breasts and stomachs felt by adults on school premises and some have been compelled by their schools to take urine tests.

In Equatorial Guinea, the Ministry of Education issued an order calling for the expulsion of pregnant girls, justified as a supposed means to reduce adolescent pregnancies.<sup>407</sup> Similarly, in Tanzania, many girls are forced to undergo pregnancy testing in school and then expelled if found pregnant.<sup>408</sup> School officials interpret pregnancy as an offence against “morality” as their reasoning for expulsion, disregarding that education is a right and not a privilege to be taken away as punishment.<sup>409</sup> (See also Annex on Pregnancy Criminalization) .

## **ACCESS TO SEXUAL AND REPRODUCTIVE HEALTH INFORMATION AND SERVICES**

Stigma and fear of judgment can inhibit adolescents from accessing health care services. According to the Special Rapporteur on the right to health, “Many adolescents, in particular girls and those identifying as lesbian, gay, bisexual and transgender, are deterred from approaching health professionals in anticipation of a judgemental attitude that results from social norms or laws that stigmatize or criminalize their sexual behaviour.”<sup>410</sup>

Age of consent laws can act as a barrier to access to sexual and reproductive health information and services because health care providers feel limited in the information and services they can provide legally or because they are compelled by law to report sexual activity of those under the age of consent to the authorities.<sup>411</sup> This can severely limit adolescents’ ability to make decisions about their lives, particularly in terms of managing their health, and can lead to adverse health outcomes.

In Zimbabwe, age of consent laws are often perceived by adolescents to restrict their right to access sexual and reproductive health services and information.<sup>412</sup> For example, a young person who has not reached the age at which she can legally consent to sexual

activity may face additional barriers to accessing contraception or abortion. Amnesty International's research has found that implementation of Zimbabwe's sexual and reproductive health policies are shaped and influenced by confusion around the legal age of consent for sexual activity, as well as for marriage. The conflation of these distinct legal age of consent standards – for accessing health services, sexual activity and marriage – has created barriers for adolescents seeking to access sexual and reproductive health information and services, and to exercise their right to make decisions about their lives and bodies in line with their evolving capacities. It also risks undermining the government's efforts to address Zimbabwe's high rates of child marriage and sexual abuse.<sup>413</sup>

The UN Population Fund (UNFPA) recommends that laws and policies clarify adolescents' right to consent to medical treatment, to avoid health care providers withholding access due to their uncertainty about the law or their personal discretion.<sup>414</sup> Similarly, UNAIDS has found that punitive and age-restrictive laws on access to sexual and reproductive health services can prevent adolescents from managing their sexual health and reducing potential health risks.<sup>415</sup>

## **LACK OF CONFIDENTIALITY AND BARRIERS TO ADOLESCENT HEALTH**

Criminal laws and biased attitudes have an especially harmful impact on adolescents facing complex barriers to health care services. These barriers include “parental consent or notification requirements; provision of services in a manner that is disrespectful, hostile, judgemental or lacking sympathy; and discrimination against particular groups of adolescents, including those with disabilities, those living and working on the streets...”<sup>416</sup> Removing punitive age of consent provisions and other discriminatory measures that promote stigma can help adolescents exercise their rights. For many, “the effects of stigma, discrimination and violence are exacerbated by policy and legal barriers related to the age of consent for sex as well as selected medical interventions, further limiting access to a range of health services.”<sup>417</sup>

Spousal and parental consent laws require young people to secure permission from their parents or partners to access information, or health care services, such as contraception, and can also stand in the way of rights to privacy, information and health, and the ability to explore one's sexualities.<sup>418</sup> These laws are another example of how unequal power dynamics shape adolescents' ability to make decisions about their own lives.

Requirements that mandate health care providers to report to law enforcement or child welfare authorities can pose challenges to confidentiality. Where laws do not recognise adolescents' ability to consent to sex until they reach a certain age, disclosing to a provider that they are sexually active before reaching that age can trigger mandatory reporting requirements.<sup>419</sup> Strict reporting requirements can introduce a conflict between guaranteeing adolescents confidential sexual and reproductive health services and protecting them from perceived or actual instances of physical or sexual violence.

The South African Constitutional Court (see above) found that mandatory reporting requirements “exacerbate harm and risk to adolescents by undermining support structures, preventing adolescents from seeking help and potentially driving adolescent sexual behaviour underground.”<sup>420</sup>

## HUMAN RIGHTS PROTECTIONS

Although states have an obligation under international human rights law to protect children and adolescents from sexual coercion and violence, they are also required to respect, protect and fulfil their human rights, including in the realms of their developing sexualities, and in accordance with their evolving capacities.<sup>421</sup> To that end, human rights bodies have called upon states to recognise that adolescents are rights holders,<sup>422</sup> and (in accordance with the principle of evolving capacities) not to impose a strict age of consent requirement on adolescents.<sup>423</sup> The CRC has called on states to:

***“... take into account the need to balance protection and evolving capacities [in determining the legal age for sexual consent and to] avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.”<sup>424</sup>***

The UN Convention on the Rights of the Child (CRC) requires states to ensure that adolescents are protected from discrimination on the basis of sex, which requires equalizing age of consent provisions for boys and girls (regardless of the type of sex involved).<sup>425</sup> In 2011, the OHCHR called for the repeal of discriminatory laws that criminalize people on the grounds of their sexuality and gender, specifically laws that criminalize same-sex sexual activity or enforce higher age of consent thresholds for sex between same-sex partners.<sup>426</sup>

States are also required to ensure that adolescents have access to sexual and reproductive health information and services. The CRC Committee has confirmed that “adolescents have the right to access adequate information essential for their health and development and for their ability to participate meaningfully in society.”<sup>427</sup> States must, therefore, ensure that adolescents “are provided with, and not denied, accurate and appropriate information on how to protect their health and development and practice healthy behaviours.”<sup>428</sup>

The Committee also confirmed that adolescents’ right to health depends on safe, supportive environments where they can “participate in decisions affecting their health”, acquire information, and access sexual and reproductive health care in an environment that respects confidentiality and privacy.<sup>429</sup> Spousal and parental consent laws deprive adolescents of their rights to privacy, to form their own views, and “express those views freely in all matters.”<sup>430</sup>

While the CRC recognises the rights and duties of parents and others to provide “appropriate direction and guidance”, this guidance must be “consistent with the evolving capacities of the child”, meaning that the best interests of the child takes precedence.<sup>431</sup> States should ensure that children have the right to express themselves freely and that due weight is given to their views in accordance with their age and maturity.<sup>432</sup> Therefore, as confirmed by the CRC Committee, adolescents should be able to access reproductive health care services without parental consent.<sup>433</sup> Notably, the CEDAW Committee has called on states to remove parental consent barriers to women seeking contraception.<sup>434</sup>

The CRC Committee recommends: “There should be no barriers to commodities, information and counselling on sexual and reproductive health and rights, such as requirements for third-party consent or authorization. In addition, particular efforts need to be made to overcome barriers of stigma and fear experienced by, for example, adolescent girls, girls with disabilities and LGBTI adolescents, in gaining access to such services.”<sup>435</sup>

## **COMPREHENSIVE SEXUALITY EDUCATION**

An essential tool for empowering adolescents to make decisions about their bodies, health and lives is access to comprehensive sexuality education. The CRC Committee has confirmed that “[a]ge-appropriate, comprehensive and inclusive sexual and reproductive health education, based on scientific evidence and human rights standards and developed with adolescents, should be part of the mandatory school curriculum and reach out-of-school adolescents.”<sup>436</sup> The CEDAW Committee has also stated that “to make informed decisions about sexuality and reproduction, individuals need accessible, quality, comprehensive information.”<sup>437</sup> Furthermore, the CESCR Committee has confirmed that states violate their obligation to fulfil the right to sexual and reproductive health when they fail to ensure that all educational institutions incorporate unbiased, scientifically-accurate, evidence-based, age-appropriate and comprehensive sexuality education into their required curricula.”<sup>438</sup>

The CRC Committee has emphasized that in the delivery of comprehensive sexuality education:

***“Attention should be given to gender equality, sexual diversity, sexual and reproductive health rights, responsible parenthood and sexual behaviour and violence prevention, as well as to preventing early pregnancy and sexually transmitted infections[, and that i]nformation should be available in alternative formats to ensure accessibility to all adolescents, especially adolescents with disabilities.”<sup>439</sup>***

The Committee has further noted that sexuality education should aim to transform cultural taboos around adolescent sexuality.<sup>440</sup>

## LEARN MORE

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## NOTES ANNEX 4

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A sex worker in Tegucigalpa, Honduras,  
18 July 2012. © Spencer Platt/Getty Images

# ANNEX 5

# CRIMINALIZING SEX WORK

**“[Laws criminalizing sex work] codify profound discrimination; they reflect general social contempt toward female, male and transgender sex workers.”**

Global Commission on HIV and the Law<sup>441</sup>

States around the world use a range of laws and policies to restrict or punish sex work.<sup>442</sup> While some states criminalize sex work and all related activities, others punish the purchase of sex or third parties who facilitate the sale of sex. Other countries such as New Zealand, the Netherlands, Denmark and parts of Australia, do not consider sex work to be activity worthy of punishment or punitive state interference and have decriminalized or legalized it, regulating it through administrative provisions like licensing or zoning restrictions.

Laws and policies that criminalize sex work can violate several human rights. These types of provisions can enable law enforcement officials to intervene excessively in people's private consensual sexual decision making. In casting sex workers as either criminals worthy of contempt or as victims who cannot consent to selling sex, these sanctions frequently deny sex workers their dignity and personal autonomy over their bodies and lives.

Sex work takes different forms, and varies between and within countries and communities. Sex work may differ in the degree to which it is “formal” or organized.<sup>443</sup> People may choose to undertake sex work for various reasons. While some engage in sex work as a preferred means to earn a living, others sell sex because they have limited options due to marginalization. Yet, rather than supporting individuals to overcome life challenges and escape poverty, criminalization may further limit their options and make them a target for abusive criminal justice responses. This not only exacerbates their socio-economic marginalization, it also compromises their protection from violence and abuse by clients and law enforcement.

Criminalization of sex work also promotes and perpetuates negative attitudes towards sex workers. This stigma has a detrimental effect on their lives, impeding their access to basic social and health services and increasing their vulnerability to ill health, violence, sexual abuse and extortion. The presumption of criminality accorded to sex workers often gives law enforcement officials and community members licence to treat them with contempt and to harass, threaten, extort and, in some cases, subject them to violence, including sexual violence.

## **DIRECT CRIMINALIZATION**

Over 100 countries directly criminalize sex work through a range of punitive laws and policies that explicitly prohibit the sale, purchase of sex and/or related activities.<sup>444</sup> These laws are often based on religion, notions of morality and female “chastity” and/or political expediency, among other things, to the detriment of sex workers’ health and lives.

### **LAWS THAT CRIMINALIZE SEX WORK AND ASSOCIATED ACTIVITIES**

Around 40 countries outlaw sex work entirely by applying laws that criminalize both the act of exchanging sex for money or goods and the full range of activities related to the selling or buying of sex.<sup>445</sup> Under such criminalized legal systems, sex workers, their clients and other individuals involved in facilitating or supporting sex workers may face prosecution and punishment.

In South Africa, sexual offences legislation criminalizes anyone who “has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward.”<sup>446</sup> This law also contains various provisions that prohibit activities including procuring a person for paid sex, “brothel keeping”, enticing or soliciting individuals in order to sell sex, assisting anyone involved in sex work and living off the earnings of sex work.<sup>447</sup>

Thailand’s Prevention and Suppression of Prostitution Act 1996 directly outlaws the act of selling sex, describing it as “sexual intercourse, any other act, or the commission of any other act in order to gratify the sexual desire of another person in a promiscuous manner in return for earning or any other benefit.”<sup>448</sup> It also criminalizes a wide range of related activities, including procuring the sale of sex, advertising or soliciting the sale of sex, associating with others with the aim of selling sex and owning or operating a prostitution business. Despite this wide-ranging criminalization, it has been estimated that around 200,000 to 300,000 people are employed in Thailand’s sex-work industry, generating between two and 14% of the country’s gross domestic product.<sup>449</sup>

Across the US, sex work is predominantly outlawed through enforcement of state law. With the exception of some counties in Nevada, every state has provisions to prosecute the full range of activities associated with sex work, including selling or buying sex, “pimping” and “brothel keeping”. In some states the punishment for re-offending can be up to US\$10,000<sup>450</sup> or five years’ imprisonment.<sup>451</sup>

The criminalization of sex work and related activities can result in violations of a wide range of human rights, particularly for those who sell sex. In addition to potentially violating individuals’ sexual autonomy and right to privacy, such laws can expose sex workers to harassment and violence, impede their access to vital social services and subject them to stigma and discrimination.

## **LAWS THAT CRIMINALIZE ACTIVITIES ASSOCIATED WITH SEX WORK**

Often, it can be extremely difficult for police or prosecutors to effectively prove that a sex act took place between consenting adults and that money or goods were exchanged in return. Thus, many states around the world impose criminal sanctions on activities related to sex work, rather than on the sex act itself. These prohibitions usually relate to approaching someone in order to offer the sale of sex (“soliciting”). Sanctions are also commonly placed on activities such as “brothel keeping”, recruiting for or arranging sex work, living off the proceeds of sex work and facilitating sex work through the provision of information or assistance. States may also enforce bans on procuring a person for the purposes of buying sex (“kerb crawling”).

This far reaching approach to criminalizing sex work has profound consequences on sex workers’ lives and their decisions. Vital support functions that can keep sex workers safe, such as security guards or other sex workers, may be prohibited, often requiring sex workers to work in isolation, increasing their vulnerability to violence and abuse.<sup>452</sup>

## CASE STUDY: HONG KONG SAR (CHINA)

In Hong Kong, the act of selling sex is not itself illegal but many of the activities associated with sex work are illegal. Amnesty International's research on criminalization of sex work in Hong Kong confirmed that sex workers can be prosecuted for soliciting customers, for sharing premises with other sex workers and for "living off the proceeds of prostitution". In practice, as one scholar observed, "the regulatory framework adopted in Hong Kong is a prohibition in all but the narrowest sense."<sup>453</sup>

Those who work on the street are at particular risk of arrest because they are easily identified and have difficulty operating without violating the criminal prohibition on solicitation. Many sex workers are migrants or from mainland China and must obtain permits to work in Hong Kong. However, migrants and people from mainland China cannot lawfully engage in sex work in Hong Kong; all migrant sex workers are in "breach of condition of stay", a criminal offence under the Immigration Ordinance. In fact, charges for breach of conditions of stay may well be the primary means by which sex workers are criminalized in Hong Kong (a form of indirect criminalization).

Because of the de facto prohibition on sex work, sex workers, in particular migrant sex workers, reported feeling powerless and unwilling to seek legal protection from violence and abuse from clients and others, such as the police. Sex workers told Amnesty International that if they are victims of crime, they are unlikely to seek police help. Sex workers' organizations told us that police rarely follow up on reports from sex workers and instead typically blame or insult them. Sex workers also face entrapment, extortion and other coercive police measures. For example, they and their advocates reported situations where police had threatened to report them to their spouses, parents or children if they did not "confess", and misled sex workers about the consequences of their "confessions". Some sex workers complained that police, or individuals claiming to be police, demand money or – more frequently – free sexual services. The police confirmed that undercover officers are allowed to receive certain sexual services to secure evidence. Undercover police officers often engage in behaviour akin to entrapment. Several sex workers reported that the police charged them with solicitation even though the officer initiated the exchange and offered to purchase sex.

Sex workers also said that police induce them to break “vice establishment” laws, for example, by convincing two sex workers to visit one apartment. Amnesty International heard reports from sex workers that police obtain confessions through coercion or deception, including by threatening indefinite detention. Sex workers and NGOs report that police sometimes file reports containing false statements, routinely fail to inform sex workers of their rights on arrest, subject sex workers to lengthy interrogations and threaten to tell family members of the allegations against them.

Amnesty International, China: Harmfully isolated: Criminalizing sex work in Hong Kong (Index: ASA 17/4032/2016)

## **LAWS THAT CRIMINALIZE THE PURCHASE OF SEX**

A small number of countries claim to shift criminal responsibility away from sex workers by directing sanctions toward individuals who buy or attempt to buy sex. The criminalization of clients, as opposed to sex workers themselves, is sometimes referred to as the “Swedish Model” as Sweden adopted it in 1999. Subsequently, it was adopted in Norway, Iceland, Northern Ireland and France.<sup>454</sup>

Such laws are generally based on the notions that sex workers are “victims” of sexual exploitation who cannot consent to sex work and that all sex within the context of sex work is coerced and is gender-based violence. Evidence increasingly indicates, however, that there are various reasons why individuals engage in sex work and/or pay for sex, and that many people who sell sex do so consensually and do not consider themselves victims of violence simply based on their work.<sup>455</sup>

Whatever their intention, laws that criminalize the purchase of sex can place sex workers at greater risk of harassment, violence and extortion.<sup>456</sup> In Sweden and Norway, researchers found evidence of increased risk-taking among sex workers since the passage of the purchasing ban. Research in 2012 by Pro Sentret, Norway’s national centre of expertise on sex work policy, indicated that since the introduction of the criminal prohibition on purchasing sex, some sex workers reported a decrease in “good” clients and that the remaining “bad” clients made up a greater proportion of available options. Further, sex workers appeared to be taking greater risks in their interactions with clients, such as agreeing to visit their homes, concluding negotiations with clients more quickly or in secluded spaces that are safer for the client and agreeing to engage with more dangerous clients.<sup>457</sup>

Other research also indicates that this increase in risk is felt most acutely by resource-poor, street-based sex workers who cannot relocate indoors and face increased competition for “bad” clients, more pressure to conclude negotiations quickly and covertly, and reduced bargaining power.<sup>458</sup>

For more information on the situation in Norway, see Amnesty International, The human cost of ‘crushing’ the market: Criminalization of sex work in Norway (Index: EUR 36/4034/2016)

## **IMPACT OF CRIMINALIZING THE ORGANIZATION OF SEX WORK**

The criminalization of the organization of sex work, including through offences like “brothel keeping”, “renting premises for the purposes of prostitution” and “living off the proceeds of prostitution”, punish activities that are seen as facilitating sex work. These laws are used in most countries where sex work is criminalized.

While it is perhaps logical to criminalize the organization of sex work as a necessary step to protect sex workers, the relevant legislation rarely distinguishes between organizational activity that is exploitative, abusive, or coercive, and activity that is personal, practical, or for the purposes of safety. Legislation instead tends to apply blanket prohibitions on all collaborative organization of sex work. As such, sex workers working together or with a receptionist, cleaner, security guard or driver for the purposes of safety, can frequently be criminalized and subjected to police enforcement under organizational prohibitions.<sup>459</sup> For example, during research conducted in Hong Kong, Amnesty International learned that sex workers who try to work on the same premises for security can be prosecuted under the criminal “vice establishment” law. In fact, undercover police officers try to induce sex workers to fall foul of this law by asking them to have a “threesome” and subsequently charging them with “managing a vice establishment”.<sup>460</sup>

## **INDIRECT CRIMINALIZATION**

States also criminalize sex work by enforcing general laws unrelated to sex in a way that targets sex workers. These laws may prohibit “vagrancy”, “loitering”, “public lewdness” or other forms of “public nuisance”. The visible and often public nature of sex work, particularly street-based sex work, means that such laws are frequently used in a discriminatory way against sex workers and/or have a disparate impact on them. These provisions can be found in criminal, civil or administrative codes. They often require less evidence to prove a violation of the law and grant law enforcement bodies greater discretion to determine who has committed an offense. In some instances, police officers may even have discretion to detain individuals or issue fines on the spot. Sex workers are routinely stopped, questioned, searched and detained under these laws and subjected to discretionary or arbitrary fines. They are also, in many cases, particularly vulnerable to harassment, blackmail, extortion and sexual and other violence from police and other officials.

## **PENALIZATION AND PRESUMED CRIMINALITY**

Sex workers are also criminalized through the application of a wide range of state regulations that have a punitive effect on their lives. For example, some countries impose public health restrictions on sex workers including forced medical examinations and HIV and other STI testing. Research confirms that government authorities in China, India and Viet Nam<sup>461</sup> forced sex workers to take HIV tests.

In addition to the marginalization that sex workers can experience because of their gender and/or other aspects of their identity or status, they frequently face censure, judgment and blame for being seen to transgress social or sexual norms and/or for not conforming

to gender roles and stereotypes specifically because they are sex workers. They can also face denial of their agency and individual freedoms and further shaming where they are seen to refuse exiting sex work, rehabilitation or other prohibition initiatives. The stigmatized and criminalized nature of sex work routinely forces sex workers to operate at the margins of society in clandestine and dangerous environments with little recourse to safety or state protection. The multifaceted discrimination and exclusion they face leaves them at increased risk of violence and abuse, and offers impunity to perpetrators of violence and abuse against sex workers.<sup>462</sup>

Sex workers are also often presumed to be “criminals” regardless of whether they have committed a crime. The social stigma attached to sex work means that they are routinely suspected and/or accused of criminal conduct, and can encounter arbitrary and repeated investigations, arrests, detention and harassment by the police, often without due process or other legal protections.<sup>463</sup> Additionally, presumptions of criminality enable community members to abuse sex workers knowing that they will likely not complain to authorities. For example, Amnesty International found that sex workers in Buenos Aires, Argentina, living in guesthouses or hotels in poor conditions, were often charged substantially more rent than others. One group of sex workers reported paying up to four times the regular rental fee.<sup>464</sup> Presumptions of criminality can also prevent sex workers from seeking justice when they encounter physical or sexual violence or extortion for fear that they will instead become the focus of criminal investigation. As law enforcement officials often have the power to abuse, harass and extort sex workers under the guise of “enforcing the law”, sex workers can be discouraged from seeking redress for violence and rights violations by the state. As a result, aggressors can direct violence at sex workers with relative impunity.<sup>465</sup>

## **MISUSE OF HUMAN TRAFFICKING LAWS AND POLICIES**

In some instances, laws and policies aimed at preventing, detecting or prosecuting human trafficking into the sex sector are interpreted broadly or in a sweeping manner that compromises sex workers’ rights and increases their vulnerability. This is often due to conflation of sex work with human trafficking by governments, media commentators, politicians and law enforcement officials. It stems largely from two schools of thought. First, some believe that sex work and trafficking for the purposes of sexual exploitation are the same and that all sex work is coerced and violent.<sup>466</sup> They may also assert that individuals who claim to exercise agency and consent to sex work are victims of a patriarchal structure that forces them to sell sex and that their consent is therefore immaterial. Second, there is a belief that sex work is the cause and/or source of the demand for trafficking for the purposes of sexual exploitation.<sup>467</sup>

Such beliefs often deny personal agency to individuals who engage in sex work voluntarily. It can also lead to coercive or overreaching interventions such as brothel raids or “rescues” that result in the arbitrary dispersal or arrest of sex workers.<sup>468</sup> Some anti-trafficking measures are also drafted and enforced in an overly broad manner, subjecting sex workers to mandatory “rehabilitation” interventions, regardless of whether they want support or to stop selling sex. For example, proposed amendments to India’s Immoral Traffic (Prevention) Act,<sup>469</sup> have been criticized by sex work advocates for including additional sanctions that may force sex workers to enter “rehabilitation homes” against their will.<sup>470</sup>

There is growing evidence to suggest that indiscriminate approaches that fail to distinguish between sex workers and victims of trafficking into the sex sector, undermine valuable links and intelligence to detect trafficking and support victims.<sup>471</sup> Sex workers are often uniquely positioned to identify, witness and inform police of instances of forced or coerced sex and trafficking.<sup>472</sup> However, they are unlikely to report such crimes if they are at risk of being criminalized or “rehabilitated” themselves.

## SEX WORK AND HUMAN TRAFFICKING: WHAT’S THE DIFFERENCE?

***[T]rafficking and sex work are two very different things. Trafficking involves coercion and deceit; it results in various forms of exploitation, including forced labour and is a gross violation of human rights. Sex work, on the other hand, does not involve coercion or deceit. Even when it is illegal, sex work comprises freely entered into and consensual sex between adults, and like other forms of labour provides sex workers with a livelihood.***

UNAIDS’s Guidance Note on HIV and Sex Work<sup>473</sup>

Human trafficking amounts to a grave human rights violation and states have an obligation under international human rights and international criminal law to ensure that it is recognised as a criminal offence. States must investigate, prosecute and bring traffickers to justice and guarantee victims access to justice and reparation, including with all necessary levels of support. Victims are entitled to protection and remedies, regardless of their sex, nationality, health status, sexual orientation, gender identity, prior work history, willingness to contribute to prosecution efforts and/or other factors, and should never be criminalized.

By contrast, laws and policies on adult sex work should reflect that those who voluntary engage in sex acts, regardless of whether remuneration is involved, are exercising their autonomy and should be permitted to do so free from undue interference from the state.

The UN Trafficking Protocol defines trafficking as constituting three elements:

- An “action”: the recruitment, transportation, transfer, harbouring or receipt of persons.
- A “means” by which that action is achieved (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability and the giving or receiving of payments or benefits to achieve consent of a person having control over another person).

- A “purpose” (of the action/means) specifically, exploitation.

All three elements must be present to constitute “trafficking in persons” under the Protocol. The only exception is when the victim is a child, in which case the “means” requirement is no longer an element of the crime.

Amnesty International supports the criminalization of human trafficking and calls on states to guarantee effective legal protections against it. States must investigate, prosecute and bring traffickers to justice and guarantee victims access to justice and reparation, including with all necessary levels of support. Trafficking victims should not be criminalized.

(Amnesty International, *Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers* (Index: POL 30/4062/2016))

## HUMAN RIGHTS PROTECTIONS

Decades of evidence, including Amnesty International’s research, confirms that criminalization of sex work infringes on a range of human rights, including the rights to life, liberty, autonomy and security of person; the right to equality and non-discrimination; the right to be free from torture or cruel, inhuman or degrading treatment or punishment; the right to privacy; the right to the highest attainable standard of health; the right to information and education; the right to freedom of opinion and expression; the right to adequate housing; the right to just and favourable conditions of work; the right to family life and to found a family; and the right to remedy for human rights abuses.<sup>474</sup>

Significantly, in addressing the reality that “[m]isuse of criminal law often negatively impacts health and violates human rights”, the UN Secretary-General has emphasized that “decriminalization of sex work can reduce violence, harassment and HIV risk.”<sup>475</sup> He further affirmed that “[s]ex workers should enjoy human rights protections guaranteed to all individuals, including the rights to non-discrimination, health, security and safety.”<sup>476</sup>

## **RIGHT TO SECURITY OF THE PERSON AND FREEDOM FROM VIOLENCE**

When sex workers face extortion and violence at the hands of police and other government officials, when they are forced to work in a precarious, clandestine manner because of stigma and presumptions of criminality, and when they cannot seek police protection from violence, their right to security of the person is at stake. The ICCPR requires that the state protect individuals from intentional physical or mental injury.<sup>477</sup> To respect and protect this right, state parties must respond appropriately to patterns of violence against categories of victims, including sex workers.

States are obliged to protect sex workers from violence, harassment and other abuse by adopting and enforcing laws that prohibit such acts.<sup>478</sup> The CEDAW Committee, in its General Recommendation 19 and its update (General Recommendation 35 focusing on gender-based violence against women), recognises the vulnerability of sex workers to human rights violations and violence, resulting from their marginalization and unlawful legal status.<sup>479</sup> The Committee notes that:

**Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.**<sup>480</sup>

The Committee has called on states to take measures to ensure “the rights of all sex workers, whether men, women or transgender people, to access sexual health services; that they are free from violence or discrimination, whether by state agents or private persons; and that they have access to equal protection of the law.”<sup>481</sup> It has further noted in its General Recommendation 33 (women’s access to justice) that where sex workers face the threat of criminalization, penalization or loss of livelihood when or if they report crimes against themselves to police, their access to justice and equal protection under the law is significantly compromised.<sup>482</sup> This, in turn, allows perpetrators of violence and abuse against sex workers to enjoy impunity. Notably, the CESCR Committee, in its General Comment 22 on the Right to sexual and reproductive health (Article 12), calls on state parties to “take measures to fully protect persons working in the sex industry against all forms of violence, coercion and discrimination.”<sup>483</sup>

Under international and regional human rights law, states are obliged to protect all individuals from all forms of violence. This obligation is closely related to and overlaps with the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment (see Right to be Free from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment below). In line with the human rights principle of “due diligence”, states must adopt the legislative, administrative, social, economic and other measures necessary to prevent, investigate, prosecute and punish acts of violence, whether perpetrated by the state or by private individuals.<sup>484</sup>

States also have an obligation to refrain from creating or perpetuating gender stereotypes that essentially justify violence against certain groups of people, such as transgender people.<sup>485</sup> Failure to hold those accountable for attacking, extorting or harassing sex workers and for enforcing the law in a violent and discriminatory manner, making it impossible for sex workers to complain about violence, reinforces sex and gender stereotypes and contravenes states’ obligation to respect, protect and fulfil sex workers’

right to security of the person. (See State Obligations to Combat Sex and Gender Stereotypes below.)

UN bodies and experts are increasingly looking at the impact of criminalizing sex work on a range of human rights. This is partly because criminalized approaches tend to put sex workers at heightened risk of violence, often with little legal recourse. For example, various UN bodies have recognised that “[c]riminalization legitimizes violence and discrimination against sex workers (particularly from law enforcement officers and health care providers) and makes authorities reluctant to offer protection or support to sex workers.”<sup>486</sup> Following a visit to India, the UN Special Rapporteur on violence against women emphasized the need to address violence against sex workers from state and non-state actors and the lack of legal redress. She also spoke of the damaging impact of conflating sex work and human trafficking.<sup>487</sup>

The CEDAW Committee has expressed concern about the criminalization of sex work and its negative impact on sex workers’ human rights, health and security.<sup>488</sup> The Committee has consistently made clear that, under the Convention, criminal sanctions should be reserved for those who profit from the “exploitation of prostitution.”<sup>489</sup> It has noted that imposing criminal penalties on sex workers only “entrenches sexual exploitation of women.”<sup>490</sup>

The CEDAW Committee has also specifically condemned laws and policies that exacerbate, rather than improve, the situation of sex workers. For example, it expressed concern in its concluding observations to Norway, “about the unintended consequences of the criminalization, since 2009, of the purchase of sexual activity or a sexual act from adults, in particular the higher risk for the personal safety and physical integrity of women in prostitution, as reflected in the low reporting rate of physical and sexual violence, exploitation and harassment, and the risk of their being evicted from their premises when used for prostitution[,] and the government’s failure to “develop new policies for the protection of the rights of women in prostitution” following a 2014 evaluation of the effects of Norway’s criminalized approach to sex work.”<sup>491</sup>

## **RIGHT TO LIBERTY**

Criminalizing the buying or selling of adult consensual sex, or elements of these transactions, threatens the right to liberty where sex workers are arbitrarily detained.<sup>492</sup> The HRC determined that legally authorized detention must be reasonable, necessary and proportionate taking into account the specific circumstances of a case.<sup>493</sup> Detention may amount to arbitrary detention, even if it is authorized by law, if it includes “elements of inappropriateness, injustice, lack of predictability and due process of law”.<sup>494</sup> The UNAIDS Advisory Group on HIV and Sex Work recommends that:

States should move away from criminalizing sex work or activities associated with it. Decriminalization of sex work should include removing criminal penalties for purchase and sale of sex, management of sex workers and brothels, and other activities related to sex work. To the degree that states retain non-criminal administrative law or regulations concerning sex work, these should be applied in ways that do not violate sex workers’ rights or dignity and that ensure their enjoyment of due process of law.<sup>495</sup>

## **THE RIGHT TO BE FREE FROM TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

Criminalizing sex work can lead to violations of the right to be free from torture and other cruel, inhuman or degrading treatment or punishment (other ill-treatment). The prohibitions against torture and other ill-treatment are absolute and cannot be suspended during times of civil unrest or emergency.<sup>496</sup>

States are obliged as a matter of international law to take measures to prevent torture and other ill-treatment, to investigate and prosecute perpetrators<sup>497</sup> and to provide adequate reparations for victims.<sup>498</sup> States have an enhanced obligation to diligently prevent acts of torture and other ill-treatment, including during law enforcement operations.<sup>499</sup> Their duty to prevent torture and other ill-treatment is further implicated by laws and policies that perpetuate harmful gender stereotypes. The UN Special Rapporteur on torture confirms that:

**States fail in their duty to prevent torture and ill-treatment whenever their laws, policies or practices perpetuate harmful gender stereotypes in a manner that enables or authorizes, explicitly or implicitly, prohibited acts to be performed with impunity.<sup>500</sup>**

## **RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH**

Criminalization of sex work impacts on the right to the highest attainable standard of health on various grounds.<sup>501</sup> The right to health contains both freedoms and entitlements, including the “right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference,” as well as “equality of opportunity for people to enjoy the highest attainable level of health.”<sup>502</sup>

Like other rights, the right to health is subject to non-discrimination guarantees, including on the basis of sex, property or other status. The CEDAW Committee has recommended that special attention be given to the health rights of women belonging to at-risk groups, including “women in prostitution”.<sup>503</sup>

Health services should be made available, accessible and acceptable to people engaged in sex work based on the principles of equality and non-discrimination and the right to the highest attainable standard of health.<sup>504</sup> Human rights bodies have called on states to ensure timely and affordable access to good quality health services that ensure informed consent, respect dignity, guarantee confidentiality and are sensitive to people’s particular needs and perspectives.<sup>505</sup>

Laws which preclude individuals’ access to necessary health services, including those for all dimensions of sexual health, violate human rights and are commonly associated with preventable ill health.<sup>506</sup> The Committee on Economic, Social and Cultural Rights has confirmed that criminalizing consensual adult sexual activities violates states’ obligation to respect the right to sexual and reproductive health as it amounts to a legal barrier that impedes access to sexual and reproductive health services.<sup>507</sup> Therefore, states have an immediate obligation to “repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine individuals’ or a particular group’s access to sexual and reproductive health facilities, services, goods and information”.<sup>508</sup> The Committee has further called on state parties to ensure that sex industry workers have access to the full range of sexual and reproductive health care services.<sup>509</sup>

The public health impact of criminalizing sex work is well documented. Public health research has found, for example, that criminal laws undermine sex workers' ability to collaborate in order to identify potentially violent clients and their capacity to demand condom use as a means to prevent unintended pregnancy, HIV and STIs.<sup>510</sup> Public health literature repeatedly identifies the necessity for furtive, rushed transactions as a principal factor in sex workers' reduced ability to negotiate safer sex.<sup>511</sup> Criminalization also diminishes sex workers' ability to access health services.<sup>512</sup>

## IMPACT OF CRIMINALIZATION OF SEX WORK ON HIV PREVENTION

Criminalization of sex work has particularly dire consequences for HIV prevention because it stops sex workers – and sometimes their clients – from taking the necessary precautions to lower the risk of transmission. For example, sex workers who fear detection by the police may be compelled to engage in rushed transactions with clients, to the detriment of their health and safety.<sup>513</sup> Similarly, law enforcement practices like the confiscation of condoms or the use of condoms as evidence for sex work, reduces condom use among sex workers and their clients.<sup>514</sup> Criminalization also deters sex workers from testing or seeking treatment for fear of arrest.<sup>515</sup> An examination of HIV among female sex workers published in July 2014 in *The Lancet* concluded that of all potential interventions identified, “[d]ecriminalisation of sex work would have the greatest effect on the course of HIV epidemics across all settings, averting 33–46% of HIV infections in the next decade.”<sup>516</sup> (See also Annex on Criminalization of HIV)

International human rights bodies and experts such as the UN Special Rapporteur on the right to health have called on states to ensure (at a minimum) the rights of all sex workers to access sexual health services; that they are free from violence or discrimination, whether by state agents or private persons; and that they enjoy equal protection of the law.<sup>517</sup>

Human rights standards also call for quality health care information to be available, accessible and acceptable, including for transgender and gender non-conforming people. They also require that all those seeking services should be treated with respect and dignity and without discrimination.<sup>518</sup> Some regional standards specifically call for the consideration of the “specific needs of lesbian, gay, bisexual and transgender persons in the development of national health plans including suicide prevention measures, health surveys, medical curricula, training courses and materials, and when monitoring and evaluating the quality of health-care services.”<sup>519</sup>

## **RIGHT TO JUST AND FAVOURABLE CONDITIONS OF WORK**

States have an obligation to ensure that everyone is able to access just and favourable conditions of work and is protected against exploitation, including people who are self-employed or who make their living in informal settings.<sup>520</sup> There have been some moves at the international<sup>521</sup>, regional<sup>522</sup> and national<sup>523</sup> levels to recognise that sex workers must be protected with relevant labour and employment guarantees even in the absence of explicit recognition by the state in which they are undertaking work (and including, in some cases, where sex work remains criminalized). Notably, in 2010, the International Labour Organization decided that its Recommendation 200 should apply to all workers, both formal and informal, including sex workers.<sup>524</sup>

The right to just and favourable conditions of work is negatively impacted by criminal legal frameworks when they punish sex workers for engaging in work that is, in practice, criminalized in all circumstances. Working on the margins or outside the law reduces sex workers' ability to protect themselves in the course of their work and to advocate for better working conditions. Criminal legal frameworks actually lead some to sell sex in more precarious, less safe conditions and subjects them to violence, to the detriment of their lives and health.

## **RIGHT TO PRIVACY**

Laws that criminalize consensual adult sex in private violate the right to privacy.<sup>525</sup> Everyone is entitled to respect for their privacy and to enjoy this right without fear and discrimination. The right to privacy means that individuals may not be subject to arbitrary or unlawful interference with their privacy and should enjoy protection of the law in this respect.

The rights to privacy and bodily integrity have been applied to sexuality and individuals' autonomous decisions with regard to their bodies.<sup>526</sup> For example, in *Toonen v. Australia*, the HRC confirmed that laws that interfered with adult consensual sex in private breached the ICCPR, in particular Article 17 (right to privacy). While the Committee considered a criminal "sodomy" law in this communication, it did not limit its reasoning to this specific type of criminal provision. The Committee's analysis and reasoning is applicable to all laws prohibiting consensual adult sex in private, likely including private consensual sex work. To justify such laws which infringe on individuals' human rights, governments must demonstrate that the law has a legitimate purpose, clearly provided by law, necessary for and proportionate to the legitimate aim sought, and is not discriminatory.<sup>527</sup>

## **RIGHT TO EQUALITY AND THE PRINCIPLE OF NON-DISCRIMINATION**

While criminalizing sex work violates a range of human rights, it can also create a permissive environment for discrimination, harassment and intimidation of sex workers, in violation of the right to equality and the principle of non-discrimination,<sup>528</sup> a fundamental principle of international human rights law.<sup>529</sup> Additionally, a range of general laws can be applied in a way that discriminates against sex workers, including for example, immigration laws and policies, family laws and administrative laws and regulations, among others.<sup>530</sup>

Laws criminalizing sex work often violate sex workers' right to equality and the principle of non-discrimination. They tend to be disproportionately enforced against women, transgender people and migrants on the basis of their sex, gender, gender identity and expression and/or migrant status — people who already face intersectional discrimination.

## **STATE OBLIGATIONS TO COMBAT STEREOTYPES BASED ON SEX AND GENDER**

Selling sex is a highly stigmatized activity in many countries. The act has historically been attributed shame in western culture in particular,<sup>531</sup> and associated with personal degradation, sexual deviancy, the spread of STIs and moral and social decay. This deep-rooted stigma intersects with and compounds harmful stereotypes against women and marginalized groups involved in sex work on the basis of their perceived failure to conform to social and gender-based norms of sexual behaviour.

Criminal laws which prohibit sex work serve as an expression of this stigma, as they are the manifestation of society's disapproval of certain conduct. They also serve as a driver of ongoing stigmatization and stereotyping as they confirm and compound the perception of people who undertake, or are suspected of undertaking, sex work as criminal and unwanted.<sup>532</sup>

International human rights law requires states to combat stereotypes and stereotyping, including gender stereotypes and stereotyping.<sup>533</sup> For example, Article 5.a) of CEDAW calls upon states to take "all appropriate measures" to "modify the social and cultural patterns of conduct of men and women" in an effort to eliminate practices that "are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."<sup>534</sup> Article 5.a) covers both gender stereotypes that are based on a view of women as inferior to men and sex-role stereotypes.<sup>535</sup>

## SEXUAL CONSENT

There is no clear definition of consent under international law and most of the legal analysis around consent has arisen in its absence - in legal decisions on rape, war crimes and human trafficking. Debates around the concept arise in all legal systems in relation to a range of issues.<sup>536</sup> From a human rights perspective, consent analysis needs to be situated in the broader understanding of individual autonomy.

Amnesty International uses the term to mean the voluntary and ongoing agreement to engage in a particular sexual activity. Consenting to sex does not mean consenting to violence. Rather, sex workers, like other people, can change or rescind their consent to have or sell sex at any point and this must be respected by all parties (for example clients, potential clients, third parties, police, judges and other law enforcement officials). Where consent is not voluntary and ongoing, including when a person's changed or rescinded consent is not respected, this constitutes sexual violence and is a human rights abuse and must be treated as a criminal offence. Consent analysis is necessarily a fact and context specific analysis. When conducting this type of analysis, the views, perspectives and experiences of individuals selling sex is fundamental in any considerations of issues related to consent. Moreover, it is vital that law and policy makers and service providers engage directly with the individuals who engage in sex work to develop laws, policies and practices that protect sex workers' human rights.

Law enforcement bodies, other government bodies and clients often make assumptions, based on stereotypes, that sex workers always consent to sex (because they may engage in sex frequently for their work) or, conversely, that sex workers can never consent to sex (because no one could rationally consent to selling sex). These assumptions lead to violations of sex workers' human rights, particularly their safety, access to justice and equal protection under the law. Criminalization often reinforces these problematic assumptions.

Decisions to sell sex can be influenced by poverty and/or marginalization. Such situations do not necessarily undermine or negate a person's consent. Constrained circumstances do not eliminate an individual's ability to make decisions about their own lives, except under particular circumstances that amount to coercion where an individual faces threats, violence or abuse of authority.

Nevertheless, there may be an increased risk of exploitation for individuals making decisions in the context of poverty, displacement and/or conflict. States have obligations to protect all individuals from exploitation and the conditions that create a risk of exploitation. However, in doing so, states must also recognise and respect the agency and capacity of adults engaged in consensual sex work. States must address the conditions that give rise to exploitation, by enhancing sex workers' choices and control over their own circumstances.<sup>537</sup>

Sex work laws that fail to recognise that sex workers can and do make conscious decisions about their lives and how they use their bodies, raise many human rights concerns. Despite approaching the issue with different motivations, criminal laws that either designate all sex work and sex workers as “immoral/criminal”, or laws that conceive of all sex workers as “victims” of gender-based violence against women or as people who lack full understanding of the harm they face, can deny sex workers the ability to make decisions about their lives and bodies and enjoy their human rights. Such approaches are problematic from a human rights perspective, as they deny agency and decision-making to an entire group of people (most of whom are women) and place the power to make decisions about their lives in the hands of the state.

## LEARN MORE

- Amnesty International, *Policy on state obligations to respect, protect and fulfil the human rights of sex workers* (Index: POL 30/4062/2016)
- Amnesty International, *Explanatory note on Amnesty International's policy on state obligations to respect, protect and fulfil the human rights of sex workers* (Index: POL 30/4063/2016)
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## NOTES ANNEX 5

- 441** Global Commission on HIV and the Law, *Risks, Rights & Health*, 2012, p. 36, [hivlawcommission.org/report/](http://hivlawcommission.org/report/)
- 442** The term "sex work" is used in this document to mean the exchange of sexual services (involving sexual acts) between consenting adults for some form of remuneration, with the terms agreed between the seller and the buyer. This definition of 'sex work' does not include adult dancing or the production of sexually explicit material, including pornography.
- 443** See also, the definition used by the WHO. See WHO, HIV/AIDS Programme, Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income Countries: Recommendations for a Public Health Approach, 2012, p.12
- 444** Global Commission on HIV and Law, *Risks, Rights & Health*, 2012, p. 36, [hivlawcommission.org/report/](http://hivlawcommission.org/report/)
- 445** See Institute of Development Studies, Sexuality, Poverty and Law Program, [spl.ids.ac.uk](http://spl.ids.ac.uk)
- 446** See Sexual Offences Act 23 of 1957 (South Africa), section 20, [www.justice.gov.za/legislation/acts/1957-023.pdf](http://www.justice.gov.za/legislation/acts/1957-023.pdf); U.C.A. Nyathi-Mokoena and H.U. Choma, 'Prostitution under the Sexual Offences Act in South Africa: A Constitutional Test', 3 *International Journal of Humanities and Social Science* 1, 2013, [www.ijhssnet.com/journals/Vol\\_3\\_No\\_1\\_January\\_2013/28.pdf](http://www.ijhssnet.com/journals/Vol_3_No_1_January_2013/28.pdf)
- 447** See Sexual Offences Act 23 of 1957 (South Africa), [www.justice.gov.za/legislation/acts/1957-023.pdf](http://www.justice.gov.za/legislation/acts/1957-023.pdf). After twenty years of research and consideration, the South African Law Reform Commission recently released a report that continues to call for full criminalization of sex work, yet also recommending the addition of a diversion programme to allow sex workers to avoid criminal sanctions if they agreed to participate in a 'rehabilitation' programme. See South African Law Reform Commission Report, Project 107, Sexual Offences and Adult Prostitution, 2017, [salawreform.justice.gov.za/reports/r-pr107-SXO-AdultProstitution-2017.pdf](http://salawreform.justice.gov.za/reports/r-pr107-SXO-AdultProstitution-2017.pdf); see also M. Van Der Merwe, Analysis: What Happened to The Sex Work Report?, Daily Maverick, 23 August 2017, [www.dailymaverick.co.za/article/2017-05-29-analysis-what-happened-to-the-sex-work-report/#.WZ35Tz6G0pq](http://www.dailymaverick.co.za/article/2017-05-29-analysis-what-happened-to-the-sex-work-report/#.WZ35Tz6G0pq)
- 448** See Thailand, Prevention and Suppression of Prostitution Act B.E. 2539, 1996, [www.refworld.org/docid/482aff982.html](http://www.refworld.org/docid/482aff982.html)
- 449** ILO, Sex industry assuming massive proportions in Southeast Asia (press release), 1998, [www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_007994/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007994/lang-en/index.htm); see also UNAIDS, The Gap Report, 2014, [www.unaids.org/en/resources/documents/2014/20140716\\_UNAIDS\\_gap\\_report](http://www.unaids.org/en/resources/documents/2014/20140716_UNAIDS_gap_report)
- 450** Texas and Wisconsin State Laws make provision for fines of up to \$10,000.
- 451** Pennsylvania state laws provides for a 5 year sentence for reoffending beyond the 3rd offence.
- 452** See Amnesty International, *The human cost of 'crushing' the market: Criminalization of sex work in Norway* (Index: EUR 36/4034/2016); Amnesty International, *Harmfully isolated: Criminalizing sex work in Hong Kong* (Index: ASA 17/4032/2016); Amnesty International, "What I'm doing is not a crime": *The human cost of criminalizing sex work in the city of Buenos Aires* (Index: AMR 13/4042/2016)
- 453** Nga Yan Cheung, Accounting for and Managing Risk in Sex Work: A Study of Female Sex Workers in Hong Kong, Ph. D. thesis, University of London, p. 54, 2011
- 454** *Explanatory Note on Amnesty International's Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers* (Index: POL 30/4063/2016)
- 455** See Amnesty International, *Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers* (Index: POL 30/4062/2016); *Explanatory Note on Amnesty International's Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers* (Index: POL 30/4063/2016)
- 456** See UNAIDS, Guidance Note on HIV and Sex Work, 2012, at Annex 2 ("The generally negative attitudes to sex workers and clients that characterise efforts to end demand also contribute to the neglect of evidence-informed HIV prevention programmes and services. These attitudes also encourage law enforcement officials and local authorities to enforce laws in ways that increase HIV vulnerability among sex workers—for instance, by using condoms as evidence of involvement in sex work and thus as grounds for arrest or detention, which discourages condom use. Activities to ensure that clients take responsibility for their own sexual behaviour, thereby protecting themselves and all their sexual partners from HIV infection, must be developed and supported. Clients' negative attitudes towards, female, male and transgender sex workers and towards condom use need to be addressed and challenged. . . . [To that end, UNAIDS recommends e]mpowering sex workers to have greater control over their working conditions, rather than 'end demand' approaches. . . .")
- 457** See U. Bjørndahl, Dangerous Liaisons: A report on the violence women in prostitution in Oslo are exposed to, Municipality of Oslo and Ministry of Justice and Public Safety, 2012
- 458** See J. Levy and P. Jakobsson, 'Sweden's abolitionist discourse and law: Effects on the dynamics of Swedish sex work and on the lives of Sweden's sex workers', *Criminology and Criminal Justice*, British Society of Criminology, 2014; S. Dodillet and P. Östergren, The Swedish sex purchase act: Claimed success and documented effects, 2011
- 459** NSW, Community Guide: The Decriminalisation of Third Parties, 2016
- 460** See Amnesty International, *Harmfully isolated: Criminalizing sex work in Hong Kong* (Index: ASA 17/4032/2016)

- 461** UNAIDS, UNFPA, UNDP, Sex Work and the Law in Asia and the Pacific, 2012, [www.unpd.org/content/dam/unpd/library/hiv/English/HIV-2012-SexWorkAndLaw.pdf](http://www.unpd.org/content/dam/unpd/library/hiv/English/HIV-2012-SexWorkAndLaw.pdf)
- 462** See Amnesty International, *“What I’m doing is not a crime”*: The human cost of criminalizing sex work in the city of Buenos Aires (Index: AMR 13/4042/2016); Amnesty International, *The human cost of ‘crushing’ the market: Criminalization of sex work in Norway* (Index: EUR 36/4034/2016); Amnesty International, *Harmfully isolated: Criminalizing sex work in Hong Kong* (Index: ASA 17/4032/2016); Amnesty International, *Outlawed and abused: Criminalizing sex work in Papua New Guinea* (Index: ASA 34/4030/2016)
- 463** See Amnesty International, *“What I’m doing is not a crime”*: The human cost of criminalizing sex work in the city of Buenos Aires (Index: AMR 13/4042/2016); Amnesty International, *The human cost of ‘crushing’ the market: Criminalization of sex work in Norway* (Index: EUR 36/4034/2016); Amnesty International, *Outlawed and abused: Criminalizing sex work in Papua New Guinea* (Index: ASA 34/4030/2016); Amnesty International, *Harmfully isolated: Criminalizing sex work in Hong Kong* (Index: ASA 17/4032/2016)
- 464** See Amnesty International, *“What I’m doing is not a crime”*: The human cost of criminalizing sex work in the city of Buenos Aires (Index: AMR 13/4042/2016)
- 465** See Amnesty International, *“What I’m doing is not a crime”*: The human cost of criminalizing sex work in the city of Buenos Aires (Index: AMR 13/4042/2016); Amnesty International, *Outlawed and abused: Criminalizing sex work in Papua New Guinea* (Index: ASA 34/4030/2016)
- 466** See Urban Justice Center, L.D. Schreter, M.M. Jewers and S. Sastrawidjaja, The Danger of Conflating Trafficking Sex Work: A Position Paper of the Sex Worker Rights Project at the Urban Justice Center, 2007, [sexworkersproject.org/media-toolkit/downloads/20070330-BriefingPaperOnConflationOfTraffickingAndSexWork.pdf](http://sexworkersproject.org/media-toolkit/downloads/20070330-BriefingPaperOnConflationOfTraffickingAndSexWork.pdf); UNAIDS, Guidance Note on HIV and Sex Work (updated), 2012, [www.unaids.org/en/resources/documents/2012/20120402\\_UNAIDS-guidance-note-HIV-sex-work](http://www.unaids.org/en/resources/documents/2012/20120402_UNAIDS-guidance-note-HIV-sex-work)
- 467** See Urban Justice Center, L.D. Schreter, M.M. Jewers and S. Sastrawidjaja, The Danger of Conflating Trafficking Sex Work: A Position Paper of the Sex Worker Rights Project at the Urban Justice Center, 2007, [sexworkersproject.org/media-toolkit/downloads/20070330-BriefingPaperOnConflationOfTraffickingAndSexWork.pdf](http://sexworkersproject.org/media-toolkit/downloads/20070330-BriefingPaperOnConflationOfTraffickingAndSexWork.pdf); UNAIDS, Guidance Note on HIV and Sex Work, 2012, [www.unaids.org/en/resources/documents/2012/20120402\\_UNAIDS-guidance-note-HIV-sex-work](http://www.unaids.org/en/resources/documents/2012/20120402_UNAIDS-guidance-note-HIV-sex-work)
- 468** See UNAIDS, Guidance Note on HIV and Sex Work, 2012, [www.unaids.org/en/resources/documents/2012/20120402\\_UNAIDS-guidance-note-HIV-sex-work](http://www.unaids.org/en/resources/documents/2012/20120402_UNAIDS-guidance-note-HIV-sex-work)
- 469** Amendment of Immoral Traffic (Prevention) Act, 1956, India, [pib.nic.in/newsite/erelease.aspx?relid=92404](http://pib.nic.in/newsite/erelease.aspx?relid=92404)
- 470** ‘New anti-trafficking law will affect sex workers,’ Z News, 18 February 2013, [zeenews.india.com/news/delhi/new-anti-trafficking-law-will-affect-sex-workers\\_829965.html](http://zeenews.india.com/news/delhi/new-anti-trafficking-law-will-affect-sex-workers_829965.html)
- 471** UNAIDS, Guidance Note on HIV and Sex Work, 2012, [www.unaids.org/en/resources/documents/2012/20120402\\_UNAIDS-guidance-note-HIV-sex-work](http://www.unaids.org/en/resources/documents/2012/20120402_UNAIDS-guidance-note-HIV-sex-work)
- 472** See Open Society Foundations (OSF), 10 Reasons to Decriminalize Sex Work: A Reference Brief, p. 6, [www.opensocietyfoundations.org/sites/default/files/decriminalize-sex-work-20120713.pdf](http://www.opensocietyfoundations.org/sites/default/files/decriminalize-sex-work-20120713.pdf); see also UNAIDS, Guidance Note on HIV and Sex Work, 2012, [www.unaids.org/en/resources/documents/2012/20120402\\_UNAIDS-guidance-note-HIV-sex-work](http://www.unaids.org/en/resources/documents/2012/20120402_UNAIDS-guidance-note-HIV-sex-work)
- 473** UNAIDS, Guidance Note on HIV and Sex Work, 2012, p. 14, Annex 3, [www.unaids.org/en/resources/documents/2012/20120402\\_UNAIDS-guidance-note-HIV-sex-work](http://www.unaids.org/en/resources/documents/2012/20120402_UNAIDS-guidance-note-HIV-sex-work)
- 474** For more information, see ‘Human Rights Standards and UN Agency Positions on Sex Work’, in Amnesty International’s, *Explanatory Note on Amnesty International’s Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers* (Index: POL 30/4063/2016)
- 475** See UN General Assembly, Report of the Secretary-General, On the Fast-Track to end the AIDS epidemic (advance unedited edition), 2016, para. 53
- 476** See UN General Assembly, Report of the Secretary-General, On the Fast-Track to end the AIDS epidemic (advance unedited edition), 2016, para. 53
- 477** UN Human Rights Council, General Comment 35 (Article 9: Liberty and security of person), UN Doc. CCPR/C/GC/35, 2014, para. 9
- 478** See Report of the UN Special Rapporteur on the right to health, UN Doc. A/HRC/14/20, 2010; UN CESCR, General Comment 22 (Right to sexual and reproductive health (Article 12)), UN Doc. E/C.12/GC/22, 2016, para. 32. Along similar lines, the UN CEDAW Committee has recently expressed concern to one state party about “widespread violence and discrimination against women in prostitution, in particular by the police.” UN CEDAW, Concluding Observations: Kyrgyzstan, UN Doc. CEDAW/C/KGZ/CO/4, 2015, para. 21(c)
- 479** For a more in-depth discussion of the CEDAW Committee’s analysis around the human rights of sex work or “women in prostitution”, including the impact of criminalization of aspects of commercial sex, see Amnesty International’s ‘Explanatory Note’ (which both contextualizes and provides an overview of Amnesty International’s research base for its policy on states’ obligations to respect, protect and fulfill sex workers’ human rights); see also UN CEDAW, General Recommendation 19 (Violence against women), UN Doc. A/47/38, 1992; UN CEDAW, General Recommendation 35 (Gender-based violence against women, updating General Recommendation 19), UN Doc CEDAW/C/GC/35, 2017

**480** UN CEDAW, General Recommendation 19 (Violence against women), UN Doc. A/47/38, 1992, para. 15

**481** UN CEDAW, General Recommendation 24 (Article 12: Women and health), Chapter I; see also Report of the UN Special Rapporteur on the right to health, UN Doc. A/HRC/14/20, 2010; and UN CEDAW, General Recommendation 19 (Violence against women), UN Doc. A/47/38, 1992

See UN CEDAW, General Recommendation 33 (Women's access to justice), UN Doc. CEDAW/C/GC/33, 2015, paras. 9, 51(I)

**482** See UN CEDAW, General Recommendation 33 (Women's access to justice), UN Doc. CEDAW/C/GC/33, 2015, paras. 9, 51(I)

**483** See UN CESCR, General Comment 22 (The right to sexual and reproductive health (Article 12)), UN Doc. E/C.12/GC/22, 2016, para. 32

**484** See Committee against Torture, General Comment 2 (Implementation of Article 2 by States Parties), UN Doc. CAT/C/GC/2, 2008; and UN General Assembly, Declaration on the Elimination of Violence against Women, UN Doc. A/RES/48/104, 1993

**485** See UN CEDAW, Art. 5; UN CEDAW, General Recommendation 28 (Core obligations of States Parties under Article 2 of CEDAW), UN Doc. CEDAW/C/GC/28, 2010, paras. 18, 26; OAS, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará"), Arts. 6 and 8; see also UN OHCHR, Gender stereotyping as a human rights violation, 2013, p. 23-24; Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/31/57, 2016, para. 10

**486** UNFPA, APNSW, UNDP, Policy brief: Sex work, violence and HIV in Asia – From evidence to safety, 2015, p. 7. The WHO calls on all countries to "work toward decriminalization of sex work and elimination of the unjust application of non-criminal laws and regulations against sex workers." WHO, UNFPA, UNAIDS, NSWP, Prevention and treatment of HIV and other sexually transmitted infections for sex workers in low- and middle-income countries: Recommendations for a public health approach, 2012, p. 8, apps.who.int/iris/bitstream/10665/77745/1/9789241504744\_eng.pdf The UN Special Rapporteur on the right to health has also highlighted the impact of criminalizing sex work on health and human rights and explicitly called for decriminalization of sex work. See Report of the UN Special Rapporteur on the right to health, UN Doc. A/HRC/14/20, 2010, para. 76(b)

**487** See Report of the UN Special Rapporteur on violence against women, its causes and consequences (Mission to India), UN Doc. A/HRC/26/38/Add.1, 2014, para. 78(e)

**488** See UN CEDAW, General Recommendation 33 (Women's access to justice), 2015, paras. 9, 51(I); UN CEDAW, Concluding Observations: Norway, UN Doc. CEDAW/C/NOR/CO/9, 2017, paras. 28-29; Concluding Observations: Fiji, UN Doc. A/57/38,

2002, paras. 64-65; Concluding Observations: Hungary, UN Doc. A/57/38, 2002, paras. 323-324; Concluding Observations: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 2007, paras. 29-30; Concluding Observations: Republic of Korea, UN Doc. CEDAW/C/KOR/CO/6, 2007, paras. 19-20; Concluding Observations: France, UN Doc. CEDAW/FRA/CO/6, 2008, paras. 30-31; Concluding Observations: Germany, UN Doc. CEDAW/C/DEU/CO/6, 2009, paras. 49-50; Concluding Observations: Japan, UN Doc. CEDAW/C/JPN/CO/6, 2009, para. 39; Concluding Observations: China, UN Doc. CEDAW/C/CHN/CO/6, 2006, para. 4. Article 6 of UN CEDAW requires states to protect women and girls against "exploitation of prostitution".

**489** See UN CEDAW, Concluding Observations: Fiji, UN Doc. A/57/38, 2002, paras. 64-65; Concluding Observations: Hungary, UN Doc. A/57/38, 2002, paras. 323-324; Concluding Observations: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 2007, paras. 29-30; Concluding Observations: Republic of Korea, UN Doc. CEDAW/C/KOR/CO/6, 2007, paras. 19-20; Concluding Observations: France, UN Doc. CEDAW/FRA/CO/6, 2007, paras. 30-31; Concluding Observations: Germany, UN Doc. CEDAW/C/DEU/CO/6, 2009, paras. 49-50; Japan, UN Doc. CEDAW/C/JPN/CO/6, 2009, para. 39; Concluding Observations: Albania, UN Doc. CEDAW/C/ALB/CO/3, 2010, para. 29. While Article 6 of CEDAW requires that states take "all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women", the CEDAW Committee does not define the terms "exploitation" or "prostitution." The inclusion of the term "exploitation" suggests that not all forms of commercial sex are exploitative and that states are not obligated to suppress "prostitution", but rather only that which involves exploitation. Indeed, when the text of CEDAW was being drafted, a proposal to amend Article 6 to call for the abolition of prostitution in all its forms was rejected. Furthermore, the delineation between "traffic in women" and "exploitation of prostitution" recognizes the two issues as distinct, but in some cases related, phenomena. See C. Mgbako and L.A. Smith, 'Sex work and human rights in Africa', *Fordham International Law Journal*, 2011, p. 1200-01; UN CEDAW, General Recommendation 19 (Violence against women), UN Doc. A/47/38, 1992, para. 16; UN CEDAW, Concluding Observations: Indonesia, UN Doc. CEDAW/C/IDN/CO/5, 2007, paras. 28-29

**490** UN CEDAW, Concluding Observations: Lithuania, UN Doc. A/55/38, 2000, para. 152; see also UN CEDAW, Concluding Observations: Armenia, UN Doc. CEDAW/C/ARM/CO/4/Rev.1, 2009, para. 27 (Addressing administrative penalties imposed on sex workers); Concluding Observations: Egypt, UN Doc. CEDAW/C/EGY/CO/7, 2010, para. 25 (expressing concern that women in prostitution are punished, as opposed to clients)

**491** See UN CEDAW, Concluding Observations: Norway, UN Doc. CEDAW/C/NOR/CO/9, 2017, para. 28; see also UN CEDAW, Concluding Observations: China (including mainland China, Hong Kong and Macau), UN Doc. CEDAW/C/CHN/CO/6, 2006, para. 19 (The Committee expressed concern that "the

continued criminalization of prostitution disproportionately impacts on prostitutes rather than on the prosecution and punishment of pimps and traffickers.”)

**492** See UN ICCPR, Art. 9(1); UN Human Rights Committee, General Comment 35 (Article 9: Liberty and security of person), UN Doc. CCPR/C/GC/35, 2014, paras. 10-23; Methods of work of the Working Group on Arbitrary Detention, UN Doc. A/HRC/30/69, 2015, para. 8

**493** See *Van Alphen v The Netherlands*, UN Human Rights Committee, UN Doc. CCPR/C/39/D/305/1988, para. 5.8; *A v Australia*, UN Human Rights Committee, UN Doc. CCPR/C/59/D/560/1993, para. 9.2

**494** *A. W. Mukong v Cameroon*, UN Human Rights Committee, UN Doc. GAOR, A/49/40 (vol. II), para. 9.8

**495** UNAIDS, Guidance Note on HIV and Sex Work, Annex I, 2012, p. 6, [www.unaids.org/en/resources/documents/2012/20120402\\_UNAIDS-guidance-note-HIV-sex-work](http://www.unaids.org/en/resources/documents/2012/20120402_UNAIDS-guidance-note-HIV-sex-work) (The Guidance Note makes clear that its recommendation relates to buying as well as selling sex)

**496** See UN ICCPR, Art. 4.2; American Convention on Human Rights, Art. 27, UN CAT, Art 2; see also UN Human Rights Committee, General Comment 29 (States of Emergency (Article 4)), UN Doc. CCPR/C/21/Rev.1/Add.11, 2001

**497** See Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/57/199, 2002, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 4; UN Human Rights Committee, General Comment 20 (Replaces General Comment 7 on prohibition of torture and cruel treatment or punishment (Article 7)), UN Doc. HRI/GEN/1/Rev.1, 1992, paras 8 and 11; see also *Rodriguez v Uruguay*, UN Human Rights Committee, UN Doc CCPR/C/51/D/322/1988; *Blanco v Nicaragua*, UN Human Rights Committee, UN Doc. CCPR/C/51/328/1988, 1994; *Kurbanov v Tajikistan*, UN Human Rights Committee, UN Doc. CCPR/C/79/D/1096/2002, 2003

**498** See UN Human Rights Committee, General Comment 20 (Replaces General Comment 7 on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment (Article 7)), UN Doc. HRI/GEN/1/Rev.1, 1994, paras. 14, 15; UN General Assembly, Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/55/290, 2000, para. 28

**499** See *Cabrera Garcia and Montiel Flores v Mexico*, Inter-American Court of Human Rights, Judgment of November 26, 2010 (Preliminary Objection, Merits, Reparations and Costs), para. 135

**500** Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/31/57, 2016, para.10

**501** UN ICESCR, Art. 12; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”), Art. 10

**502** UN CESCR, General Comment 14 (The right to the highest attainable standard of health), UN Doc. E/C.12/2000/4, 2000, para. 8

**503** UN CEDAW, General Recommendation 24 (Article 12: Women and health), UN Doc. A/54/38/Rev.1, chap. I, 1999, para. 6

**504** UN ICESCR, Art. 12

**505** UN CEDAW, General Recommendation 24 (Article 12: Women and health), UN Doc. A/54/38/Rev.1, chap. I, 1999; UN CRC, General Comment 4 (Adolescent health and development in the context of the Convention on the Rights of the Child)

**506** See UN CEDAW, General Recommendation 24, UN Doc. A/54/38/Rev.1, 1999; UN CESCR, General Comment 14 (The right to the highest attainable standard of health), UN Doc. E/C.12/2000/4, 2000; UN CRC, General Comment 15 (right of the child to the enjoyment of the highest attainable standard of health), UN Doc. CRC/C/GC/15, 2013

**507** See UN CESCR, General Comment 22 (The right to sexual and reproductive health (Article 12)), UN Doc. E/C.12/GC/22, 2016, para. 57

**508** UN CESCR, General Comment 22, (The right to sexual and reproductive health (Article 12)), UN Doc. E/C.12/GC/22, 2016, para. 49(a)

**509** See UN CESCR, General Comment 22, (The right to sexual and reproductive health (Article 12)), UN Doc. E/C.12/GC/22, 2016, para. 32

**510** See UNAIDS, Guidance Note on HIV and Sex Work, Annex 2, 2012, p. 8, [www.unaids.org/en/resources/documents/2012/20120402\\_UNAIDS-guidance-note-HIV-sex-work](http://www.unaids.org/en/resources/documents/2012/20120402_UNAIDS-guidance-note-HIV-sex-work); see also D. Kulick, ‘Sex in the new Europe: The criminalization of clients and Swedish fear of penetration’, *Anthropological Theory*, 2003, pp. 199-218; NSWP, Research for sex work, No. 12, 2010; K. Blankenship and S. Koester, ‘Criminal law, policing policy, and HIV risk in female street sex workers and injection drug users’, *Journal of Law, Medicine and Ethics*, 2002, p. 550 (finding that raids, cautions, arrests, and the use of anti-social criminal orders (ASBOs) against sex workers in the United Kingdom shift sex workers toward unsafe areas and diminish sex workers’ ability to choose clients and negotiate condom use)

**511** See K. Shannon, et al, ‘Global epidemiology of HIV among female sex workers: Influence of structural determinants’, *The Lancet*, 2010, p. 10, [dx.doi.org/10.1016/S0140-6736\(14\)60931-4](https://doi.org/10.1016/S0140-6736(14)60931-4) (“Kenyan sex workers describe similar experiences to Vancouver—of how criminalization compromises HIV prevention by rushed transactions due to fear of arrest, bribes, extortion, sexual coercion, and the forgoing of condoms, and the deterrence of sex workers from reporting violence to authorities.”)

**512** See C.M. Lowndes, et al, ‘Injection drug use, commercial sex work, and the HIV/STI epidemic in

the Russian Federation', *Sexually Transmitted Diseases*, 2003, p. 47; see also Global Commission on HIV and the Law, *Risks, Rights & Health*, 2012, [hivlawcommission.org/report/](http://hivlawcommission.org/report/)

**513** See K. Blankenship and S. Koester, 'Criminal law, policing policy, and HIV risk in female street sex workers and injection drug users,' *Journal of Law, Medicine and Ethics*, 2002, p. 550; K. Shannon, et al, 'Global epidemiology of HIV among female sex workers: Influence of structural determinants', *The Lancet*, 2010, p. 10, [dx.doi.org/10.1016/S0140-6736\(14\)60931-4](https://doi.org/10.1016/S0140-6736(14)60931-4)

**514** See OSF, 'Criminalizing condoms: How policing practices put sex workers and HIV services at risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe,' 2012; Amnesty International, *Harmfully isolated: Criminalizing sex work in Hong Kong* (Index: ASA 17/4032/2016)

**515** See UNDP, Global Commission, HIV and the Law, *Risks, Rights & Health*, 2012, p. 38, [hivlawcommission.org/report/](http://hivlawcommission.org/report/)

**516** K. Shannon, et al, 'Global epidemiology of HIV among female sex workers: influence of structural determinants', *The Lancet*, 2010, p. 1

**517** Report of the UN Special Rapporteur on the right to health, UN Doc. A/HRC/14/20, 2010; UN CEDAW, General Recommendation 24 (Article 12: Women and health), UN Doc. A/54/38/Rev.1, chap. I, 1999; UN CEDAW, General Recommendation 19 (Violence against women), UN Doc. A/47/38, 1992

**518** See UN CESCR, General Comment 14 (The right to the highest attainable standard of health), UN Doc. E/C.12/2000/4, 2000; UN CRC, General Comment 15 (right of the child to the enjoyment of the highest attainable standard of health), UN Doc. CRC/C/GC/15, 2013; UN CESCR, General Comment 20 (Non-discrimination in economic, social and cultural rights (Article 2, para. 2)), UN Doc. E/C.12/GC/20, 2009; UN CEDAW, General Recommendation 28 (Core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women), UN Doc. CEDAW/C/GC/28, 2010

**519** Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, 2011, p. 13, para. 33; Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe* (2nd edition), 2011

**520** UN ICESCR, Art. 7; see also Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), Arts. 6 and 7 (Article 7, in particular, highlights the need for fair, equitable and satisfactory conditions in one's exercise of work); Inter-American Charter of Social Guarantees, IX International Conference of American, 1948 (sets forth the minimum rights workers must enjoy in the American states, including fair working conditions, without prejudice to the fact that the laws of each state may extend such rights or recognize others that are more favourable)

**521** See ILO, Report of the Committee on HIV/AIDS, HIV and AIDS and the world of work (Provisional Record 13 (Rev.), 2010, paras. 192-210

**522** In 2001, the European Court of Justice ruled that a group of Polish and Czech women had the right to engage in sex work in the Netherlands under treaties between the European Union and its applicant countries. The judges said that "prostitutes" could work in any European Union country where selling sex was tolerated as long as they were genuinely self-employed, had the means to set up their business and had a reasonable chance success. See *Jany and others v Staatssecretaris van Justitie*, Case C-268/99, European Court of Justice, 2001

**523** See *Kylie v Commission for Conciliation, Mediation and Arbitration & Ors*, C52/07, C52/07, ZALC 86, 2008 (in which the South African Labour Appeals Court ruled that a sex worker was entitled to protection against unfair dismissal even though sex work remained criminalized). See also the minority judgment of Sachs and O'Regan JJ in *S v Jordan and others*, 2002 (6) SA 642 (CC), para 74.

**524** See ILO, Report of the Committee on HIV/AIDS, 'HIV/AIDS and the world of work' (Provisional Record 13 (Rev.), 2010, paras. 192-210.

**525** See UDHR, Art. 12, UN ICCPR, Art. 17; *Toonen v Australia*, UN Human Rights Committee, UN Doc. CCPR/C/50/D/488/1992, 1994; American Convention, Art. 11; American Declaration of Human Rights, Art. V

**526** UN ICCPR, Art. 17(1)(2); UN CRC, Art. 16(1)(2); Convention on the Rights of Persons with Disabilities (CRPD), Art. 22(1); *K.L. v Peru*, UN Human Rights Committee, UN Doc. CCPR/C/85/D/1153/2003, 2005, paras. 6.4 and 6.5; UN CEDAW, General Recommendation 24 (Article 12: Women and health), UN Doc. A/54/38/Rev.1, chap. I, 1999

**527** See UN ICCPR, Arts. 18, 19, 21 and 22; UN ICESCR, Art. 4; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), Art. 5. The content of these requirements has been developed extensively by independent experts. See, for example, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4, annex, 1985; Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, 1987, annex. See also Report of the UN Special Rapporteur on extreme poverty and human rights, UN Doc. A/66/265, 2011, para. 11

**528** UN ICCPR, Arts. 2 and 26; American Convention on Human Rights, Arts. 1 and 24

**529** See Charter of the United Nations, Arts. 1(3) and 55; Universal Declaration of Human Rights, Art. 2

**530** See International Labour Office, *Migration, Health & HIV and AIDS*, [www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms\\_605763.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_605763.pdf)

**531** See C.A. Mgbako, *To live freely in this world: Sex worker activism in Africa*, 2016, p. 50

**532** See R. Fassinger and J. Arseneau, 'Diverse women's sexualities', in F. Denmark, P. Florence, and A. Paludi, (eds.) *Psychology of Women: A Handbook of Issues and Theories*, 2008

**533** See UN CEDAW, Art. 5; OAS, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará"), Arts. 6 and 8

**534** UN CEDAW, Art. 5.a)

**535** UN CEDAW, Art. 5.a); see also UN OHCHR, Gender stereotyping as a human rights violation, 2013, p. 23

**536** See UNODC, Issue Paper: The Role of 'Consent' in the Trafficking in Persons Protocol, 2014, p. 34.

**537** For further analysis, see the section on 'Coercion, consent and autonomy' in Amnesty International, *Explanatory Note on Amnesty International's Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers* (Index: POL 30/4063/2016)



Women's rights activists demonstrate for the decriminalisation of abortion, in front of the Supreme Court in San Salvador, 15 May 2013. © Giles Clarke



## ANNEX 6

# CRIMINALIZING ABORTION

**“[Laws criminalizing abortion] infringe women’s dignity and autonomy... such laws consistently generate poor physical health outcomes, resulting in deaths that could have been prevented, morbidity and ill-health, as well as negative mental health outcomes, not least because affected women risk being thrust into the criminal justice system. Creation or maintenance of criminal laws with respect to abortion may amount to violations of the obligations of States to respect, protect and fulfil the right to health... perpetuates discrimination and generates new forms of stigmatization.”**

Anand Grover, UN Special Rapporteur on the right to health<sup>538</sup>

According to the World Health Organization (WHO), there are approximately 22 million unsafe abortions each year, 98% of which are carried out in developing countries.<sup>539</sup> Globally, unsafe abortion results in the death of approximately 47,000 women. Five million women are estimated to suffer disability as a result of complications due to unsafe abortion.<sup>540</sup> This accounts for roughly 13% of maternal deaths, making unsafe abortion the third largest cause of maternal mortality globally.<sup>541</sup> The WHO defines unsafe abortion as “a procedure for terminating an unintended pregnancy carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both.”<sup>542</sup> Unsafe abortions are frequently characterized by unhygienic conditions, dangerous interventions, untrained providers or incorrect administration of medication by unqualified individuals, including pregnant women themselves. When performed by trained health care providers in sanitary conditions abortion is one of the safest medical procedures,<sup>543</sup> significantly safer than childbirth.<sup>544</sup>

Restrictive abortion laws and policies are a major cause of women's and girls' resort to unsafe abortions.<sup>545</sup> The WHO has identified a direct link between laws that criminalize abortion and the incidence of unsafe abortion and maternal deaths and injuries.<sup>546</sup> Significantly, legal restrictions on abortion do not lead to decreased numbers of abortions or significant increases in birth rates.<sup>547</sup> Lifting legal restrictions leads to a shift from previously clandestine, unsafe procedures to legal and safe ones.<sup>548</sup> States with less restrictive abortion laws generally have lower abortion rates than countries with extremely restrictive abortion laws.<sup>549</sup> Part of the reason abortion is higher in countries with restrictive laws is that access to contraception, comprehensive sexuality education and other family-planning services also tend to be restricted in these countries. When women and girls cannot access contraception they have more unintended pregnancies, which in turn leads to more abortions. As such, one of the first steps toward avoiding maternal deaths and injuries is to ensure that women and girls have access to contraception, information and to safe abortion, among other things.<sup>550</sup>

## LEGAL TRENDS - ABORTION LAW REFORM

Over the last 60 years, a large number of countries have liberalized their abortion laws, at times recognizing the vital role that access to safe abortion plays in protecting women's lives and health. Notably, 179 countries committed to address unsafe abortion by adopting the Programme of Action agreed at the 1994 UN International Conference on Population and Development.<sup>551</sup> Since then and following decades of advocacy, over 30 countries worldwide have liberalized their laws and only a few countries have tightened legal restrictions on abortion.<sup>552</sup> Currently 74 countries, more than 60% of the world's population, permit abortion without restriction as to reason, or on broad grounds.<sup>553</sup>

Despite these advancements, however, progress remains slow in many parts of the world and in some cases the situation has regressed. For example, in Nicaragua, abortion was banned in all circumstances in 2006, and has been prohibited in all circumstances in El Salvador since 1956. Access to abortion in the Americas more broadly continues to erode. Restrictive legislative initiatives are also emerging in Europe, including in Poland where law makers attempted to usher in a near ban on abortion,<sup>554</sup> and in Spain where the government tried to permit abortion solely on grounds of threats to a pregnant woman's life and in cases of rape, as well as to introduce various administrative barriers to services, and subsequently to require adolescents to have parental consent to access abortion.<sup>555</sup> Across the Global South, a majority of countries retain highly restrictive abortion laws and policies, particularly in Africa, Latin America and southern Asia.<sup>556</sup> Nearly half of all women of childbearing age worldwide live in countries that have such laws.<sup>557</sup> In these states, abortion is banned or only permitted in highly restricted circumstances.

Restrictive abortion laws create a punitive environment in which women's and girls' human rights are routinely violated. They force women and girls to continue pregnancies that may damage their physical and mental health, or compel them to resort to unsafe abortions. This has a grave impact on their bodily autonomy and violates their rights to life, health, privacy, sexual and reproductive autonomy, freedom of conscience and to freedom from discrimination and torture and other ill-treatment. In many circumstances, those who undergo unsafe abortions also risk prosecution and punishment, including imprisonment, and can face cruel, inhuman and degrading treatment and discrimination in, and exclusion from, vital post-abortion health care.<sup>558</sup>

Such laws also compromise health care when providers fear prosecution for terminating pregnancies and/or for providing post-abortion care to women who have had illegal abortions. Fear of criminalization and mandatory reporting requirements can lead health care workers to report women who have had clandestine abortions to the police, turn them away from emergency care or vital services or to refuse services altogether.<sup>559</sup> Amnesty International interviewed doctors in Nicaragua, for example, who reported feeling anxious about treating women who have suffered miscarriages or those with ectopic pregnancies, even though treating such conditions is legal.<sup>560</sup> This anxiety can undermine medical confidentiality and jeopardize trust between health care providers and their patients.

Finally, restrictive laws can lead to discrimination against women by health care providers who do not understand their rights and obligations under the law or who misinterpret the law to deny women's requests for legal abortions. The culture of suspicion and fear generated by these laws often lead to dangerous delays or denial of care, in particular for those seeking abortions to protect their health or life, as well as prosecution and punishment for women who have had miscarriages.

## **DIRECT CRIMINALIZATION**

The most common means of criminalizing abortion is through specific penal code provisions that explicitly prohibit the termination of pregnancy. Where abortion is criminalized, it may involve punishment of the abortion provider, the woman seeking the abortion, or both.<sup>561</sup> In over 99% of the world's countries abortion is decriminalized in some circumstances.<sup>562</sup> Governments generally permit access to abortion by providing for exceptions to the criminal law to allow for abortion in some cases. The grounds on which abortion is permitted vary across countries worldwide.

### **ABORTION BANS**

Five countries (Dominican Republic, El Salvador, Malta, Nicaragua and the Vatican) prohibit abortion on all grounds through criminal law.<sup>563</sup> This means that abortion is forbidden even when pregnancy seriously endangers a woman's life. Women who seek or undertake clandestine abortions in these countries may be harshly penalized, along with anyone who helps perform or facilitates the abortion. Punishments include prison sentences of at least eight years in some cases.<sup>564</sup> A rape survivor was recently sentenced to 30 years' imprisonment under El Salvador's anti-abortion law after suffering a stillbirth.<sup>565</sup> Criminalization of abortion through the application of other criminal laws not specific to abortion such as "aggravated assault", "feticide" or murder laws against women who have had miscarriages or have been accused of inducing a miscarriage, can result in even steeper prison sentences, for example, up to 50 years.<sup>566</sup> (See Indirect Criminalization below for further information).

## NICARAGUA'S CRIMINAL ABORTION BAN

Since 2006, several amendments were made to the Nicaraguan Penal Code, leading to a total prohibition of abortion with no exceptions. The country's criminal abortion ban officially came into effect in July 2008.<sup>567</sup> The ban prohibits abortion even where the continued pregnancy places a woman's or girl's life or health at risk, or when the pregnancy is the result of rape. Abortions are even prohibited where serious complications arise that require urgent and decisive treatment, such as ectopic pregnancy. Given the high rate of teenage pregnancies in Nicaragua, many of those affected are under 18 years of age.

Prior to this legislative reform, therapeutic abortion had been recognised as a legal and necessary medical procedure for more than 100 years. The law was interpreted in practice to permit abortion when the life or health of the woman or girl was at risk from the pregnancy and, on particular occasions, where the pregnancy resulted from rape.

Under the current Penal Code women and girls who seek an abortion can face imprisonment for up to two years. Health professionals who provide abortion services and life-saving or essential obstetric care can be imprisoned for up to three years.<sup>568</sup>

For more information see: Amnesty International, *The total abortion ban in Nicaragua: Women's lives and health endangered, medical professionals criminalized* (Index: AMR 43/001/2009)

### ABORTION CRIMINALIZED IN MOST CIRCUMSTANCES

In other countries, abortion is legally permitted only in narrow circumstances. Although this approach may be seen as providing some limited protection for women, in reality, it largely fails to protect women's health and lives or to promote their human rights. Some of the primary reasons why women and girls seek abortions are economic and driven by their concern about their ability to care for the children they already have<sup>569</sup> – factors which are not grounds for abortion in restrictive legal environments.

In many countries, legal abortion to save a woman's life is not clearly provided for in law, but rather could be inferred from a general criminal law defence of "necessity". In these situations, it could be performed on the rationale that it is necessary to preserve a woman's life,<sup>570</sup> or to preserve the "greater good" – often an undefined concept.<sup>571</sup> Lack of clear exceptions to the criminal law or legal clarity of existing law means that women are unlikely to know they have legal rights to access abortions. In addition, medical providers may be unclear about when they can legally carry out an abortion. Even when access to abortion to protect a woman's life is written in law, medical providers may be unclear about what degree of risk to a woman's life is required for an abortion to be legal.<sup>572</sup> In practice, women may face dangerous delays and barriers to abortion care when their lives are at risk.

## CASE STUDY: DR SAVITA HALAPPANAVAR, IRELAND

Under Irish law, abortion is only permitted if there is a “real and substantial risk” to a woman’s life. However, historically, it is unclear what constitutes a risk and the exact circumstances under which abortion is legal.

In October 2012, Dr Savita Halappanavar, a 31-year-old woman who was 17 weeks pregnant, died in a Galway hospital following a miscarriage.<sup>573</sup> In the days leading to her death, she had attended hospital because she was in pain. After examination, she was told that she was having an inevitable miscarriage. Despite the fact that there was no possibility of the fetus surviving, Dr Halappanavar was denied several requests for an abortion on the basis that a fetal heartbeat was still detectable. In the following days, her condition deteriorated and she was diagnosed with septicaemia. She died seven days after her admission.

The official cause of death was recorded as septic shock following miscarriage. The report of the investigation by the Health Service Executive of Ireland, published in June 2013, found that the key causal factors included inadequate assessment and monitoring of Dr Halappanavar’s condition, and non-adherence to clinical guidelines on the management of sepsis. However, it further acknowledged that “the interpretation of the law related to lawful termination in Ireland, and particularly the lack of clear clinical guidelines and training” had been “a material contributory factor” in her death.<sup>574</sup>

Various human rights bodies have recommended that Ireland liberalize its abortion law and ensure access to safe and legal abortion services.<sup>575</sup> A parliamentary committee was formed to consider whether Ireland’s abortion law should be reformed. This followed a government-established Citizens Assembly process, the report of which sets out specific recommendations on how the law should be changed and calls for a referendum on removing the 8th Amendment from the Irish Constitution (which recognises the “right to life of the unborn”).<sup>576</sup>

## INDIRECT CRIMINALIZATION

In addition to being explicitly criminalized under penal code provisions for obtaining abortion, women and girls can be punished through the discriminatory enforcement of other criminal and civil provisions not specific to abortion. In the US, women and girls have been prosecuted for “feticide”, “fetal assault” or “child neglect”, among other crimes, for having a miscarriage or self-inducing an abortion.<sup>577</sup> These prosecutions are related to attempts to establish fertilized eggs, embryos and/or fetuses as “legal persons” (separate from pregnant women) with equal rights to others. These initiatives contravene international human rights standards which confirm that human rights protections do not apply before birth. (See Human Rights Do Not Apply Prenatally Textbox, for more information)

For example, in 2015, Purvi Patel, a South Asian-American woman in Indiana, USA, was sentenced to 20 years’ imprisonment after a self-induced medical abortion. Her prosecution involved a novel application of Indiana’s “feticide” and “child neglect” laws to criminally prosecute her for seeking to terminate her pregnancy and for failing to summon medical services immediately following the unexpected emergency delivery. In an important precedent, the Court of Appeals of Indiana found that “the legislature did not intend for the feticide statute to apply to illegal abortions or to be used to prosecute women for their own abortions.”<sup>578</sup> As a result, Purvi Patel’s “feticide” conviction was vacated. Despite concerns about the lack of sufficient evidence, her “felony neglect of a dependent” conviction was not vacated, although the crime was reclassified with a shorter sentence.<sup>579</sup>

Amnesty International documented indirect criminalization of women and girls in El Salvador.<sup>580</sup> Women who had miscarriages were charged and in some cases prosecuted, for “murder” or “aggravated homicide”. This type of criminalization was largely enabled by the country’s abortion ban, as well as discriminatory attitudes and gender biases in society.

## **PENALIZATION AND PRESUMED CRIMINALITY**

In reality, women can be arrested, prosecuted and punished as a result of a state's regulatory system surrounding abortion, even when abortion is legally permitted in some circumstances. The mere perception that abortion is unlawful or immoral leads to the stigmatization of women and girls by health care staff, family members, and the judiciary, among others. Consequently, women and girls seeking abortion risk discrimination and harassment. For example, some women have reported being abused and shamed by health care providers when seeking abortion services or post-abortion care.<sup>581</sup> In some contexts, women's experiences of rape are viewed with suspicion and, as such, access to legal abortion services hinges on moral conceptions of sexual violence and victims'/survivors' submission to forensic exams, as opposed to their personal testimony.<sup>582</sup>

Procedural regulations can also be used in health care settings to limit women's legal access to abortion, causing unnecessary or lengthy delays and subjecting women to poor or discriminatory treatment or denial of treatment.<sup>583</sup> The Special Rapporteur on the right to health has identified several "burdensome procedural barriers" that impede access to safe and legal abortions, including:

- Mandatory and biased counselling requirements
- Mandatory waiting periods
- Third-party (including spousal) consent and notification requirements
- Limitations on the range of abortion options (such as restrictions on medical abortion)
- Conscientious objection clauses
- Abortion advertising restrictions
- Laws prohibiting public funding for abortion care<sup>584</sup>

While supporters of these regulations may claim that they are necessary to safeguard women's health and best interests, in reality the regulations subject women and girls to persecution, stigma and denial of services. Burdensome regulations also stand in the way of patients' privacy, physicians' ability to practise medicine and their human rights obligation to improve health outcomes.

## CONSCIENTIOUS OBJECTION

In many countries, the law allows health care professionals to conscientiously object to facilitating or performing abortions. Such protections are common in the US, Central and South America and parts of Europe.<sup>585</sup> The use of conscientious objection to deny services is reportedly increasing in a number of countries. For example, the Italian Ministry of Health said that between 2003 and 2007, the proportion of gynaecologists who refused to perform abortions on conscience grounds rose from 58.7% to 69.2%.<sup>586</sup> Other health care professionals are also increasingly attempting to assert conscience objection to various types of service related to abortion, including pharmacists, nurses, technicians and receptionists.<sup>587</sup>

Conscientious objection is often so poorly regulated or widespread that it can lead to discrimination against women, denial of information about, or referral to, alternative services, and refusal of, or unnecessary delays in, treatment even in emergency situations<sup>588</sup> — all of which violate international human rights law. To date, international and regional human rights bodies have not recognised a right of health care providers to refuse to provide medical services (including abortion services) on grounds of “conscience”, or required that states permit conscientious objection to medical services under domestic law. However, when states legally permit conscientious objection, human rights law requires that they put in place a regulatory framework to ensure that women’s access to services is not undermined by refusals and in practice, is guaranteed.<sup>589</sup> Notably, only those directly involved with the provision of abortion services can assert conscientious objection, not those simply providing related or support services and not public or private institutions. Additionally, conscientious objection can never be invoked in emergency situations or to deny vital post-abortion care.<sup>590</sup>

Legal protections to preserve individuals’ right to freedom of thought, conscience and religion should not be used to obstruct others’ enjoyment of their human rights. At a minimum, states have an obligation to ensure that procedures are in place, such as effective referral mechanisms, to ensure that when health care providers object, it does not obstruct women’s access to appropriate information and to timely and safe abortion services. Such procedures must also include a complaint mechanism that can address abuses that result from conscientious objection and provide women with an effective and timely remedy for such abuses.

## HUMAN RIGHTS PROTECTIONS

Criminal legal restrictions on abortion breach a wide range of human rights, global political commitments and internationally recognised medical ethics standards. UN human rights bodies have consistently found that countries that criminalize abortion and fail to ensure access to legal abortion on certain grounds in law and in practice violate numerous human rights, including the rights to life, health, privacy and freedom from discrimination and from torture and other ill-treatment. Below is an overview of human rights violations that result from the existence and enforcement of criminal and other punitive laws and policies around abortion, and the increasing calls from human rights bodies for full decriminalization of abortion, with a broader focus on states' obligations to ensure women's and girls' access to safe and legal abortion.

### RIGHT TO LIFE

The HRC has found that women's right to life is violated by restrictive abortion laws that expose them to the risk of death and injury from unsafe abortion.<sup>591</sup> It has called upon states to provide information on measures taken to ensure that women do not have to undergo life-threatening, clandestine abortions, when reporting on their compliance with their right to life obligations.<sup>592</sup> The CESCR Committee has also called on states to amend restrictive abortion laws or to increase access to legal abortion to reduce maternal deaths.<sup>593</sup> In its General Comment 22, the Committee specifically noted that denial of abortion often leads to maternal mortality or morbidity, which in turn constitutes a violation of the right to life or security.<sup>594</sup>

### RIGHT TO HEALTH

In terms of the right to health, international human rights bodies have repeatedly confirmed that severe restrictions or prohibitions on abortion violate the right to health. The CESCR Committee confirmed in its General Comment 22 that:

**States must reform laws that impede the exercise of the right to sexual and reproductive health. Examples include laws criminalizing abortion ...**<sup>595</sup>

In its General Comment 15 on the right of the child to the enjoyment of the highest attainable standard of health,<sup>596</sup> the CRC Committee has recommended that states "ensure access to safe abortion and post-abortion care services, irrespective of whether abortion itself is legal". The Committee also called on states in various concluding observations to decriminalize abortion and review legislation with a view to ensuring children's access to safe abortion and post-abortion care services, and to ensure that the views of the pregnant girl are always heard and respected in abortion decisions.<sup>597</sup> The Special Rapporteur on the right to health has also confirmed that "criminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization of women's right to health and must be eliminated,"<sup>598</sup> and that the criminalization of abortion has a "severe impact on mental health."<sup>599</sup>

## **RIGHT TO PRIVACY**

The HRC remarked that state imposition of a legal duty on health care providers to report cases of women who have undergone abortion may violate women's privacy rights.<sup>600</sup> Additionally, in various individual cases, the Committee found that a state's refusal to act in accordance with a woman's decision to undergo a legal abortion, and judicial interference with that decision, constituted a violation of the right to privacy.<sup>601</sup>

The CRC Committee has further confirmed that: "All adolescents must have access to confidential adolescent-responsive and non-discriminatory reproductive and sexual health information and services, available both on and off-line, including... safe abortion services."<sup>602</sup> The Committee has specifically called for confidential access for adolescent girls to legal abortions<sup>603</sup> and for states to ensure, in law and in practice, that the views of the child are always heard and respected in abortion decisions.<sup>604</sup>

## **RIGHT TO EQUALITY AND NON-DISCRIMINATION**

The CEDAW Committee notes that "laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures" form "barriers to women's access to appropriate health care" which contravenes the state's obligation to respect women's human rights.<sup>605</sup> The Committee has explicitly stated that "failure of a State party to provide services and the criminalization of some services that only women require is a violation of women's reproductive rights and constitutes discrimination against them."<sup>606</sup> The Committee has consistently stated confirmed that restrictive abortion laws constitute discrimination against women.<sup>607</sup>

The HRC has also regularly confirmed that lack of reproductive health information and services, including abortion, undermines women's right to non-discrimination.<sup>608</sup> The CRC Committee has confirmed that punitive abortion laws constitute a violation of children's right to freedom from discrimination.<sup>609</sup> Further, the CESCR Committee confirms that: "A wide range of laws, policies and practices undermine the autonomy and right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health, for example criminalization of abortion or restrictive abortion laws."<sup>610</sup> It also notes that restrictions on abortion particularly affect poor and less educated women.<sup>611</sup>

Notably, UN and regional rapporteurs issued a joint statement in 2015 saying that:

"The criminalization of or other failure to provide services that only women require, such as abortion and emergency contraception, constitute discrimination based on sex, and is impermissible."<sup>612</sup>

The Special Rapporteur on the independence of judges and lawyers has also expressed concern regarding criminal law provisions that discriminate against women, including criminalization of abortion.<sup>613</sup>

## **RIGHT TO BE FREE FROM TORTURE AND OTHER ILL-TREATMENT**

The HRC confirms that the denial of abortion when pregnancy poses a significant risk to the life and physical and mental health of the pregnant woman, as well as in the case of rape, violates the right to be free from cruel, inhuman or degrading treatment.<sup>614</sup> The Committee also found that the governments of Argentina and Peru violated this right by failing to ensure access to legal abortion services.<sup>615</sup> In two cases against Ireland in *Mellet v Ireland* and *Whelan v Ireland*, the Committee found that in criminalizing abortion and thereby preventing women from accessing abortion services, that the state had violated the rights to be free from cruel, inhuman and degrading treatment, privacy and non-discrimination.<sup>616</sup> The cases involved women petitioners whose pregnancies were diagnosed with fatal fetal impairments and were compelled to travel abroad to access abortion services, suffering serious emotional and mental pain and suffering.

The CESCR Committee has also stated that denial of abortion “in certain circumstances can amount to torture or cruel, inhuman or degrading treatment.”<sup>617</sup> The CEDAW Committee has stated that “violations of women’s sexual and reproductive health and rights, such as... forced pregnancy, criminalization of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, ... are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.”<sup>618</sup> The UN Special Rapporteur on torture has also stated that:

Highly restrictive abortion laws that prohibit abortions even in cases of incest, rape or foetal impairment or to safeguard the life or health of the woman violate women’s right to be free from torture and ill-treatment.<sup>619</sup>

In an intervention to the Supreme Court of Brazil, the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, UN Special Rapporteur on violence against women, its causes and consequences, the Working Group on discrimination against women in law and practice, the UN Special Rapporteur on the right to health, and the UN Special Rapporteur on the rights of persons with disabilities, highlighted the circumstances in which denial of abortion services may constitute torture and/or cruel, inhuman or degrading treatment, with specific focus on women’s and girls’ rights to access information and services in the context of the 2015 Zika epidemic.<sup>620</sup> In particular, the Special Rapporteurs and Mandate Holders confirm that the mental suffering that women and girls may face when they wish to terminate their pregnancy, including when they have received Zika diagnosis, but do not have legal access to service, can be severe, and can meet the threshold of torture and/or cruel, inhuman and degrading treatment. Furthermore, these circumstances can be exacerbated for certain women and girls in a particularly vulnerable situation, including as a result of their age, disability status, or circumstances under which they became pregnant.

## **CALLS FOR DECRIMINALIZATION OF ABORTION**

International human rights bodies have long stated that to comply with human rights obligations, states should decriminalize abortion, liberalize restrictive laws and remove barriers that hinder access to safe abortion.<sup>621</sup> While they have noted that states must ensure access to abortion in cases of threat to the woman's life or health, in cases of rape or incest and in cases of severe or fatal fetal impairment,<sup>622</sup> they have also called on states which allow abortion only on such minimum grounds, to liberalize their laws.<sup>623</sup> International human rights laws and standards are clear that women and girls should not face criminal penalties for undergoing abortions. Health care providers should not be criminally sanctioned for providing safe abortion services and post-abortion care to women.<sup>624</sup>

The CEDAW Committee has called on states to amend legislation criminalizing abortion "in order to withdraw punitive measures imposed on women who undergo abortion."<sup>625</sup> The CRC Committee has also urged states to "decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services."<sup>626</sup> In its concluding observations to multiple countries,<sup>627</sup> the Committee has called on states to decriminalize abortion in all circumstances.<sup>628</sup> It has also called for the review of abortion laws in order to ensure children's access to safe abortion and post-abortion care services, and that the views of the pregnant girl are always heard and respected in abortion decisions.<sup>629</sup>

The Special Rapporteur on the right to health has noted that an "absolute prohibition [of abortion] under criminal law deprives women of access to what, in some cases, is a life-saving procedure"<sup>630</sup> and recommends that states decriminalize abortion.<sup>631</sup> Additionally, the WHO and UNAIDS have jointly called for the review and repeal of "punitive laws that have been proven to have negative health outcomes and that counter established public health evidence... including laws that criminalize or otherwise prohibit sexual and reproductive health care services..."<sup>632</sup>

## **CALLS FOR LIBERALIZATION OF ABORTION LAWS**

In recent years, international human rights bodies, mechanisms and experts are increasingly directing states to ensure access to safe and legal abortion in a more general manner, as opposed to only on certain grounds, to protect women's rights and fulfil governments' obligations under international human rights law and standards. Such recommendations have been made to countries where legislation provides for access to abortion in some cases.

Countries such as Poland, Zimbabwe and New Zealand, which have legalized abortion only for pregnancies which place a woman's life or health at risk, where the pregnancy is the result of sexual assault, or in cases of fetal impairment, have been called upon to "liberalize" their "restrictive" and "convoluted" laws.<sup>633</sup> The CEDAW Committee has also expressed concern about convoluted abortion law, "making women dependent on the benevolent interpretation of a rule which nullifies their autonomy", and recommended that the New Zealand government "review the abortion law and practice with a view to simplifying it and to ensure women's autonomy to choose."<sup>634</sup>

Additionally, the HRC and the CEDAW Committee have raised concerns about the discriminatory impact of restrictive abortion laws on marginalized women and girls and

their access to legal abortion services.<sup>635</sup> The CRC and CESCR Committees have specified that states must ensure that marginalized women and girls are able to access safe abortion and that states must address discrimination and inequality which may impede their access.<sup>636</sup> In its recent General Comment 22, the CESCR Committee said that, “Preventing unintended pregnancies and unsafe abortions requires States to adopt legal and policy measures to guarantee all individuals access to affordable, safe and effective contraceptives and comprehensive sexuality education, including for adolescents, liberalize restrictive abortion laws, guarantee women and girls access to safe abortion services and quality post-abortion care including by training health care providers, and respect women’s right to make autonomous decisions about their sexual and reproductive health.”<sup>637</sup>

In 2016, the Working Group on Discrimination Against Women in Law and Practice recommended that to end discrimination against women, states should: “Recognise women’s right to be free from unwanted pregnancies and ensure access to affordable and effective family planning measures. Noting that many countries where women have the right to abortion on request supported by affordable and effective family planning measures, have the lowest abortion rates in the world...”<sup>638</sup>

In 2016, the Special Rapporteurs on health, torture and violence against women, and the Chair-Rapporteur of the Working Group on Discrimination Against Women in Law and in Practice, issued a joint statement<sup>639</sup> noting that restrictive laws and prohibition of abortion do not reduce either the need for or number of abortions: they merely increase the risks to the health and lives of women and girls who resort to unsafe and illegal abortion. The experts recommended “the good practice found in many countries which provide women’s access to safe abortion services, on request during the first trimester of pregnancy”, as well as abortion in exceptional cases later in pregnancy and abortion “on request” without limits for adolescents.

A similar statement was issued in 2017 by the Special Rapporteurs on health, violence against women, and extrajudicial, summary or arbitrary executions and the Chair-Rapporteur of the Working Group on Discrimination Against Women in Law and in Practice, which called on states to:

Repeal laws that criminalize and unduly restrict abortion and policies based on outdated stereotypes, to release all women in prison on abortion charges and to counter all stigma against abortion.<sup>640</sup>

This group of experts further emphasized that criminalization of abortion perpetuates stigma and discrimination and infringes women’s dignity and bodily integrity, and called on states to “ensure that their laws, policies and practices are built on their human rights obligations and on the recognition of women’s dignity and autonomy.”<sup>641</sup>

The WHO’s safe abortion guidance<sup>642</sup> recommends that “laws and policies on abortion should protect women’s health and their human rights,” that “regulatory, policy and programmatic barriers that hinder access to and timely provision of safe abortion care should be removed,” and that where abortion is legal on broad socio-economic grounds or on a woman’s request, and where safe services are accessible in practice, both unsafe abortion and abortion-related mortality and morbidity are reduced.<sup>643</sup>

## HUMAN RIGHTS DO NOT APPLY PRENATALLY

Opponents who advocate for criminalization of abortion often assert that the medical procedure is incompatible with a fetus's "right to life". This argument is premised on the idea that the internationally recognised human rights of persons apply prior to birth.<sup>644</sup> However, international and regional human rights treaty provisions protecting the right to life, and the official bodies that interpret articles protecting life and other human rights guarantees, do not extend such protections prenatally.<sup>645</sup> No international human rights body has ever recognised a fetus as a subject of protection under the right to life under Article 6 (1) of the ICCPR or other provisions of international human rights treaties, including the Convention on the Rights of the Child.<sup>646</sup> The negotiating history of the ICCPR further reinforces the proposition that the protection of the right to life applies after birth.<sup>647</sup>

The HRC criticized a state party's Constitution which granted the "unborn" the right to life on an equal footing with a pregnant woman's right to life.<sup>648</sup> Human rights bodies have refrained from stating that right to life protections apply prenatally as this would inevitably lead to a conflict of rights between a pregnant woman or girl and her fetus. Such a position would not only undermine the rights of the woman in the context of access to abortion, but also in other maternal health and general health care services required.<sup>649</sup> For example, this reasoning around the "unborn's" right to life has been used as a justification to override a woman's refusal to consent to a caesarean section.<sup>650</sup>

UN human rights bodies have recognised that prenatal development can be protected by promoting the health and well-being of pregnant women, through adequate maternal health care, information and goods and services.<sup>651</sup>

Expanding access to health care to pregnant women would promote progress towards this goal. According to international human rights standards, states have an obligation to take measures to ensure that the life and health of the woman or girl take priority over the protection of her fetus.<sup>652</sup>

(Also see Annex on Criminalizing Pregnancy)

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**639** See Joint Statement by the UN Special Rapporteurs on Health, Torture and Violence Against Women, and the Chair-Rapporteur of the Working Group on Discrimination Against Women in Law and in Practice, 'Unsafe Abortion is Still Killing Tens of Thousands Women around the World' – UN Rights Experts Warn, 28 September 2016 (International Safe Abortion Day), [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20600&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20600&LangID=E)

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**644** See Inter-American Commission on Human Rights, *Baby Boy* (case 2141), Resolution 23/81, 6 March 1981, 25/OEA/ser.L./II.54, Doc. 9 Rev.1

**645** See R. Copelon et al., 'Human Rights Begin at Birth: International Law and the Claim of Fetal Rights', in 13 *Reproductive Health Matters* 26, November 2005, pp. 120-129. While Article 4 of the Inter-American Convention on Human Rights states that the right to life "shall be protected by law and, in general, from the moment of conception," the Inter-American Court on Human Rights has established that any interest states may have in protecting the right to life should be "gradual and incremental," and cannot be absolute. The Court further confirmed that an embryo is not a person under the Inter-American Convention. See Case of *Artavia Murillo et al. ("In Vitro Fertilization") v Costa Rica*, Inter-American Court of Human Rights, *Judgment of 28 November 2012* (Preliminary objections, Merits, Reparations and Costs, Judgment), para. 264 (ban on IVF violated the rights to privacy, family and equality before the law); See also Inter-American Commission on Human Rights, *Baby Boy* (case 2141), Resolution 23/81, 6 March 1981, 25/OEA/ser.L./II.54, Doc. 9 Rev.1

**646** R. Copelon et al., 'Human Rights Begin at Birth: International Law and the Claim of Fetal Rights', in 13 *Reproductive Health Matters* Vol. 26, 2005, p. 122. Copelon explains that an argument to the contrary is erroneously built upon Paragraph 9 of the UN CRC Preamble, which provides: "Bearing in

mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.'" The history of negotiations by states on the treaty clarify that these safeguards "before birth," must not affect a woman's choice to terminate an unwanted pregnancy. As originally drafted, the Preamble did not contain the reference to protection "before as well as after birth," although this language had been used in the earlier Declaration on the Rights of the Child. The Holy See led a proposal to add this phrase, at the same time as it "stated that the purpose of the amendment was not to preclude the possibility of an abortion" (UN Commission on Human Rights, Question of a Convention on the Rights of a Child: Report of the Working Group, 36th Session, UN Doc. E/CN.4/L/1542 (1980)). Although the words "before or after birth" were accepted, their limited purpose was reinforced by the statement that "the Working Group does not intend to prejudice the interpretation of Article 1 or any other provision of the Convention by States Parties." UN Commission on Human Rights, Report of the Working Group on a Draft Convention on the Rights of the Child, 45th Session, UN Doc. E/CN.4/1989/48, 1989, p. 10.

**647** The history of the negotiations on the Covenant indicates that an amendment was proposed and rejected that stated: "the right to life is inherent in the human person from the moment of conception, this right shall be protected by law." UN GAOR Annex, 12th Session, Agenda Item 33, at 96, UN Doc. A/C.3/L.654; UN GAOR, 12th Session, Agenda Item 33, at 113, A/3764, 1957. The Commission ultimately voted to adopt Article 6, which has no reference to conception, by a vote of 55 to nil, with 17 abstentions.

**648** See UN Human Rights Committee, Concluding Observations: Ireland, UN Doc. CCPR/C/IRL/CO/4, 2014, para. 9; *Mellet v Ireland*, UN Human Rights Committee, UN Doc. CCPR/C/116/D/2324/2013, 2013

**649** For example, see evidence presented in Amnesty International, *She is Not a Criminal: The Impact of Ireland's Restrictive Abortion Laws* (Index: EUR 29/1597/2015)

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# NO A LA CRIMI DE LAS MUJER

Demonstration demanding the release  
of a woman sentenced to eight years in jail  
for having a miscarriage, in Argentina,  
3 May 2016.

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DE MUJERES

YO ME PONGO LA CASQUETA  
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VIOLENCIA  
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**ANNEX 7**  
**CRIMINALIZING**  
**PREGNANCY**

**“Policing wombs brings private, intimate spaces into the public theatre, creating spectacles of poor, pregnant women and their children; and this public humiliation functions to visually inscribe these women’s place in the social hierarchy.”**

Professor Michele Goodwin, Chancellor’s Professor of Law at the University of California, Irvine <sup>653</sup>

While discrimination against pregnant women occurs around the world, countries, including El Salvador,<sup>654</sup> Norway,<sup>655</sup> Russia,<sup>656</sup> Ukraine<sup>657</sup> and the US,<sup>658</sup> are criticized for their punitive policies and practices directed at women’s actions and decisions while pregnant. Pregnant women face intimidation by law enforcement officials and health care providers based on their real or perceived behaviour. They have been accused of illegal abortion in cases of miscarriage and have been coerced into terminating their pregnancies on the basis of misinformation about the effects of drug use.<sup>659</sup> Laws in Norway and in some US states allow for pregnant women who use drugs to be involuntarily detained in drug treatment centres or jail.<sup>660</sup> In many African countries, pregnant girls are denied the right to education by policies that prevent them from going to school.<sup>661</sup> (For more, see Annex on Criminalization of Adolescent Sexual Activity)

Pregnancy criminalization is particularly widespread in the US, where a specific set of laws targets pregnant women, especially those who are marginalized and those who use drugs, based on a belief that they have caused or risked harm to their fetus. Often known as “fetal assault”, “chemical endangerment” or “personhood” laws, these measures have been used to arrest and prosecute women who experience pregnancy complications and conditions such as drug dependence.

The majority of the cases involve women who used drugs while pregnant.<sup>662</sup> However, most US state laws that criminalize pregnant women are not specific to drug use, but are more general, for example. “fetal assault” laws which include fetuses within the legal definition of a “victim” of assault. Laws identifying fetuses as potential “victims” can put pregnant women’s rights at risk, regardless of the law’s intended purpose. Most “fetal assault” laws do not exempt pregnant women from committing crimes in relation to their own pregnancies. As a result, the laws have been used to prosecute women who miscarried or were suspected of harming their fetus.

Hundreds of women in the USA have faced arrest, interrogation, prosecution and detention after disclosing what they believed was confidential information to a health care provider, or simply when seeking routine or emergency medical care.<sup>663</sup> Advocacy groups and scholars have documented cases in which pregnant women were arrested for otherwise legal activities such as refusing medical interventions including caesarean surgery or even for attempting suicide. Thus, the laws can effectively punish women simply for being pregnant.

This has occurred against the backdrop of an ongoing, hostile debate around abortion and “fetal personhood” measures, also known as “prenatal personhood” measures. These measures refer to attempts to establish fertilized eggs, embryos and/or fetuses as “legal persons” (separate from pregnant women) with equal rights to others. Many US states have incorporated similar definitions of “person” into state criminal codes in order to include fertilized eggs, embryos or fetuses as potential victims of violent crime.<sup>664</sup> Such punitive regulation can violate women’s human rights and their personal autonomy.

While states have a legitimate interest in promoting maternal health, efforts should be made to ensure that this aim underlies their laws, policies and practices around pregnancy and that they comply with international human rights law and standards.

## **DIRECT CRIMINALIZATION**

In the USA, Tennessee’s “fetal assault” law is a striking example of a directly discriminatory pregnancy criminalization law. In April 2014, the state amended its “fetal assault” law, becoming the first US state to introduce a law making it a crime to give birth to a child showing symptoms of prenatal exposure to narcotics.<sup>665</sup> Beyond this, any unlawful act or omission a pregnant woman engaged in had the potential to be considered an “assault” against her own embryo or fetus. Based on Amnesty International’s research, about 100 women were charged under the “fetal assault” law between 2014 and 2016, mostly in rural eastern Tennessee, an area severely lacking in drug treatment facilities, and in Memphis, a majority African-American city.<sup>666</sup>

Amnesty International found that the threat of criminal punishment for drug use during pregnancy drives pregnant women away from health care, prenatal care and even drug treatment, in violation of their right to health. This policy was put in place in the context of public concern over high rates of drug dependence. Yet the criminal justice based response did nothing to address a lack of access to health care services and other root causes.

## INDIRECT CRIMINALIZATION

The majority of cases brought against pregnant women in the USA have been based on laws concerning child protection rather than laws directly targeting pregnant women. Criminal laws covering child abuse or neglect, chemical endangerment, homicide, manslaughter and first-degree murder have been routinely used to detain or punish women for their behaviour during pregnancy. Pregnant women in the USA most commonly experience this type of criminalization if they have admitted to, or are suspected of, illegal drug use.

In 2006, Alabama passed the “chemical endangerment” law as a means to protect children from environments where they could be exposed to drugs or controlled substances. However, individual prosecutors and the Alabama Supreme Court have interpreted the law to apply to pregnant women themselves. Amnesty International spoke to women who were arrested while they were pregnant and one who was handcuffed as she was taking her newborn son home from the hospital.<sup>667</sup> One woman told us she was charged with “chemical endangerment” even though she was unaware she was pregnant, and another said she was planning to get an abortion at the time of her arrest.

Advocates and researchers documented 479 such prosecutions between 2006 and 2015, more than have been documented under any other single law. Of these women, 89% could not afford their own lawyers.<sup>668</sup> Across the US, 38 states have feticide laws,<sup>669</sup> the majority of which were passed, ostensibly, to protect women by increasing penalties for violent attacks against them. Twenty three states apply these laws at any stage of gestation. The vague or open-ended wording of these laws has allowed prosecutors and police to exploit or misinterpret the statutes to punish pregnant women. In several instances, women who experienced miscarriage, stillbirths or lost a child through early infant death, have been arrested, interrogated and prosecuted under these laws, often with little or no evidence.<sup>670</sup>

Women have also been reported to the police and punished for being victims of violence with the intention of causing an abortion, attempting suicide, falling down stairs, drinking alcohol and resisting and refusing medical interventions.<sup>671</sup> For example, Samantha Burton, a Florida woman with pregnancy complications, was ordered to remain confined indefinitely in the Tallahassee Memorial Hospital and to undergo any medical procedures deemed necessary to save the life of her fetus. She was forced to undergo a caesarean section but still suffered a stillbirth.<sup>672</sup> Laura Pemberton, from Tallahassee, was in labour at home when she was forced into an ambulance by law enforcement officials and paramedics. She underwent a legal hearing while strapped to a stretcher and a judge ordered that she be forced to submit to a caesarean section.

## DRUG COURTS

While women sometimes serve significant jail or prison sentences for drug use during pregnancy, a large number of these cases are adjudicated in drug treatment courts. These proceedings are not public, and each judge has a large degree of discretion in defining the terms of treatment within the court. Drug courts are intended to offer court-supervised treatment for drug dependence as an alternative to prison for certain drug-related offences, thus in theory ensuring treatment for people in the criminal justice system and reducing rates of incarceration and overcrowding.<sup>673</sup> The basic assumption of this model is that judicial intervention can be a leverage for treatment and rehabilitation, through which drug dependence is seen as a health issue.<sup>674</sup>

Critics of this model have argued that drug courts often fail to acknowledge relapse as a normal part of an effort to stop using drugs, such that those who “fail” in completing court-supervised treatment may be sent back to court with a guilty plea already on their record that can result in a harsher sentence than if they had never been in the drug court.<sup>675</sup> Drug courts have also been criticized for requiring court-supervised treatment for people who are not drug-dependent.<sup>676</sup> Ultimately, court-supervised treatment takes the form of punishment rather than therapy.<sup>677</sup>

Some public health and safety laws specifically target pregnant women. In Norway, the Municipal Health and Care Services Act 10-3 allows for the detention of pregnant women who are drug users if voluntary drug treatment measures are deemed insufficient. While the treatment might be called “voluntary,” many women experience the treatment as coerced because if they do not agree they will be involuntarily detained.<sup>678</sup>

## CHALLENGE TO WISCONSIN'S “UNBORN CHILD ABUSE” LAW

Five US states have civil child protection or public health and safety laws in place that specifically allow the state to detain pregnant women.<sup>679</sup> The Wisconsin Law, Act 292, allows the court to claim “jurisdiction over an unborn child” if a pregnant woman “lacks self-control in the use of alcohol beverages or controlled substances.”<sup>680</sup>

After a visit to the USA in 2016, the UN Working Group on Arbitrary Detention commented on these civil laws, finding, “[t]his form of deprivation of liberty is obviously gendered and discriminatory in its reach and application as pregnancy – combined with the presumption of drug or substance abuse – is the determining factor for involuntary treatment.”<sup>681</sup>

In August 2014, Tamara Loertscher went to the Eau Claire Mayo Clinic Hospital in Taylor County, Wisconsin to receive medical care.<sup>682</sup> At the request of Mayo Clinic personnel, Tamara Loertscher provided a urine sample.

No one at the hospital informed Tamara Loertscher that her urine would be tested for drugs or provided to state agencies, but an “unconfirmed positive” drug screen was reported to child welfare authorities and she was ordered to attend inpatient drug treatment.

Tamara Loertscher was told she could not leave the hospital because of the law. The lawyer appointed to represent the interests of her fetus held her in contempt of court. She was incarcerated for 18 days. During that time, she did not receive prenatal care. When she refused a pregnancy test, jail personnel put her in solitary confinement.

In April 2017, a federal court in Wisconsin struck down this law.<sup>683</sup> The court concluded that the law is vague in violation of the US Constitution’s guarantee of due process of law, explaining it “affords neither fair warning as to the conduct it prohibits nor reasonably precise standard for its enforcement.”<sup>684</sup> However, the issue is not settled as the state has appealed the ruling. A group of leading medical and international human rights groups, including Amnesty International, filed briefs opposing the law.<sup>685</sup>

Lynn Paltrow, Executive Director of National Advocates for Pregnant Women stated:

***“The Wisconsin law takes away from a pregnant woman virtually every right associated with constitutional personhood, from the most basic right to physical liberty to the right to refuse bad medical advice... this kind of dangerous, authoritarian state-action, is exactly what happens when laws give police officers and other state actors the authority to treat fertilized eggs, embryos, and fetuses as if they are already completely separate from the pregnant woman.”***<sup>686</sup>

## **PENALIZATION AND PRESUMED CRIMINALITY**

Punitive legislation is used to target particular individuals based on discrimination and stereotyping. Criminal prosecutions of pregnant women in the USA began to increase sharply in the late 1980s, following debates on abortion rights, repressive drug control policies in the so-called “war on drugs” and a political turn towards stigmatizing urban poverty.

At that time, media was focused on crime in the cities and the perceived “epidemic” of crack cocaine use, perpetuating stigmatizing images of African-Americans. While African-Americans use illegal drugs at approximately the same rate as whites, they are 10 times more likely to go to prison for drug offenses.<sup>687</sup>

Media portrayals of babies born harmed by their mothers’ cocaine use during pregnancy spread quickly despite a lack of scientific evidence of the purported harm. These reports reflected and perpetuated the stigmatization of women, and blamed women, rather than encouraging the state to take responsibility for failures in the health care system, including lack of access to health care and discrimination in health care settings, particularly for women of colour and low-income women.<sup>688</sup>

Despite the lack of evidence, sensationalized media accounts alleging women’s callous disregard for the health of their pregnancies caught on in the public imagination and drove early “fetal protection” efforts. The assumption of substance use as an indicator of maternal unfitness has persisted, causing continued stigmatization and overbroad criminal law endeavours.<sup>689</sup>

Prescription opiate painkiller abuse has led to concern over reducing the costs of caring for newborns experiencing opiate withdrawal.<sup>690</sup> While the symptoms of withdrawal, known as Neonatal Abstinence Syndrome (NAS) are expected, treatable, and medical evidence has shown they do not lead to long-term complications,<sup>691</sup> policy makers have been slow to take up an evidence-based response. In all of these cases, the most marginalized communities, including poor women, rural women and women of colour, have been targeted and blamed disproportionately.

A study by National Advocates for Pregnant Women identified 413 arrests, detentions and forced interventions against pregnant women between 1973 and 2005.<sup>692</sup> The vast majority of the women were economically disadvantaged, with 71% qualifying for indigent defence. Of the 368 women for whom information on race was available, 59% were women of colour, including African-Americans, Hispanic American/Latinas, Native Americans and Asian/Pacific Islanders. Comprising 52% of the cases, African-American women were particularly overrepresented.

For more information on women presumed to be criminals as a result of experiencing miscarriage, see the annex on abortion, and for more on penalization of pregnant girls, see the annex on adolescent sexuality.

## HUMAN RIGHTS PROTECTIONS

Laws that criminalize pregnant women can violate a range of human rights including the rights to the highest attainable standard of health, privacy, freedom from discrimination and equal protection before the law as well as fair trial rights. Promoting women's health during pregnancy is a legitimate aim, but using criminal laws to promote public health goals is the wrong approach as it promotes fear and does not encourage healthy pregnancies or expand access to health care and other social services. In fact, every major medical organization in the USA opposes these prosecutions as they undermine maternal health.<sup>693</sup> Instead, punitive approaches deter women from seeking health care services, have a discriminatory impact on marginalized individuals and effectively criminalize pregnancy for certain classes of women, violating their human rights.

The Special Rapporteur on the right to health has stated that criminalization of various forms of conduct during pregnancy such as drug use impedes access to health care goods and services, infringing pregnant women's right to health. The threat of criminal laws around pregnancy create barriers to seeking care while eroding trust in health care providers. The Special Rapporteur has explicitly called for states to suspend the application of "existing criminal laws to various forms of conduct during pregnancy."<sup>694</sup>

Laws criminalizing pregnant women are often enforced in a health care context that does not respect the right to privacy. In the US, some health care providers test pregnant women for drugs without their consent and then share the results of the tests with child welfare and/or law enforcement authorities in some cases due to mandatory reporting requirements.<sup>695</sup> Privacy and specifically medical confidentiality are key components of the right to health. The CESCR Committee has confirmed that: "All health facilities, goods and services must be... designed to respect confidentiality."<sup>696</sup>

Beyond privacy rights-related concerns, mandatory reporting requirements can also impose a "dual loyalty" or "simultaneous obligation to a patient and a third party"<sup>697</sup> (including law enforcement and/or social service providers) on health care providers. "Dual loyalty poses particular challenges for health professionals throughout the world as the subordination of the patient's interests to state or other purposes risks violating the patient's human rights."<sup>698</sup> While doctors owe "complete loyalty" to patients according to the World Medical Association's International Code of Medical Ethics,<sup>699</sup> in practice, additional obligations are imposed on medical providers by family members, employers, insurance companies and state governments, which often conflict with their loyalty to patients.<sup>700</sup> Health care professionals often lack clear guidance on how to evaluate situations where dual loyalty may violate a person's human rights and how to implement appropriate responses that respect human rights.<sup>701</sup>

The CEDAW Committee confirmed stated that "While lack of respect for the confidentiality of patients will affect both men and women, it may deter women from seeking advice and treatment and thereby adversely affect their health and wellbeing."<sup>702</sup> This is particularly true for marginalized and under-served groups who already face barriers to necessary services and treatment. The UN Working Group on Discrimination against Women has stressed the importance of the rights to informed consent and confidentiality in ensuring that women can make decisions freely and autonomously as competent individuals.<sup>703</sup>

Similarly, the UN Special Rapporteur on the right to health found that “a lack of confidentiality may deter individuals from seeking advice and treatment, thereby jeopardizing their health and well-being. Thus states are obliged to take effective measures to ensure medical confidentiality and privacy.”<sup>704</sup>

Laws that criminalize women’s actions during pregnancy are directly discriminatory in that they apply only to women, girls and those with the capacity to become pregnant. Therefore, these laws amount to prohibited discrimination on the basis of sex. International human rights law recognises that women should not be discriminated against or subject to unique criminal penalties because of their reproductive capabilities.<sup>705</sup> The CEDAW Committee has specifically stated that “criminalizing forms of behaviour that can be performed only by women,” thereby discriminate against women.<sup>706</sup>

The HRC has also noted that the ICCPR’s prohibition of discrimination should be understood to encompass both discriminatory purposes and effects.<sup>707</sup> States have an obligation to refrain from passing laws that are discriminatory and where their impact could be discriminatory with regard to certain groups or categories of individuals, even when there is no discriminatory intention.<sup>708</sup> Pregnancy criminalization laws tend to be disproportionately enforced against low-income women and women of colour - people who are often already facing intersectional discrimination and who may already be involved in the criminal justice or child welfare system.

The right to equality and non-discrimination requires states to do more than refrain from discriminatory acts: where necessary, states must also devote “greater resources to traditionally neglected groups” and put in place measures that allow marginalized groups to access their rights and entitlements equally.<sup>709</sup> This right also requires states to invest in addressing discriminatory attitudes, stereotypes and behaviours amongst populations as a way to address structural discrimination.

The Special Rapporteur on extreme poverty and human rights has observed that the “highly punitive regimes directed against pregnant women” in the USA are a confused and counter-productive policy response,<sup>710</sup> especially given that these policies have a disproportionate impact on families living in poverty.

States have an obligation to promote the health and well-being of pregnant women through adequate maternal health care, goods and services.<sup>711</sup> Pregnant women who are dependent on drugs need support and access to health care including evidence-based drug treatment services, which currently remain largely inaccessible to many.

UN agencies have recommended that states review and repeal laws that result in negative public health outcomes and have specifically referenced laws that criminalize drug use in this context.<sup>712</sup> States should also ensure access to affordable, scientific evidence-based, gender-responsive drug dependence treatment and sexual and reproductive health care services without discrimination. Policy-makers should issue guidelines on drug testing practices to ensure pregnant women are not tested without their knowledge or consent and their autonomy and privacy are respected.

## LEARN MORE

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## NOTES

### ANNEX 7

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# BODY POLITICS

## A PRIMER ON CRIMINALIZATION OF SEXUALITY AND REPRODUCTION

The criminalization of sexuality and reproduction is a major barrier to the realization of human rights and denies millions of their human dignity. Around the world governments are using criminal or other punitive laws and policies to limit or control who people can have sex with and why; how people access sexual and reproductive health information and services; and the decisions people make regarding pregnancy and whether and when to become pregnant. Same-sex sexual activity, abortion, adolescent sexuality, HIV exposure, non-disclosure and transmission, conduct during pregnancy, sex work and sex outside marriage, are just some of the sexual and reproductive actions, decisions or gender expressions that are criminalized in violation of a wide range of human rights. This primer aims to motivate and empower Amnesty International's global movement to challenge criminalization of sexuality and reproduction in local, national, regional and international contexts. It is one component of Amnesty International's *Body Politics: Criminalization of sexuality and reproduction* series and should be read in conjunction with the other components: *The Body Politics Toolkit* (Index: POL 40/7764/2018) which provides guidance for activists on planning a strategic campaign to challenge states' unjust criminalization of sexuality and reproduction, and *The Body Politics Training Manual* (Index: POL 40/7771/2018) which provides a flexible module for engaging audiences in training activities.

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