



Primer on

FLAWS IN LAWS

Challenging Criminalization of Young
People's Bodily Autonomy (South Asia)



crea

CREA, New Delhi
2023

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<https://creaworld.org/challenging-crim-knowledge-resources/>



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Acknowledgments

CREA would like to recognize the contributions made by our #FlawsInLaws partners, with whom we collaborated to develop these ideas and this analysis. These partners include Aahung, Pakistan; ARROW, Asia-Pacific; Bandhu Welfare Society, Bangladesh; Hidden Pockets, India; the YP Foundation, India; YUWA, Nepal; Youth Advocacy Network of Sri Lanka and Accountability International and RESURJ, our global partners. We are excited about the upcoming stage of this journey in continued partnership.

We thank Alternative Justice for enriching our knowledge of non-punitive approaches to addressing harm and providing ideas for the section on alternatives. We would also like to thank our external reviewers, Srilatha Batliwala, Senior Advisor, Knowledge Building, CREA; Alice M. Miller, Co-Director, Global Health Justice Partnership of the Yale Law and Public Health Schools; and Marisa Viana, co-coordinator of Vecinas Feministas for their thoughtful and engaged comments. In addition, we would like to extend our gratitude to Gitanjali Joshua, who served as our copy editor.

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Contents

3	Abbreviations
4	Summary
5 Methodology
6	Questioning Punishment and Protectionism: Re-thinking Justice in Criminal Legal Systems
6 Introduction
10 Words Matter: A quick explainer for key terms
13	Unpacking 'Criminalization'
18	Criminalization of Bodily Autonomy
20	Challenging Criminalization of Young People's Bodily Autonomy
24	Protectionist Laws, Policies, and Practices Undermine the Rights of Young People
27	Young People as Rights Bearers: 'Evolving Capacity' in the Child Rights Convention
29	Accountability, not Punishment
32 Restorative Practices
35 Transformative Justice
36 Implementing Alternatives: Concerns and challenges
37	Moving from Theory to Practice: What Would Challenging Criminalization Look Like?
39	Concluding Reflections
41	Endnotes

Abbreviations

ARROW	Asian Pacific Resource and Research Centre for Women
CCI	Child Care Institution
CCTV	Closed-Circuit Television
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women, 1979
CEFMU	Child, Early, and Forced Marriages and Unions
CRC	Convention on the Rights of the Child, 1989
CRPD	Convention on the Rights of Persons with Disabilities, 2006
CSE	Comprehensive Sexuality Education
CSJ	Counsel to Secure Justice
CSO	Civil Society Organization
FAYA	Feminist Adolescent and Youth-Led Action
FIRE	Feminist Inquiries Into Rights and Equality
GBV	Gender-Based Violence
HIV/AIDS	Human Immunodeficiency Virus/ Acquired Immunodeficiency Syndrome
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
IPPF	International Planned Parenthood Federation
LGBTIQ persons	Lesbian, Gay, Bisexual, Transgender, Intersex and Queer persons
LSBE	Life Skills-Based Education
NGO	Non-Governmental Organization
POCSO	Protection of Children from Sexual Offences Act, 2012
RJ	Restorative Justice
SAFE	Safe Abortion for Everyone
SOGIESC	Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics
SRHR	Sexual and Reproductive Health and Rights
TJ	Transformative Justice
UK	United Kingdom
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
USA	United States of America
WHO	World Health Organization
YANSL	Youth Advocacy Network Sri Lanka

Summary

Young people are rights-holders who are capable of making autonomous decisions about their health, sexuality, reproduction and gender in line with their evolving capacities.ⁱ While protectionist approaches often negate the autonomy of those to be 'protected', an approach to protect rights is based on the premise that protection, education and autonomy mutually reinforce each other. **We maintain that protection is necessary to develop autonomy and autonomy is necessary to ensure that protection enhances rights, rather than limiting them.**ⁱⁱ In other words, it is important to protect young people who are vulnerable to harm and rights violations (especially in contexts where they may not be aware of the risks they face). However, this protection, whether by the state or by family, can take different forms, some of which may affirm rights and some of which may constrain or contravene rights.

Situated within the socio-cultural, economic and political realities of South Asia, the Primer focuses on **how protection of rights is transformed into 'protectionism' — a set of ideologically driven punitive practices that ultimately undermine the rights of young people, especially in terms of their sexuality, gender and identity.** In its corresponding Sourcebook, we build upon the work of many feminist groups, child rights' groups, alternative justice practitioners, and critical feminist and legal scholars in order to challenge existing forms of criminalization and to explore non-punitive means of addressing gender-based harms.ⁱⁱⁱ

This Primer lays down the foundational concepts and assertions crucial to unpacking criminalization and understanding the impact of criminalization of bodily autonomy of young people in South Asia through a feminist lens. For an in-depth comprehensive guide to this theme with country-specific examples, we recommend the *Sourcebook on Flaws in Laws: Challenging Criminalization of Young People's Bodily Autonomy.*

Methodology

The Primer and corresponding Sourcebook were inspired by the 2019 Flaws in Laws campaign conducted by CREA and our seven partners^{iv}. The publications have been prepared based on an extensive desk review of legal policies, legal judgments and news articles from five South Asian countries, as well as academic scholarship and feminist documentation on relevant themes.

We have expanded on the discussions among Flaws in Laws partners during the 2019 social media campaign and subsequent virtual learning sessions. We have incorporated inputs from Flaws in Laws partners from four countries (India, Pakistan, Sri Lanka and Nepal) and comprehensive feedback from three peer reviewers.

While this is not a comprehensive overview of the subject, we hope this Primer and its companion Sourcebook will prompt activists, civil society, and feminist, women's rights and child rights movement actors to critically engage not just with formal and non-formal systems but also within our own movements and collectives. And through this critical engagement, we hope to nurture efforts to question and de-center punitive practices, center alternative visions of justice, and strengthen the focus on approaches to achieve rights recognition, protection of rights and advance well-being.

Questioning Punishment and Protectionism: Re-Thinking Justice in Criminal Legal Systems

“The right to the autonomy of our bodies means that we have the power and agency to make choices, without fear of violence or having someone else decide for us. It means being able to decide whether, when or with whom to have sex. It means making your own decisions about when or whether you want to become pregnant. It means the freedom to go to a doctor whenever you need one....Where there are gender-discriminatory social norms, [young people’s] bodies can be subject to choices made not by them, but by others, from intimate partners to legislatures. When control rests elsewhere, autonomy remains perpetually out of reach.”^v

(United Nations Population Fund, My Body Is My Own: Claiming the Right to Autonomy and Self-Determination, State of World Population 2021)

Introduction

Over the last several years, the understanding and recognition of the right to bodily autonomy has advanced. So too have legal and policy efforts attempting to complement these rights. As a result, engagement with the state, especially by women’s rights, child rights and feminist movements, has pushed the state to legislate on aspects of bodily autonomy including sexuality and gender expression. Historically, feminist movements in South Asia have played a crucial role in challenging and shaping

the language of the law and expanding the rights recognized and addressed within the law. The major changes in the way criminal legal systems in the region address gender-based violence is a result of the feminist movements’ demands, engagement and mobilization.^{vi} Feminist movements in South Asia continue to advocate for greater recognition of and attention to gender-based violations. This includes challenging discrimination in family settings, decrying domestic violence and dowry-based harassment,



seeking broader understandings of sexual violence, heightened prosecution, enhanced sentences and critiquing reliance on sexist stereotypes by the police, prosecution and judiciary as well as by religious, community, political, and other social actors and institutions. They demand legal recognition of the pervasive discrimination and gender-based harms at the family and community levels, by state and non-state actors, and by individuals and institutions.

In the process, the state—as it is required to do as a matter of international human rights and most national constitutional law—has stepped up to validate and fulfill these rights against violence and discrimination. Yet the actions taken often come into practice as forms of ‘protection’. As a result of existing gender, class, caste, disability, age, religion, ethnicity and stereotypes, state action

responding to calls to end violence often lay bare a paternalistic and punitive state. This reality often places rights at risk of violation, and further enforces gender and other stereotypes.

In the contexts of South Asia, young people are still subject to old and new laws which operate as ‘protectionist’ treatment, as though they are incapable of making decisions about their own bodies, or exercising their rights, as though they are not rights holders^{vii}. Too often, young people are viewed as defined by their sexual vulnerability, in need of control, protection or of surveillance, all of which are easily transformed into punitive laws, policies and practices.

Underlying these practices of social control are pervasive ideas of shame and stigma. E.g.: Cultural and social norms and taboos on sexuality paint menstruating

persons as dirty, impure, vulnerable to pollution, and in need of isolation and segregation.^{viii} These pervasive cultural linkages between shame, stigma, purity, honor and penalization affect how young people think and feel about their sexuality growing up. Protectionist laws, policies, practices and attitudes have been enforced which, that deny young people a safe and enabling environment to explore their gender expression and sexuality. Instead, they are subject to an environment of surveillance, policing, stigma, threats and actual violence for violating social and familial norms.

Lanka), The YP Foundation (India) and YUWA (Nepal), delved deeper into the ideas and practices of criminalization. This enabled us to better understand the impacts of criminalization on young people's sexuality and their access to human rights. The campaign titled [#FlawsInLaws: Rethink my freedoms, Reimagine my rights, Realize my future](#) called attention to the negative impact of protectionist approaches, laws and policies on young people's sexuality. It also explored shifts in their ongoing work in order to better incorporate this understanding.

“Sexual conduct and reproductive conduct are in themselves deemed harm for the young, so that sexual and reproductive health information rights are “harm reduction rights” — not enabling rights. Modern rights regimes seek to both empower girls and young women (and, to a lesser extent, boys, and young men) vis-à-vis their sexual and reproductive lives and at the same time remove them from exposure to sexual conduct and reproduction.”^{ix}

(Alice M. Miller with Tara Zivkovic, Seismic Shifts: How Prosecution Became the Go-To Tool to Vindicate Rights, Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law)

In 2019, CREA in partnership with Aahung (Pakistan), ARROW (Malaysia), Bandhu (Bangladesh), Hidden Pockets Collective (India), Youth Advocacy Network (Sri

even, in many cases, open discussion. Based on this, we decided to examine the theory and concepts underlying the campaign more deeply. Our partners

Following the campaign, we received feedback from several individuals and organizations who work both on challenging criminalization and on young people's rights. They shared that there was a need for attention to how restrictions on and protectionist approaches to young people's bodily autonomy leads to them being penalized for any non-normative sexual activity, exploration or

in South Asia also expressed interest in a tool that could expand their ability to draw links between young people's empowerment, and with a sharper focus on the impact of criminalization of bodily autonomy, in all its forms.

The Primer and the Sourcebook are a result of the learnings from the campaign, discussions and consultations with CREA, Aahung (Pakistan), Bandhu (Bangladesh), Hidden Pockets Collective (India), Youth Advocacy Network (YANSL, Sri Lanka), The YP Foundation (India) and YUWA (Nepal).

In the *Sourcebook on 'Flaws in Laws: Challenging Criminalization of Young People's Bodily Autonomy'* ([accessible here](#)), we expand the scope of those conversations. We dissect the patterns and practices of criminalization, especially as they pertain to young people's bodily autonomy. Situated within the socio-cultural, economic and political realities of South Asia, the Sourcebook focuses on how the protection of rights is transformed into 'protectionism' — a set of ideologically driven punitive practices that ultimately undermine the rights of young people, especially in terms of their sexuality, gender and identity. In the Sourcebook, we build upon the work of many feminist groups, child rights groups, alternative justice practitioners, and critical feminist

and legal scholars to challenge existing forms of criminalization and to explore non-punitive means of addressing gender-based harms^x.

This Primer on Flaws in Laws lays down the foundational concepts and assertions crucial to unpacking criminalization and understanding the impact of criminalization on the bodily autonomy of young people in South Asia through a feminist lens. For an in-depth, comprehensive guide to this theme with country-specific examples, we recommend the *Sourcebook on 'Flaws in Laws: Challenging Criminalization of Young People's Bodily Autonomy'*.

Through this Primer and its complementary Sourcebook, we invite activists, civil society and feminist, women's rights and child rights movement actors to join us in critically interrogating the impact of criminal legal systems on young people's bodily autonomy. Together we aim to envision rights-affirming and non-punitive practices to achieve the recognition and protection of rights, advance the well-being of young people and reimagine justice. It is by no means an exhaustive resource, and we look forward to feedback, questions and debates that will enrich this growing body of work.

Words Matter: A quick explainer for key terms

Young people: We use the phrase *'young people'* instead of *'adolescents'* for two reasons: first, we understand young people as encompassing more than *'adolescents'* and recognize that young people are not a homogenous group. Second, some of our partners work in politically and legally sensitive contexts where advocating for the sexual and reproductive health and rights (SRHR) of adolescents (those under 18 years old) is criminalized. *'Young people'* has no universal definition: as a category, it has been defined differently from a range of perspectives including legal rights, public health, protection from violence, protection from exploitation in labor and criminal culpability. It is important in this context to consider a broad framing of young people as encompassing but not limited to those under the age of 18. This enables us to highlight our concerns with the criminalization of young people's bodily autonomy, especially their sexuality, gender expression and gender identity as these are so often the targets of punitive laws, policies and practices.

Criminal legal system: We use the term *'criminal legal system'* instead of the *'criminal justice system'* because we believe that the *structure, substance, culture and enforcement* of criminal laws, criminal codes, their systems of administration and institutions for implementation are not designed with a broad holistic or intersectional understanding of justice. Justice — encompassing gender, racial, social, economic, climate, reproductive or disability axes, among others — is neither defined by nor contained within the law. This is especially true within criminal law which itself often perpetuates gender-, class-, caste-, religion- and ethnicity-based harms through unfair prosecutions, excessive punishments, or other abuses of policing, and through courts and prisons. While the legal system itself is an important avenue for rights recognition, our idea of *'justice'* considers socio-cultural, political and economic changes. *'Justice'* may actually challenge or radically depart from traditional norms — for example, the criminalization of caste discrimination in India was a radical advance towards social justice, from an embedded culture of such discrimination. These strides may take different shapes that are deeply situated within contexts and communities.

Protectionism: Throughout the Flaws in Laws Primer and Sourcebook, we distinguish between approaches that are '*protectionist*' and those that protect rights'. Rights-based approaches are anchored in the assumption that the discrimination and harms faced by structurally excluded persons and groups are systemic and, in most cases, systematic. Thus, any attempt to protect the rights of structurally excluded people must include addressing and transforming unequal power relations and hierarchies. This latter approach protects and expands access to exercise the rights of persons and groups, recognizes them as rights bearers and aims to enhance their autonomy. On the other hand, what we are calling *protectionist* approaches are often used in the service of maintaining and reinforcing existing gender and other intersectional power asymmetries. They are based on paternalistic assumptions about capacity and ability, especially in terms of protecting those defined as 'weak' or 'vulnerable' (including those who are disabled) as if these qualities are inherent to these individuals. They are also often acts of state overreach limiting such realms of action as access to information, movement, speech, association and choice of friends or sexual partners in the name of 'safety'.

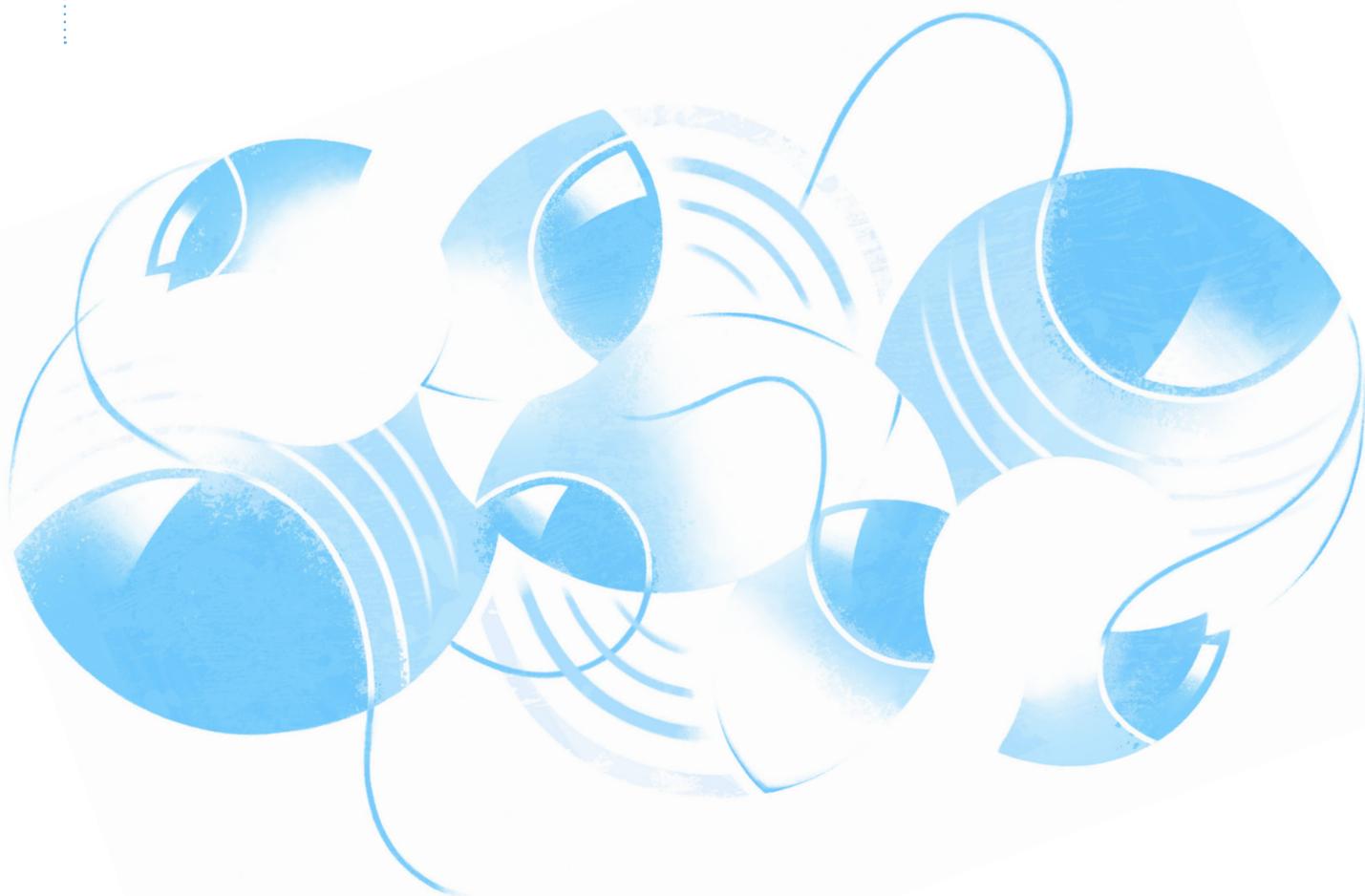
Rather than transforming "the interconnected power structures that produce and sustain unequal health outcomes and foster inequities over time";^{xi} protectionist approaches are often based on deeply rooted discriminatory social and cultural norms. For instance, the taboo against pre-marital relationships arises from the primacy of guarding the sexual and caste purity of women and negating doubts of promiscuity. These approaches are designed to reinforce rather than contest existing hierarchies and sustain power and privilege in the hands of those already holding it. We expand this understanding beyond health outcomes alone, to look more broadly at bodily autonomy, sexuality, and gender expression and identity. We contend that 'protectionist' approaches often lead to over-policing and under-protection.

Gender-based harms: We have tried to distinguish '*gender-based violence*' from '*gender-based harms*'. Gender-based harms include gender-based violence, but not all harms amount to gender-based violence. Gender-based harms can include gender-based discrimination, gender stereotyping, violations of the right to privacy, dignity, equality, bodily integrity and autonomy (and many more) on the basis of gender, which may or may not constitute violence. Gender-based harms can also include the causes and impacts of gender-based violence, such as gendered barriers to education, healthcare, livelihood and social security as well as adverse effects on mental health and well-being, violations of SRHR, stigma and social isolation, to name a few. While there is international consensus on use of the criminal legal system to punish gender-based violence, gender-based harms are a broad category that are not clearly defined or demarcated. They can often be addressed through administrative policies, civil laws, education, support services etc.

While we acknowledge that the distinction between harm and violence is often nebulous and that they occupy the same spectrum, it is important to reflect upon how we choose to designate certain acts and behaviors, usually in relation to how we wish to address them at a structural level. As a clarification, we are not creating a hierarchy of harms and violence, neither are we discouraging responses to gender-based harms.



Unpacking ‘Criminalization’



In this section, we discuss the structure of criminal law and articulate our understanding of what criminalization means, is and does. We demonstrate the myriad ways in which criminalization operates in the service of power asymmetry, discrimination and inequality. We use illustrative examples of laws, policies and practices in South Asia to do this. While investigating how both civil and criminal laws lead to direct and indirect human rights breaches, we ask: *“What does it mean to engage with criminal legal systems when those systems happen to be both the validator and the violator of rights?”*^{xii}

The framework of the law consists of three essential components — its **substance, structure and culture**.^{xiii} The **substance** is the written law, i.e., the Acts, Code, Rules and Regulations that together constitute it. The **structure** of the law includes those bodies charged with drafting, formulating and implementing the substance, i.e., the lawyers, judges, police, prosecutors, legislators etc. Finally, the **culture** includes the socio-political and economic realities within which the substance and the structure exist. These three components are interconnected and influence each other.^{xiv} Adding to these, we also look at **enforcement**, which

refers to how laws are implemented by those officially entrusted with legal duties as well as non-state actors and institutions such as families, communities, schools and medical establishments, to name a few. The **structure** and **culture** of the law determine whether **enforcement** is in line with the law's purpose and **substance**.

For example, punishing the exploration of sexuality by young people stems from a cultural norm that sexual expression outside the institution of marriage by young people, especially young women and girls, is bad. This view underlies the mind-sets and attitudes of lawmakers and implementers (who are products of that very society and can include everyone from the police to family members). These norms thus get formalized as written law and practiced in its implementation.

Criminal law constructs categories of **the criminal, criminal acts, or criminality**^{xv}.

To do so, it draws on socio-cultural understandings of what is considered 'normal' and what is not. In doing this, it expresses and reconstitutes power, inclusion and exclusion.^{xvi} Criminal laws formally focus on acts deemed to cause harm and with the intention to cause that harm. Yet, in application, what causes harm, how harm is defined and who or what caused the harm varies widely. Indeed, people experience criminalization intersectionally^{xvii} i.e., through their situated selves, encompassing their social, political, economic and cultural position in multiple, simultaneous and overlapping ways. For instance, while trans persons are often at risk of violence and discrimination, Dalit trans persons face compounded structural violence and

Amnesty International defines presumed criminality as “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.”¹

(Amnesty International, Body Politics: A Primer on Criminalization of Sexuality and Reproduction)

exclusion because of their caste and gender together. Similarly, where abortion services are criminalized and/or stigmatized, access to abortion services for young people, especially those with disabilities, have additional layers of complications with more severe barriers to access.

Criminalization is a key concept: it is more than the mere criminal prosecution of, for an action that they allegedly took. The socio-political process of criminalization occurs through a combination of laws (especially those associated with bodily autonomy) and socio-cultural practices and attitudes. All of these can render a person perpetually a criminal or morally suspect. This is not limited to the **substance** or **structure** of criminal law and the criminal legal system. It includes its **cultural resonance** i.e., socio-cultural expressions of stigmatization, ostracism and discrimination against certain behaviors, practices, professions, identities and sexualities that are not explicitly contained within the law but are very much a part of the wider social context. This **cultural resonance** is intrinsically connected with the **enforcement** of the law and the institutions that administer it.

While criminal law creates binary categories of ‘perpetrator/criminal’ and ‘victim/survivor’, criminalization works to dissociate individuals from their social, political and cultural context. The law also has an “expressive” function in symbolic statements designed to change social norms.^{xviii} People may support a law not because of its effects on norms, but because they believe that it is intrinsically valuable for the relevant

‘statement’ to be made.^{xix} A common example of the ‘expressive’ function in law is the widespread belief that capital punishment should be imposed for the most ‘immoral’, ‘brutal’, ‘heinous’ offenses that shock the *collective conscience of society*^{xx} (all terms loaded with moral, political and often patriarchal connotations), irrespective of evidence citing that capital punishment does not deter crime.^{xxi}

Even when certain laws are not enforced, through the law’s expressive function,^{xxii} criminalization feeds the popular imagination of what constitutes **criminality** and how criminals must be treated. It shapes our relationships with people, how we think of society, and how we interact with state and non-state institutions. Even when under-enforced, laws become an instrument of surveillance, control and discrimination through societal practices and attitudes.

¹ *Amnesty International. (2018). Body Politics: A Primer on Criminalization of Sexuality and Reproduction. Pp. 10, 54, 82, 98, 118, 139, 156, 186, 210. <https://www.amnesty.org/en/documents/pol40/7763/2018/en/>*

According to Amnesty International, there are three forms of criminalization of sexual and reproductive concerns: ^{xxiii}

Direct criminalization: “Passing and/or implementing criminal laws that specifically target and punish sexual and/or reproductive actions, decisions or gender expression.” E.g., the criminalization of behavior for ideological reasons where an attempt is made to ‘protect’ society at large from becoming ‘immoral’. For instance, same-sex sexuality (regardless of consent) is criminalized in Sri Lanka, Bangladesh and Pakistan under the guise of maintaining family values and preventing sexual perversion and ‘unnatural acts’.

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.” This includes, for example, the criminalization of begging and anti-vagrancy laws that disproportionately target sex workers and trans and gender non-conforming persons. In Sri Lanka, while the law itself does not criminalize being trans, the police often use impersonation laws to persecute trans people.^{xxiv} Section 399 of the Sri Lankan Penal Code, i.e., the offense of “cheating by personation” has been used to target and arrest trans persons, based on assumptions such as their being ‘effeminate’ men or ‘masculine’ women and impersonating the opposite gender, in effect, criminalizing their gender expression.^{xxv}

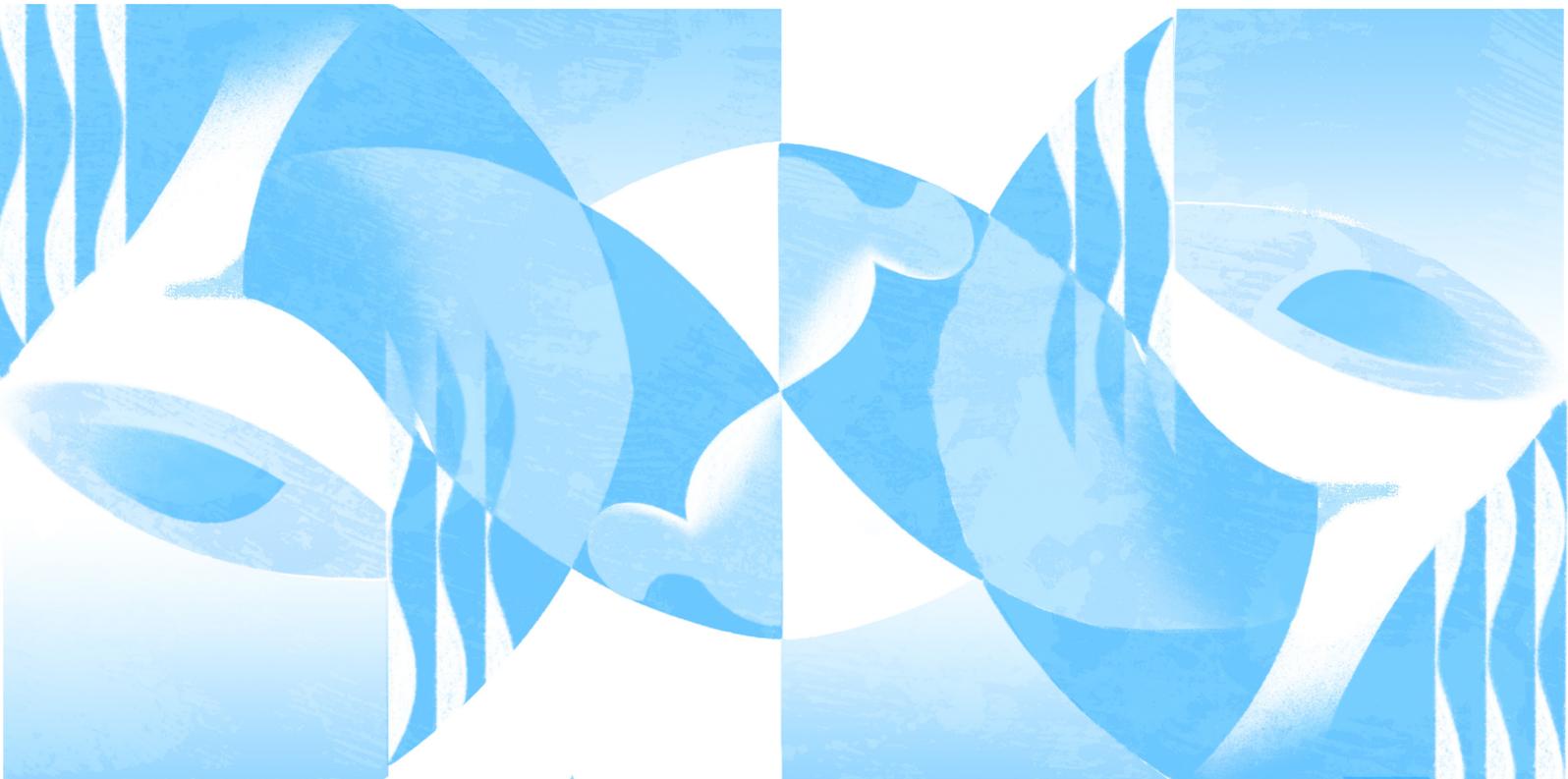
Penalization “refers to laws, policies and administrative rules that have the same intent or effect as criminal laws in punishing, controlling and regulating people based on their proscribed sexual and/or reproductive actions, decisions or gender expression.”^{xxvi} School dress codes based on the gender binary and gender roles that do not allow for any other form of gender expression, and that punish those who are genderqueer, gender non-conforming or non-binary can fall under this form of criminalization. Immigration or border-crossing laws that refuse entry or support deportation of people based on sexuality, health status or other features can also be examples of non-criminal penalization. Stigma and discrimination impede those wishing to cross borders from disclosing their sexual orientations and gender identities, which makes it especially hard to claim asylum if the persecution against them was based on their sexual orientations and gender identities in the first place.^{xxvii}

The forms of criminalization illustrated on the previous page have an adverse impact on the rights and freedoms of young people, who are perceived as not responsible or mature enough to make autonomous decisions about their sexuality and gender expression.

For instance, in India, the Transgender Persons (Protection of Rights) Act, 2019 denies the right to self-determination by mandating institutional and medical certification of one's gender.^{xxviii} This requirement of legal sanction for legitimizing one's gender identity and expression is a form of penalization. Additionally, if a person is below 18 years of age, they can only make an application for an identity certificate as a trans person through their parent/guardian. Due to stigma, social shame and the presumption that young people cannot make important decisions about their personhood, families are highly unlikely to accept the young person's affirmation of their gender, let alone support them through the process of obtaining legal recognition.



Criminalization of Bodily Autonomy



In this section, we explore what bodily autonomy encompasses and highlight the impact of the criminalization of bodily autonomy using examples in the context of South Asia.

The United Nations Population Fund (UNFPA) defines bodily autonomy as the “power and agency to make choices about your body without fear of violence or having someone else decide for you”.^{xxix} In other words, bodily autonomy is the right that entitles one to be recognized as a person capable of and authorized to exercise choice and control over their body.^{xxx} It is grounded in the right to exercise free and fully informed choices.^{xxxi}

This imposition of inflexible and binary sexual and gender norms (among others) that limit one’s right to make informed decisions results in punishment of those who transgress by expressing different and fluid forms of sexuality, gender identity and expression. These norms (**culture**) are further expressed in laws and policies (**substance**), put into place through various institutional mechanisms (**structure**), and implemented by state and non-state actors and institutions (**enforcement**) — all of which amount to criminalization. Young trans, non-binary, and gender non-conforming people, for example, are frequently mistreated by their families, forced out of their homes,

deprived of identity documents, and rendered unable to access resources to obtain gender-affirming identity documentation. Their ability to receive education is hampered by their lack of documentation. Even within educational institutions, they are denied access to sex-segregated activities or locations and experience bullying.^{xxxii} Young people are put in danger when they cannot receive support, education, public services or aid because they are engaged in sexual activities, or because of their transgressive gender and identity expression, or because they are poor or disabled. All of this illustrates the essentially punitive nature of regulations ostensibly designed to protect young people.

Criminalizing bodily autonomy circumscribes access to sexual and reproductive health services^{xxxiii}. Abortion laws are often limited and inconsistent with modern medical practice, especially for young people. Criminal law restricts what people with uteruses may do with their bodies, pushing them into having

unsafe abortions and endangering health care workers who provide such services. Structurally excluded, marginalized and disabled people face greater danger. They may have few options for private healthcare, obtaining abortion services in a different location, or reasonable accommodation in healthcare services.^{xxxiv}

Through laws, policies or practices, criminalization creates an environment that precludes the possibility of fully exercising the right to bodily autonomy as envisaged in international human rights. It seeps from the structure and substance of the criminal legal system from and to its cultural mooring and enforcement. It circumscribes, for instance, safe and consensual sexual conduct, access to health services (e.g. contraception services, hormone therapy, or alternative insemination), accessible, available and diverse information on sexual and reproductive health, or medical procedures (like abortion or gender-affirming procedures).

Challenging Criminalization of Young People's Bodily Autonomy

“(T)he law is especially ferocious in maintaining the boundary between childhood ‘innocence’ and ‘adult’ sexuality. Rather than recognizing the sexuality of the young and attempting to provide for it in a caring and responsible manner, our culture denies and punishes erotic interest and activity by anyone under the local age of consent. The amount of law devoted to protecting young people from premature exposure to sexuality is breath-taking.”^{xxxv}

(Gayle S. Rubin, Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality)

The Convention on the Rights of the Child, 1989 (CRC) sets standards on the recognition of the inherent dignity of a person below the age of 18 and centers them as right holders. The recognition of their ‘evolving capacities’ is an attempt to balance protection from harm with respect for their autonomy and respect for family life.^{xxxvi} We will discuss the framework of ‘evolving capacities’ in the next section.

In this section, we elaborate on two primary forms of control over young people’s bodily autonomy. First, we explore the impact of laws and policies on the age of consent to sex. These draw a hard line on when and how a person is capable of consenting to any form of

activity considered sexual. All too often, such laws and policies fail to provide a safe and enabling environment for young people to explore their sexuality and/or gender expression and identity. Second, we look at laws and policies that limit the scope of comprehensive sexuality education (CSE), also known as life-skills based education (in countries like Pakistan and Bangladesh). Coupled with the societal stigma associated with such exploration, this makes it close to impossible for young people to access evidence-informed and rights-affirming information on sexuality and bodily autonomy. Thus, not only are sexuality and gender diversity considered taboo, in some cases even exploring one’s own sexuality is effectively criminalized.

In South Asia, 'age of consent' regulations, also called 'statutory rape' laws, stigmatize the exploration of one's body, desires, and sexuality.^{xxxvii} These laws determine that sexual activity below a certain set legal age (known as the age of consent) is considered to be rape by the older party and is criminalized, irrespective of consent to the act. These laws severely circumscribe safe spaces for young people to share their experiences, thoughts, curiosities, concerns, anxieties and excitement regarding this integral aspect of their lives. They contribute to isolation and uncertainty that young people face/experience while growing up.^{xxxviii} This is further complicated when the law additionally limits the recognition of the legal capacity of persons with disability: People with disabilities are largely seen as sexless, genderless and inherently victims.^{xxxix} In this way, young people with disabilities are penalized in multiple ways for expressing their sexuality or non-conforming gender.

In India and Nepal, the age of consent is set at 18 years^{xl}. In Bangladesh and Pakistan, the age of consent is 16 years.^{xli} In Sri Lanka, the age of consent is set at 16 years^{xlii}, but there is a provision that allows judicial recognition of consensual sexual activity between peers below the age of 18 years. There is judicial discretion to impose a sentence less

than the mandatory minimum of 10 years when the person accused (usually older, but also in different gender cases, sometimes presumptively the boy/man) is below the age of 18 years and the sexual act was consensual.^{xliii}

It is important to keep in mind that despite extensive policing and social taboos, sexual activity among young people is common. In the Asia-Pacific region, around 1 in 6 girls and 1 in 10 boys aged 15-19 years have had sex, and 18-32% of girls and 5-32% of boys have had sex by the age of 18.^{xliv} Many young people enter early marriages or less formal romantic cohabitation, often between peers of similar ages.^{xlv}

The harms done by the criminalization of young people's sexuality are amplified and reflected in the limits on comprehensive sexuality education and access to SRHR information and services. This is especially so where simply speaking about sex to people below the age of 18 is prohibited. Few places exist where they may ask questions without fear of retribution and learn age-appropriate information about sexuality, relationships, desire, rejection, limits, consent, diversity, gender equality, sex characteristics, reproductive options and more. Such conversations are integral to young people's understanding of the world, their personal development and how they treat others^{xlvi}.

In South Asia, the age at which consent to sex is valid (age of consent) and the age at which you are permitted to marry (age of marriage) are closely related. Most countries either align the age of sexual consent to that of marriage or fail to recognize sexual consent outside of marriage at all (often through penalties for adultery). The predominant discourse often conflates early marriage with child marriage^{xlvii}. A common advocacy demand is the prohibition, non-recognition and criminalization of such marriages.

While acknowledging the impact of age-related power differentials and the range of violations that need to be addressed in early or child marriage, the blunt call to criminalize strips young people of their bodily autonomy and increases barriers to accessing SRHR.^{xlviii} In fact, studies show that raising the age of consent and conflating it with marriage drives some young people to marry earlier, since it becomes the only way for them to engage in safe and 'legal' sexual activity as well as to access SRHR services.^{xlix} Conflating the age of sexual consent and marriage may prompt families to arrange marriages for their children (especially their daughters) in order to 'protect' family honor,

'protect' their children from sexual harassment or pregnancy outside marriage and prevent their children from engaging in any sexual activity outside marriage.¹

In Pakistan^{li}, Bangladesh^{lii}, India^{liii} and Sri Lanka^{liv}, the criminal legal system and/or community actors encourage a 'compromise' where persons accused of rape marry the young woman or girl to escape criminal liability and/or to 'preserve' the honor of the woman or girl.

Campaign partners from across the region discussed the general trajectory of circumstances they face in their work with young people. When young people participate in sexual activity or exercise their freedom to choose who to marry, their families may object for a variety of reasons, ranging from caste and religion to sexual and gender identities, socio-economic status, or simply because the family and/or community wants to exert control over autonomy and decision-making.^{lv} As a result of these impulses, the family may file a series of criminal charges against the male partner including kidnapping, sexual assault and rape. This is also seen in the case of queer and trans couples, where courts have 'restored' custody of adult queer women to their families, against their will^{lvi} and have entertained criminal complaints ranging from kidnapping,

abduction to wrongful confinement against their chosen partners.^{lvii} In the event of an elopement, parents may file a missing person report with the police or contact their child's school and friends.

In these situations, girls and young women are generally sent to a 'shelter home' till they reach the age of majority or are returned to their parents' home. Meanwhile the boys or young men are incarcerated in juvenile detention centers. The overall backdrop is that of surveillance, lack of privacy, control of desires and freedoms, confinement, and separation. Laws, policies, and practices that enforce a protectionist position promote the notion that young people, especially young women, and those with disabilities, lack agency. They need to be controlled, while young men are framed as violators.

Age—emerging over the last two centuries, in part as a product of colonization^{lviii}—has been considered determinative, or a bright line indicator of when a young person can or cannot make autonomous decisions about their gender, sexuality and identity.

Moreover, today *raising* the ages for sex or marriage, is used to measure change and 'success' in efforts to prevent forced marriages. However, organizations working with young people have raised concerns that a singular and undue focus on delaying the age of sexual activity, cohabitation or marriage may draw attention and resources away from addressing the root causes of gender-based harms i.e., entrenched gender-related hierarchies, rigid and heteronormative gender roles, and inequitable and discriminatory social norms^{lix}. There is no evidence to indicate that young people have greater autonomy because they attain a certain age (for instance, 18 years).

Simply delaying the age of sexual activity or marriage does not by itself reduce the possibility of gender-based violence, discrimination, limited opportunities for education and livelihood, restricted mobility and limited access to SRHR services and information. On the contrary, evidence suggests that the best protection comes from education, including comprehensive sexuality education and gender non-normative training.^{lx}

Protectionist Laws, Policies, & Practices Undermine the Rights of Young People



Young people are rights-holders who are capable of making autonomous decisions about their health, sexuality, reproduction and gender in line with their evolving capacities. Criminal law, with its direct prosecution and indirect empowering of family surveillance, epitomizes a protectionist approach. Such approaches often negate the autonomy of those to be ‘protected’. An approach to protect rights is based on the premise that protection, education and autonomy mutually reinforce each other.

We maintain that a better understanding of what protection is, and when criminal or other formal protection actually create conditions of safety, is necessary to ensure that protection enhances rights, rather than limiting them.^{lxii}

In other words, it is important to protect young people who are vulnerable to harm and rights violations (especially in contexts in which they may not be aware of the

risks they face). However, this protection can take different forms, some of which may affirm rights and some of which may constrain or contravene rights.

In this section of the Sourcebook, we look at data, cases and experiences of young people from South Asia that substantiate the ways that criminalization undermines rights and freedoms. One example is India's Protection of Children from Sexual Offences Act (POCSO), 2012. POCSO purports to focus on abuse of young people and children under 18 but, in effect, criminalizes all forms of sexual activity and expression by and with young people who are below the age of 18 and introduces a mandatory reporting clause^{lxiii}. This criminalizes non-reporting by any person who has knowledge that a person below the age of 18 has engaged in some form of sexual activity. This has adversely affected young people's ability to access SRHR

services, their access to comprehensive sexuality education and, of course, their right to privacy and autonomy. In the implementation of one of their flagship programs, the Feminist Adolescent and Youth-Led Action (FAYA),^{lxiv} The YP Foundation (TYPF) found that POCSO has been a barrier in ensuring young people have access to comprehensive sexuality education. Trainers in these programs (among others) often face the dilemma of providing a safe space for the participants to explore such issues or abiding by the law which mandates reporting on even the suspicion of an offense. At the same time, and in absolute contradiction of what the law claims to do, in those instances where trainers have approached the police with concerns about instances of harm and rights violations of young people, the police have asked them antagonistic questions and blamed them for the delay in reporting.

Pakistan: Pakistan’s legal landscape is somewhat unique in the region. Pakistan’s constitutional and Sharia laws operate in parallel, i.e., either of the laws can be used as a matter of preference. In practice, this means that the autonomy or consent of the young person, especially young women and girls, is rarely, if ever, considered. If a girl who is below the legal age of marriage wants to marry of her free will, constitutional laws are used by family members and societal actors to stop the marriage. On the other hand, Sharia laws are frequently used to justify forcing young women and girls to marry. As per the parallel Sharia system, the age of marriage begins at puberty. Following this, marriages are often arranged to control the burgeoning sexuality of young people and control over their ‘chastity’ and the ‘honor’ of the family and community, often depriving them of their sexual liberty^{lxvi}.

Nepal: Nepal, in contrast, is often considered to have relatively progressive laws and policies on bodily autonomy. YUWA has been working in Nepal on advocacy for inclusive and comprehensive sexuality education. While the Nepali government has a large-scale comprehensive sexuality education program, the structure and implementation of the program is still deeply rooted in a restrictive and protectionist framework. As a result, its focus on puberty, health, menstruation and safe motherhood is quite limited. YUWA has advocated to broaden the scope of CSE to include rights language and center the autonomy of young people. However, this has met with reluctance from parents and teachers because of the social stigma associated with sexuality.^{lxvii}

India: The Hidden Pockets Collective is working to highlight India’s abortion restrictions for young unmarried women. Abortion providers and clients often still mistakenly believe that abortion is illegal or exclusively for married women.^{lxviii} Service providers’ ethical dilemmas over POCSO’s reporting requirement and their dedication to high-quality care for young people were revealed in interviews published in a 2021 study. Service providers shared that young people often prefer not to have either their parents or the legal system involved.^{lxix} After hearing about mandated reporting, many abortion seekers do not return to those service providers, and some providers, in fact, direct them to other clinics where they may be able to confidentially terminate their pregnancy.^{lxx}

Young People as Rights Bearers: ‘Evolving Capacity’ in the Child Rights Convention

Article 5 of the CRC states that:

“State Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

The enabling principle articulated in Article 5 recognizes that stages of growth and development are not uniform and that young people’s divergent life experiences and circumstances shape their levels of maturity, agency, competencies and ability to handle responsibilities.^{lxxi}

The CRC also states that laws and programs must prioritize young people’s “best interests”.^{lxxii} Further, an adult’s judgment of a young person’s best interests cannot override the obligation to respect all their rights under the Convention.^{lxxiii} Evolving capacities should be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict young people’s autonomy and self-expression.^{lxxiv} One example of respecting young people’s evolving

capacities is the emerging emphasis in international human rights law and some domestic law to require fully informed consent of children with diverse sex characteristics (intersex) and young adults with respect to surgical interventions. This specifically includes those which would seek to assign sex at birth or lead to genital surgeries for modification.^{lxxv}

Bangladesh, Nepal and Pakistan ratified the CRC in 1990. India and Sri Lanka ratified it in 1992. In doing so, all these countries committed themselves to adhere to the Convention, including its foundational principles. Despite this commitment, the rhetoric of ‘protection’ continues to be used to justify laws and policies (and their implementation) that restrict, punish and, in some cases, even prohibit the autonomy of young people.

The best protection for young people's rights is to center autonomy and freedom along with accurate knowledge, information and enabling spaces that support fully informed decision-making, along with access to services. Young people deserve options to explore and enjoy their sexuality, without fear of being publicly shamed, forcibly married, thrown out of school, separated from friends and loved ones, or suffering violence.

Instead of utilizing repressive protectionist policies that limit freedoms and prevent young people from achieving their rights, empowering them is the

most effective and sustainable route to defending their rights.^{lxxvi} Many groups and collectives have created and implemented programs that encourage young people to question, learn and experiment with their sexuality, sexual and gender expression in a non-judgmental, positive and rights-affirming manner. Feminist advocacy includes the collaborative South Asian initiative, Feminist Inquiries into Rights and Equality (FIRE),^{lxxvii} and the CEFMU and Sexuality Working Group and its collaborating organizations^{lxxviii} (among others) continue to challenge protectionist narratives and promote anti-carceral, gender-transformative and holistic approaches to gender-based harms.



Accountability, not Punishment

In this section, we discuss the experiences of young people in the criminal legal system and consider alternatives to advance the recognition, protection and fulfillment of rights. We explore various alternatives such as informal justice systems, preventive measures and diversion practices. We look at restorative justice and transformative practices and note concerns that emerge in implementing them. Finally, we pose a series of questions to spark discussion and thought on the practicalities of implementing these alternatives in the specific contexts of our work with young people in South Asia.

The framework we have laid out of challenging criminalization compels us to acknowledge that criminal legal systems are not always the most suitable or appropriate sites for seeking justice or even recognition of harms. As the International Commission of Jurists notes, “Criminal law is among the harshest of tools at the disposal of the State to exert control over individuals. As such, it ought to be a measure of last resort, where other less restrictive means of achieving legitimate interests are insufficient. However, globally, States have exhibited a growing trend towards more legal intervention and over-criminalization.”

This international criminal law’s principle of *criminal law as the last resort*^{xxix} can be seen as global recognition of the need to limit state interference and control over the private lives of rights-holders.^{lxxx}

In large part, this is because the **substance, structure and enforcement** of criminal laws are so deeply infused with the **sociocultural** norms that foster and support structural exclusion and inequality. This is often on the basis of gender, caste, race, disability, health status, livelihood and other similar axes of privilege and exclusion.

Policies framed around regressive protectionism and punishment cannot address inequality, discrimination and stereotypes that create vulnerability, when in fact they are designed — whether by commission or omission — to reinforce or even reconstitute them.

For instance, the practice of detaining young women and girls in ‘protective custody’ to prevent them from engaging in consensual relationships (but defined as non-consensual in the law) with persons of a different gender, caste, class or religion does little to address interpersonal harm and violence that occurs within relationships, and indeed puts young women’s rights at risk.



Seeking answers about the causes behind the harm and how it is situated structurally, as well as its effects, can produce more meaningful and sustainable interventions. This means investing energy and resources in change and prevention efforts that are shaped by ground realities and can address root causes, structural inequalities and power dynamics that contribute to harm.

This requires a strong counter-narrative that places the framework of the bodily autonomy, privacy and dignity of young people at the forefront of efforts to effect justice.

In consultations for this Primer, partners shared experiences of hostility from law enforcement agents and the deep stigma associated with being a ‘victim’ or ‘survivor’ of gender-based harms, including violence. These consultations revealed that partners

were already less inclined to engage with the police and the criminal legal system to seek any remedy. Rather, the ongoing lack of support from them as well as the known potential for further harm that they might cause to young people meant that the criminal legal system was not seen as an amenable or effective means for seeking remedies — in fact, it is seen as part of the problem. At the same time, in most — if not all — parts of the world, no consistent alternative to the criminal legal system is in place at more than a micro level. Still, throughout South Asia, groups and collectives are exploring a range of alternatives to address interpersonal and societal harms. Below, we review the most prominent of these. We call specific attention to the differences between many ‘traditional’ dispute resolution systems and the newer, more transformative informal systems that activists seek to put in place.

Some existing informal justice/dispute redressal systems may be considered ‘alternatives’ to the formal legal system and, particularly, the criminal legal system. For instance, the Nari Adalats in India^{lxxxix} constitute a women-led dispute redressal system created to address issues of domestic violence for which women were unable to find justice in the formal legal system. Most alternatives, however, are not necessarily affirming of diverse genders, sexualities and bodily autonomy. They include, for example, Gram Nyayalayas in India^{lxxxii}, the Jirga in Pakistan^{lxxxiii}, Shalish in Bangladesh^{lxxxiv} or the Mediation Boards in Sri Lanka.^{lxxxv} In addition to these, there also exist customary courts^{lxxxvi} and panchayats. However, these existing informal systems are often deeply wrought with exclusionary attitudes and practices including gender biases, casteism and ableism. Moreover, the members of these informal systems are often those who hold power in their communities and seek to uphold community morality and the status quo rather than protect the rights of the persons involved, especially if the person is a young person and/or structurally excluded.^{lxxxvii}

Preventive measures include addressing root causes of gender-based harms and other human rights violations. For instance, instead of criminalizing early marriages, preventive measures would include tackling the lack of access to information and education, the lack of appropriately calibrated decision-making power for young people (especially young girls), economic inequalities, etc.^{lxxxviii} In particular, evidence suggests that comprehensive sexuality education that works to address young people’s bodily autonomy and reduce the harm they experience is far more effective in providing young people with the means to protect themselves.^{lxxxix} These measures come into being through policy and programming, and can be either state- or non-state-actor-led.

Diversion practices refer to practices in which young people accused of infringing criminal law can be ‘diverted’ from judicial proceedings.^{xc} These practices can include care, counseling probation, education and training programs, and juvenile penal mediation among others. Unfortunately, there is limited documentation of institutionalized diversion practices in South Asia. There is also limited evidence of agentive decision-making by young people in these programs. Also under-explored is the question of whether young people who are not ‘diverted’ are ultimately directed to the criminal legal system..

Comprehensive sexuality education enables individuals to exercise their sexual and reproductive health rights. It empowers adolescents and young people to make informed decisions about their sexual and reproductive health and to prevent early pregnancy and sexually transmitted infections, including HIV. It also enables them to understand their right to bodily autonomy and integrity, to develop respectful relationships and to dismantle gender stereotypes and negative social norms. Furthermore, comprehensive sexuality education contributes to them embracing diversity, consent, respect, and equality. This contributes to their own individual development, to more equal societies and the fulfillment of human rights. In addition, comprehensive sexuality education is an effective means to address systems of patriarchal domination and toxic masculinity by changing social and cultural patterns of behavior that tend to perpetuate discrimination and violence against women and girls.^{xc}

(Tlaleng Mofokeng, Victor Madrigal-Borloz, Farida Shaheed, Dorothy Estrada-Tanck, Ms. Ivana Radacic, Elizabeth Broderick, Meskerem Gesettechane and Melissa Upreti, A Compendium on Comprehensive Sexuality Education)

Restorative Practices

Restorative justice practices seek to build healthy communities, decrease crime and wrongdoing, repair harm and restore relationships.^{xcii} In other words, they are designed to address structural exclusion, power and privilege. A range of communities across the world, including indigenous communities or those following customary and tribal laws, as well as people of color and indigenous communities in the global North, have used restorative approaches to address harm and repair relationships independently of the legal system.

Restorative justice is based on principles that guide and seek to address violations and crimes along with systemic inequality. While doing so, they engage both the perpetrator as well as the person who has experienced violation, and often the community, to reach a resolution that is satisfying to all.^{xciii}

Restoration is not strictly defined, for in cases such as murder, harm cannot be repaired. It is possible to attempt reparation — through acknowledging one's responsibility, apologizing, restitution, taking steps to prevent re-occurrence etc.^{xciv}

Three prominent approaches to restorative justice include victim-offender conferences, family group conferences and circle approaches.^{xcv} Victim-offender conferences primarily involve victims and offenders. Following individual conversations with them, upon their agreement to proceed, they are brought together in a meeting or conference led by a trained facilitator.^{xcvi} A family group conference^{xcvii} is often used to divert children accused of crimes away from the formal criminal legal system. This model was used as a part of the youth justice process in New Zealand starting in 1989, where it has become the norm, and the court has become the backup for cases involving young accused persons.^{xcviii}

It must be noted that there is not sufficient documentation of the practices of conferences in South Asia, so it cannot be assumed that these practices can be transposed without adaptation and appropriate modification to distinct and diverse socio-cultural contexts.

In Nepal, the Nepal Forum for Restorative Justice works to promote restorative justice in the judicial space as well as in the community, where interest in the approach is fast emerging.^{civ} In Pakistan and Sri Lanka, although the conversation on restorative justice is still incipient, efforts have been made to implement certain laws and rules in the form of arbitration and mediation for speedy justice.

Some of the restorative practices we highlight operate in tandem with the criminal legal system (with the support of state institutions). However, these practices can be used outside and independently of criminal legal settings in spaces such as in childcare institutions, workplaces, schools and youth groups. It is notable that these restorative justice practices tend to work at the relatively micro level (individuals, pairs or families). Many such practices focus on juveniles but very few take on 'violent' crimes.

The circle approach is the most common and has been used by multiple organizations in South Asia. The circle process is rooted in indigenous tradition in Africa and in First Nations peoples^{xix} cultures and traditions. It involves participants engaging with each other while seated in a circle to emphasize equality and connectedness and to demonstrate that there is no power center.

In India, organizations such as Enfold Proactive Health Trust, Ashiyana Foundation and the Council for Secure Justice have been using the restorative circle approach consistently^c and successfully within child-care institutions (CCI).^{ci} CCIs have been defined under the Indian Juvenile Justice (Care and Protection of Children) Act, 2015 as spaces that provide care and protection to those under the age of 18 and include shelters, observation homes, special homes, places of safety etc.^{cii} Participants in such processes said they felt respected and heard, developed positive socio-emotional skills such as anger management and being able to identify emotions, demonstrated an increase in empathy, as well as positive relationship-building and conflict-resolution skills, thus reducing levels of violence and bullying in CCIs.^{ciii}

Transformative Justice

Transformative justice exists outside of (and in most cases, as a challenge to) the legal system or other state institutions. It provides spaces to address harm and has gained popularity within social movements working towards prison abolition.

“Philly Stands Up^{cv} defines it as: a way of practicing alternative justice that acknowledges individual experiences and identities and works to actively resist the state’s criminal injustice system. Transformative Justice recognizes that oppression is at the root of all forms of harm, abuse and assault. As a practice, it therefore aims to address and confront those oppressions on all levels and treats this concept as an integral part to accountability and healing.”^{cv}

(Philly Stands Up: What is Transformative Justice)

While restorative justice models often work as alternatives within criminal legal processes, leaving the overall system intact, transformative justice approaches stand as a distinct paradigm and framework, a complete alternative to the criminal legal system.^{cvii} Practitioners of transformative justice do not treat it as a framework to use only when discrimination and violence have already occurred. Rather, they believe in embodying the principles and values of these practices, living lives and building relationships within communities in alignment with these values, capable of managing conflict, harm, abuse and violence accordingly.

The Sourcebook refers to several organizations that are seeking or have sought to explore transformative justice practices in the South Asian context, but these are not exhaustive. For instance, *Alternative Justice*^{cviii} is a collective which supports survivors of sexual harm and abuse to have access to multiple and varied community-based processes that support healing. It allows them to seek tangible accountability from those who act abusively and to create conditions that cultivate real transformation within communities. They seek to move from learning to acting through (i) hosting communities of practice; (ii) co-creating open-source resources; and (iii) supporting communities when harm does occur through healing circles, accountability processes and survivor support.

Implementing Alternatives: Concerns and challenges

In our conversations with partners, some difficulties in implementing alternatives were discussed. There is genuine concern that the emphasis on alternatives may reduce the state's commitment to investigate and address rights abuses and gender-based harms, thereby increasing impunity. Without state support and funding, it may be hard to gain interim measures for safety and protection^{ciX}.

The inclination to romanticize traditional community practices and a critique of how we define 'community' is a recurring concern as we document and study alternatives to the criminal legal system. Not all community leaders'

actions are necessarily transformative or restorative. They can frequently serve to perpetuate prejudices and systemic exclusion that favor those in power. Some fear that alternative approaches to addressing gender-based harms may not fully align with international human rights standards and practices. This risks the gains made within those legal systems over decades of progressive advocacy by movements. In 2002, the United Nations adopted the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters^{cx} noting the need for legal and procedural safeguards in restorative justice.



Moving from Theory to Practice: What Would Challenging Criminalization Look Like?

A growing number of feminist, human rights and social justice groups are wary and cautious about the increasing reliance on criminal laws to address social challenges^{cxii}. A focus on broader intersectional understandings of gender-based violence (as opposed to earlier iterations of the narrower issue of ‘violence against women’) raises questions about:

- a) whom punitive laws were meant to protect,
- b) who is harmed by the system itself, and
- c) what the purpose of criminalization is, and whose interests it serves.

To build a framework that challenges criminalization, we need to speak of what rights and justice mean to us, outside of strict legal terminology. This is not to suggest that one should not use the law and the legal system as a tool to increase rights recognition, especially by mobilizing the law’s expressive power. Rather, we have situated socio-cultural, economic and political realities at the center of the conversation, and proposed a pathway to interrogate existing, discriminatory, exclusionary and punitive state systems, the culture in which the system is embedded and which reinforces inequality through enforcement. It is grounded in the premise that inherently unjust power structures cannot embody or yield a feminist and holistic achievement of justice.

Our first step towards integrating a challenging criminalization framework into our advocacy can begin with these questions:

- *What is the image of a criminal in your community? How do you think this image was created? How are the different axes of discrimination reflected in this image?*
- *How do you define harm? Should all harms be considered crimes? What are the criteria to place certain harms in categories of crimes?*
- *What principles do you believe should guide responses to harm? (These principles will differ for those directly affected by the harm caused, communities in which the harm occurs, civil society organizations and social justice activists, the legal system and law enforcement.)*
- *What does justice mean for different persons and communities?*
- *What does justice mean for someone harmed?*
- *What might accountability look like in a different system?*

Also, see the Critical Resistance Abolitionist Toolkit (2016).

Concluding Reflections

This Primer and the Sourcebook are a starting point, one that we hope will spur deeper thinking, dialogue and ground-level innovations. We conclude with a series of questions that we hope can be used as a tool to interrogate and reflect on the work we do on addressing harm.^{cxii} In addition to the various examples shared through this Primer, including the approaches used by partner organizations, the Sourcebook includes a table^{cxiii} which shares some further examples of how transformative approaches could be used to address the criminalization of young people's bodily autonomy.

Through this Primer and the Sourcebook, we invite readers, activists, practitioners and movement-builders to continue to fearlessly deliberate about rights-affirming and non-punitive approaches to gender-based harms and rights violations. We also invite all our allies to imagine transformative approaches to criminalization, so that we can **rethink freedoms, reimagine rights** and enable young people to **realize their own futures**.





Endnotes

ⁱ International Planned Parenthood Federation. (2016). **Fulfil!: Guidance document for the implementation of young people's sexual rights.** p. 11. World Association for Sexual Health and RNW Media. [https://www.ippf.org/sites/default/files/2016-09/Fulfil!%20Guidance%20document%20for%20the%20implementation%20of%20young%20people's%20sexual%20rights%20\(IPPF-WAS\).pdf](https://www.ippf.org/sites/default/files/2016-09/Fulfil!%20Guidance%20document%20for%20the%20implementation%20of%20young%20people's%20sexual%20rights%20(IPPF-WAS).pdf)

ⁱⁱ Gerison Lansdown and Marie Wernham. (2021). Chapter 3: Understanding young people's right to decide. In: International Planned Parenthood Federation. **Are protection and autonomy opposing concepts?** p. 2. https://www.ippf.org/sites/default/files/ippf_right_to_decide_03.pdf.

ⁱⁱⁱ For an explainer on 'gender-based harms', refer to **Words matter: A quick explainer for key terms on page 9.**

^{iv} Aahung (Pakistan), The Asian-Pacific Resource & Research Centre For Women, ARROW (Asia- Pacific) Bandhu Welfare Society (Bangladesh), Hidden Pockets (India), The YP Foundation (India), Youth Advocacy Network of Sri Lanka, YANSL (Sri Lanka), YUWA (Nepal).

^v United Nations Population Fund. (2021). **My Body is My Own: Claiming the Right to Autonomy and Self-Determination.** State of World Population 2021, UNFPA. Pp. 7 and 8. https://www.unfpa.org/sites/default/files/pub-pdf/SoWP2021_Report_-_EN_web.3.21_0.pdf

^{vi} S. Laurel Weldon and Mala Htun. (2013, July 1). Feminist Mobilisation and Progressive Policy Change: Why Governments Take Action to Combat Violence against Women. **Gender & Development.** 21, no. 2 : 245.

^{vii} For a longer discussion, refer to the section titled **Young people as rights bearers: 'Evolving Capacity' in the Child Rights Convention, on page 22.**

^{viii} Rajvi Desai. (2019, March 29). From Riches to Rags: The Evolution of Menstrual Taboos in India. **The Swaddle.** <https://theswaddle.com/from-riches-to-rags-the-evolution-of-menstrual-taboos-in-india/>

^{ix} Alice M. Miller with Tara Zivkovic. (2019). CHAPTER 2: Seismic Shifts: How Prosecution Became the Go-To Tool to Vindicate Rights. In Alice M. Miller and Mindy Jane Roseman (Eds.), **Beyond Virtue and Vice: Re-thinking Human Rights and Criminal Law.** (p. 47). University of Pennsylvania Press.

^x For an explainer on 'gender-based harms', refer to **Words matter: A quick explainer for key terms on page 9.**

^{xi} Coates A & Allotey P. (2023). Global health, sexual and reproductive health and rights, and gender: square pegs, round holes. **BMJ Global Health.** 8:e011710.

^{xii} RESURJ. (2020, February 10th) **Beyond Criminalization – A Feminist Questioning of Criminal Justice Interventions to Address Sexual and Reproductive Rights Violations.**

^{xiii} See Lawrence M. Friedman. (1975) **The Legal System: A Social Science Perspective.** Russell Sage Foundation. pp. 14-16.

^{xiv} See Lawrence M. Friedman. (1975). **The Legal System: A Social Science Perspective.** Russell Sage Foundation. pp. 14-16.

^{xv} A large branch of criminology refers to 'criminality' as the patterns and behavior characteristics of those who commit crimes (often known as 'criminal characteristics'). The concept of criminality has been critiqued for perpetuating discriminatory stereotypes about apparent fixed categories of criminals, on the grounds of race, gender, caste, class, religion, sexual orientation etc.

^{xvi} OHCHR Commissioned Report. (2013). **Gender Stereotyping as a Human Rights Violation.** <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/2013-Gender-Stereotyping-as-HR-Violation.docx>

^{xvii} The term 'intersectionality' was coined by Kimberle Crenshaw. For an in-depth understanding, see Kim-

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^{xli} For Bangladesh, as per Section 375 of the Bangladesh Penal Code, 1860, any sexual activity with a person under the age of 14 is considered rape, unless such person is the wife of the perpetrator, in which case the age of consent is 13. However, according to Section 9(i) of the Suppression of Violence against Women and Children Act of 2000, which prevails over any other laws, the age of consent is 16. For Pakistan, see Section 375 (v) of the Pakistan Penal Code, 1860.

^{xlii} See section 363(e) of the Sri Lankan Penal Code, 1883.

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^{lxxviii} CEFMU and Sexuality Working Group and collaborators: Aahung, American Jewish World Service (AJWS), CARE, CREA, EMpower, EngenderHealth, Girls First Fund, Girls Not Brides: The Global Partnership to End Child Marriage, Global Fund for Women, GreeneWorks, International Center for Research on Women (ICRW), FosFeminista, International Planned Parenthood Federation (IPPF), MADRE, Nirantar Trust, Plan International, Population Council, Promundo-US, The Summit Foundation, The YP Foundation, UNFPA, UNICEF. The Working Group is responsible for the final edit of the document.

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^{cvii} Mimi E Kim, Amanda Robinson, and Robyn L Holder. (2021). Transformative Justice and Restorative Justice: Gender-Based Violence and Alternative Visions of Justice in the United States. **International Review of Victimology**. 27, no. 2: 169.

^{cviii} 'Alternative Justice', n.d., <https://www.alternativejustice.in/>.

^{cix} RESURJ. (2020). **Beyond Criminalization: A Feminist Questioning of Criminal Justice Interventions to Address Sexual and Reproductive Rights Violations**. p. 41. <https://resurj.org/wp-content/uploads/2020/12/ENGLISH-Beyond-Criminalization-A-Feminist-Questioning-of-Criminal-Justice-Interventions-to-Address-Sexual-and-Reproductive-Rights-Violations.pdf>

^{cx} See United Nations Economic and Social Council. (2002). **Basic principles on the use of restorative justice programmes in criminal matters**. Resolutions and decisions adopted by the Economic and Social Council at its substantive session of 2002. E/2002/INF/2/Add.2. <https://sites.unicef.org/tdad/basicprinciplesuseofrj.pdf>

^{cxii} For instance, see the discussion in the Introduction to Nivedita Menon. (2004). **Recovering Subversion: Feminist Politics Beyond the Law**. Permanent Black; Flavia Agnes, (1992). Protecting Women Against Violence? Review of a Decade of Legislation, 1980-89. **Economic and Political Weekly** (25 April 1992) WS-19.

^{cxiii} Some of these questions are adapted from 'Invisible No More: A Study and Discussion Guide' available at invisiblenomorebook.com/study-guide

^{cxiiii} The table structure is inspired by a similar framework in Eric A. Stanley and Nat Smith (Eds.). (2015). **Captive Genders: Trans Embodiment and the Prison Industrial Complex**. p.17. A K Press.





crea

CREA is a feminist human rights organization led by feminists from the global South. CREA envisions a more just and peaceful world where everyone lives with dignity, respect, and equality.

CREA builds feminist leadership, advances women's human rights, prevents gender-based violence and expands sexual and reproductive freedoms for all people.



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