



Sourcebook on

FLAWS IN LAWS:

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



crea

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Design and Layout by: Sixwasnine Design
Illustrations by: Sixwasnine Design

Co-created by: Aarushi Mahajan, Susana T. Fried and Ishani Cordeiro (2024)
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Susana T. Fried

*Program Director,
Addressing gender-based violence,
promoting well-being and advancing rights*

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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

Glossary

Child, Early and Forced Marriages and Unions (CEFMU): CEFMU includes all marriages, unions and cohabitation arrangements where one or both parties are under the age of 18 years, and are considered to be children as per the Convention on the Rights of the Child (CRC). Forced marriages and unions are those in which one or both parties do not give full and free consent, regardless of age. Early marriages and unions involve older adolescents, usually in the age group of 15 to 17 years, in recognition of their evolving capacities.

‘Criminal legal system’ vs. ‘criminal justice system’: This Sourcebook uses the term ‘criminal legal system’ instead of the ‘criminal justice system’ because we believe that criminal laws, criminal codes as well as their systems of administration and institutions for implementation are not designed with a broad holistic or intersectional understanding of justice. Justice that encompasses gender, racial, social, economic, climate, reproductive or disability axes, among others, is neither defined by nor contained within the law. 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 challenge or radically depart from traditional or contemporary 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 routes that are deeply situated within contexts and communities.

Evolving capacity: Article 5 of the CRC states: “States 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.” This enabling principle recognizes that stages of growth and development are not uniform and that young people’s diverse life experiences and circumstances shape their levels of maturity, agency, competencies and ability to handle responsibilities.

Gender-based harms and gender-based violence: Throughout the Sourcebook we refer to ‘gender-based harms’ and ‘gender-based violence’ as being separate but deeply interconnected. Though gender-based harms include gender-based violence, not all harms amount to gender-based violence. Gender-based harms can include gendered discrimination, gendered 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 root 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 sexual and reproductive health and rights (SRHR), stigma and social isolation, to name a few.

We recognize that patriarchal, racist, ableist, homophobic, transphobic and capitalist oppressions (gender-based harms) are part of the continuum of violence and of the conditions that facilitate, enable and perpetuate violence.¹

While there is international consensus on the 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.

UN Women defines gender-based violence as *harmful acts directed at an individual or a group of individuals based on their gender.*² The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) defines the term ‘discrimination against women’ *as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*³

¹ Tlaleng Mofokeng. (2022). *Violence and its impact on the right to health. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.* United Nations General Assembly, Human Rights Council, Fiftieth Session. A/HRC/50/28

² See UN Women. Frequently asked questions: Types of violence against women and girls. <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/faqs/types-of-violence>

³ United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979). Article 1

As we can see, gender-based violence is defined in reference to an abstract set of harms, while discrimination is defined in a narrower manner. While we acknowledge that the distinction between harm and violence is often nebulous and that they occupy the same continuum, 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 gender-based violence and harms that would rely on moral, socio-cultural-political, and economic criteria, nor are we diminishing the need to respond to gender-based harms in a systematic way and at the structural level.

Person who has been harmed: Throughout the Sourcebook we refer to various forms of harm faced by young people. This can include violence, rights violations and restrictions on freedoms. We have made a conscious decision to limit our use of the terms ‘victim’ or ‘survivor’ or ‘victim/survivor’ to describe the experiences of such persons. While ‘victim’ does signify that the person has faced harm, it often connotes a lack of agency and passivity that has been critiqued by feminist movements. The term ‘survivor’ does attribute agency to a person. However, it often does not easily map onto people’s journeys, when they do not feel that they have ‘survived’ violence or harm. The term ‘victim/survivor’ is often used for a flexible way of describing people, but we did not want to be restricted to this binary which often flattens subjective and personal experiences. Victim and survivor may be considered limiting terms that define people only by reference to the things that have been done to them.⁴ Further, the Sourcebook also seeks to complicate and encourage critical thinking around carceral categories of ‘perpetrator’ and ‘accused’, which often arise as the counterpoint to ‘victim’ and ‘survivor’.

Protectionist approaches vs. protection of rights: Rights-based approaches are based on the assumption that discrimination, violence and other harms faced by structurally excluded persons and groups are systemic and, in most cases, systematic. Thus, any attempt to protect their rights must include addressing and transforming unequal power relations and hierarchies. Such approaches protect and expand access to the rights of persons and groups, recognize them as rights bearers and aim to enhance their autonomy. In contrast, what we are calling *protectionist*

⁴ Leigh Goodmark. (2018). *Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence*. University of California Press. Note 2.

approaches are often ideologically driven and based on paternalistic assumptions about capacity and ability. This is especially so in terms of protecting those defined as 'weak' or 'vulnerable' as if these qualities are inherent to the individual people rather than attaching to individuals who are structurally excluded and/or who face systemic discrimination. Such approaches often lead to over-policing and under-protection i.e. greater surveillance and disciplining coupled with restricted freedoms and rights of structurally excluded groups. There are also often instances of State over-reach limiting such realms of action as access to information, movement, speech, association, choice of friends or sexual partners, in the name of 'safety.'

Restorative justice (RJ): Restorative Justice (RJ) can be considered as a sub-set of restorative practices. RJ is based on principles that guide and seek to address violations and crimes while engaging both the perpetrator as well as the person who has experienced violation, and often the community, to reach a resolution that is acceptable to all.⁵

Sexual and gender-diverse persons/sexual and gender diversity: Gender and sexuality are social constructs which assume significance only in reference to other cultural signifiers. A person's sexuality and gender, and the manner in which they experience, it is shaped by the different social-locations they occupy in terms of, among other things, their race, ethnicity, class, ability, faith, health status, (im)migrant status, work status, and geography. However, even under these different locations of sexual and gender identity formation, gender often remains as a limited heteronormative and binary construct with cultural expectations circumscribing how it is to be performed. The sexual and gender diversity framework (as opposed to the LGBTIQ/SOGIESC) allows us to grapple with, for instance, how sex characteristics intersect with sexuality and gender. It does this with respect to experiences of violence and discrimination and experiences of pleasure and well-being, as well as in terms of building stronger cross-movement collaboration.

Structurally excluded persons: We use the term 'structurally excluded' to draw attention to the ways in which societal architecture prevents certain people from enjoying the full spectrum of their rights. In addition, they are often also excluded from meaningfully and effectively participating in their communities and in decision-making

⁵ RESURJ. (2020, February 10th). *Beyond Criminalization – A Feminist Questioning of Criminal Justice Interventions to Address Sexual and Reproductive Rights Violations*. p. 11. <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>.

spaces. The term compels us to interrogate and hold accountable structural inequalities and power dynamics that cause and perpetuate exclusion and discrimination. It also enables us to emphasize that this exclusion is not accidental or incidental but deliberate. We choose this phrase instead of ‘minorities’ as often those facing exclusion are in fact, not numerically fewer in number and instead of ‘marginalized’ which speaks about the impact of exclusion without addressing the causes of it.

For example, this would include persons and groups that face exclusion on account of rigid gender norms, heteronormativity, religious supremacy, caste hierarchies, ableist structures etc.

Transformative justice (TJ):

“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.”⁶ (Philly Stands Up: What is Transformative Justice)

‘Young people’ vs. ‘adolescents’: This Sourcebook uses the term ‘young people’ instead of ‘adolescents’ for two reasons – firstly, we understand young people as encompassing more than ‘adolescents’, recognizing that young people are not a homogenous group. Secondly, the partners for the creation of this Sourcebook work in politically and legally sensitive contexts where advocating for adolescents’ (those under 18 years old) SRHR 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 labour, and criminal culpability. For instance, the United Nations General Assembly defines ‘youth’ as those persons between the ages of 15 and 24 years.⁷ The World Health Organization

⁶ ‘Philly Stands Up: What is Transformative Justice’, accessed 17 February, 2022, <https://www.phillystandsup.org/transjust>.

⁷ United Nations General Assembly. (1981). Report of the Secretary-General. A/36/215.; See also United Nations Department of Economic and Social Affairs. (n.d). Definition of Youth. [Fact Sheet]. <https://www.un.org/esa/socdev/documents/youth/fact-sheets/youth-definition.pdf>

(WHO)⁸ and the Framework for Action of United Nations Population Fund (UNFPA), refers to young people as adolescents and youth ranging in age from 10 to 24 years.⁹ The International Labour Organization (ILO) considers ‘youth’ to include persons in the ages between 15 and 29 years.¹⁰ The United Nations Convention on the Rights of the Child defines ‘children’ as persons up to the age of 18.¹¹ These are just a few examples to illustrate the different age categorizations of ‘young people’ depending on political, social and cultural contexts as well as the purpose of categorization.

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 to highlight the concerns with laws, and policies and the criminalization of sexuality, gender expression and identity. Through the Sourcebook, we will refer to the category of young persons under the age of 18 years as it is a common threshold for attaining the age of majority by law in South Asia.

⁸ World Health Organization. (1989, May). *The Health of Youth, Background Document, Technical Discussions*. A42/Technical Discussions/2, Geneva. p. 5.

⁹ UNFPA FRAMEWORK FOR ACTION ON ADOLESCENTS & YOUTH (2007). p. 8. https://www.unfpa.org/sites/default/files/pub-pdf/framework_youth.pdf.

¹⁰ See International Labour Organization. (n.d). YouthSTATS. From , https://www.ilo.org/global/docs/WCMS_191837/lang--en/index.htm. (A statistical database on youth labour market indicators produced by the ILO)

¹¹ United Nations (1989). *Convention on the Rights of the Child, 1989*. Article 1.

Executive Summary: Why this Sourcebook?

“Those of us advocating for gender, reproductive, sexual and erotic justice are challenged to search for more effective and less harmful paths to address and redress violations. The option for hyper criminalization implies adding water to the long history of punitive power, implies additional selective injustice, stigmatization, deprivation of freedom. Criminal repression, whatever its direction, will not overcome violence, inequality, prejudice or discrimination, if nothing else because these effects are, since ever, inherent to the expansion of the punitive power of states. While this may sound un-realistic or despairingly utopic, I want to suggest that we should dare to seriously engage with critical thinking around minimal criminal justice systems or even go further, as imagine the possibility of societies without prisons.”¹²

(Sonia Corrêa, The Problem is “Criminal Law”)

When entire communities are rendered criminal by a system that calls itself ‘justice’, we must critically look at the way this system fails those it purports to protect. These are not failures of implementation of laws, rather they are systemic flaws of the criminal legal system. The harms caused by the criminal legal system and its ineffectiveness in reducing crime, make it more relevant for us to rethink our over-reliance on criminal law to address social problems. The resulting framework 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 for recognition of harms. The harms produced by the criminalization of young people’s bodily autonomy (often through restrictions on their sexuality, gender identity and gender expression) hinders young people from gaining information that evidence suggests provides real knowledge and protection. This information includes comprehensive

¹² Sonia Corrêa. (2016, August 3). The Problem Is “Criminal Law”. Sexuality Policy Watch. <https://sxpolitics.org/the-problem-of-criminal-law/15273>.

sexuality education and access to SRHR information and services.¹³ Young people have limited or non-existent spaces and opportunities where they can access non-judgmental, age-appropriate and diverse perspectives and knowledge on relationships, sexuality, desire, rejection, consent and boundaries, diversity, gender equality, gender identity, sex characteristics, reproductive choices etc. Yet, these conversations are integral to young people's understanding of the world, their personal development and how they treat others.¹⁴

In 2019 CREA, in partnership with Aahung (Pakistan), ARROW (Malaysia), Bandhu (Bangladesh), Hidden Pockets Collective (India), Youth Advocacy Network (Sri Lanka), The YP Foundation (India) and YUWA (Nepal) decided to delve 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 through the '#FlawsInLaws: Rethink my freedoms, Reimagine my rights, Realize my future' campaign. The campaign, with a focus on South Asia,

called attention to the close connection between protectionist and punitive policies and practices, and the negative impact of protectionist approaches, laws and policies on young people's sexuality and their rights. Together, the group explored the programmatic implications of this shifting understanding for their ongoing work. More information around the campaign can be found [here](#).¹⁵

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 the existing ways in which restrictions on and protectionist approaches to young people's bodily autonomy leads to them being penalized for any non-normative sexual activity, exploration, or even, in many cases, open discussion. Based on this, we decided to delve a bit more deeply into the theory and concepts underlying the campaign. Our partners in South Asia also expressed interest in a tool that could expand their ability to make the links between the

¹³ See, for instance, World Health Organization at https://www.euro.who.int/_data/assets/pdf_file/0010/379045/Sexuality_education_Policy_brief_No_2.pdf

¹⁴ See UNFPA, 'Comprehensive Sexuality Education', accessed 17 October 2021, <https://www.unfpa.org/comprehensive-sexuality-education>.

¹⁵ Ishani Ida Cordeiro, Stuti Tripathi & Susana T. Fried. (2022). Reimagining young people's rights in South Asia: Learnings from #FlawsInLaws. Global Public Health. DOI: 10.1080/17441692.2022.2103580

young people’s empowerment, with a more pointed focus on the impact of criminalization of bodily autonomy, in all its forms.

This Sourcebook is 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 contexts of South Asia, young people are still subject to parallel systems of old and new laws which operate as ‘protectionist’ treatment. They assume and reinforce the idea and practice that young people are incapable of engaging in decisions about their own bodies and exercising their rights regardless of their age. This denigration contradicts the Convention on the Rights of the Child’s concept of *the evolving capacity of the child*¹⁶ as a more appropriate gauge of the circumstances under which laws and policies might

reasonably limit the exercise of rights by young people.

Within this context (but likely with resonance more broadly), the Sourcebook unpacks the concept of criminalization and highlights the impact of criminalization of young people’s bodily autonomy and sexuality, sexual practices, and sexual and gender expression and identity.

It does so particularly regarding their access to SRHR services and information, demonstrating when, where and how protection transforms into penalization a process we refer to as “criminalization”. It then considers alternate pathways to justice for young people’s bodily autonomy that don’t involve punitive measures or invoke the criminal legal system.

The frameworks draw upon what campaign partners have already been doing to keep their communities safe and collectively imagine what is possible if those strategies are taken forward together. This part of the

¹⁶ Article 5 of the CRC, “States 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.”; Article 14 (2) of the CRC, “States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.” The Committee defines evolving capacities as an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights. See GENERAL COMMENT No. 7 (2005) Implementing child rights in early childhood, CRC/C/GC/7/Rev.1, Committee on the Rights of the Child, 20 September 2006, <https://www.refworld.org/docid/460bc5a62.html>. Paragraph 17.

Sourcebook is grounded in a consideration of alternative justice practices deriving from a variety of communities around the world.

This Sourcebook seeks to facilitate and amplify efforts to deconstruct the impact of criminalization by interrogating the distinction between *protection of rights* and *protectionism*. It focuses on the realities of young people who are penalized for what is deemed to be non-normal behavior or engaging in prohibited activity. We situate this Sourcebook within socio-cultural, economic and political realities of South Asia.

The Sourcebook builds upon the work of many feminist groups, child rights' organizations, alternative justice practitioners and scholars, to develop a conceptual and theoretical underpinning to the discourse of challenging criminalization. While the Sourcebook introduces concepts of alternative justice, due to practical constraints, this consideration is limited. It is by no means an exhaustive resource, and we look forward to feedback, questions and debates which will enrich this growing body of work.



Methodology

The Sourcebook and corresponding primer were inspired by the 2019 Flaws in Laws campaign conducted by CREA and seven partners.¹⁷ The publications have been prepared on the basis of extensive desk review of legal policies, legal judgements 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.

For the sake of brevity, the central concepts as well as primary assertions laid down in this Sourcebook have been condensed in a Primer on 'Flaws in Laws: challenging criminalization of young people's bodily autonomy. The primer can be accessed [here](#).

While not a comprehensive overview of the subject, we hope this Sourcebook and its companion primer 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 wellbeing.

¹⁷ 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).

What Do We Mean by ‘Criminalization’?

“Time and again, criminal law provisions enshrining discriminatory proscriptions may be rooted in, embody and codify unequal power relations that, in turn, are often the legacy of colonial, xenophobic, racist, sexist, classist, ableist, cultural, religious, social, political, economic and other power dynamics. Moreover, substantive and procedural criminal law may, whether or not by design, effectively incorporate elements of discrimination embedded in perceived gender roles and patriarchal, heteronormative power relations between women and men and in other historical distinctions founded upon prohibited discrimination grounds. Ultimately, criminalization – in law and application – is the product of political decisions made in the service of existing relations of power that often detrimentally affect persons belonging to already marginalized or disadvantaged groups.”¹⁸

(International Commission of Jurists, The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty)

The law, generally, is designed to exist as black or white and to create categories of good or bad, victim or perpetrator, harm or no harm. However, people as individuals and as members of social, political, economic and cultural structures do not occupy a world in this either/or manner, but rather exist in the in-between. Each person embodies multiple

experiences, identities and characteristics that are distinct to them, and which situate them within social, cultural and political structures. This may either position them at risk of structural exclusion, or as the beneficiaries of structural privilege.

The law’s relationship with rights protection and abuses has been complicated and

¹⁸ International Commission of Jurists. (2023, March). The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty. p. 7. <https://icj2.wpenginepowered.com/wp-content/uploads/2023/03/8-MARCH-Principles-FINAL-printer-version-1-MARCH-2023.pdf>

occasionally conflicting. The legal language of rights—violation, discrimination, and even constitutionality in some countries—is drawn from it. The State and its institutions safeguard rights but also breach them by omission and commission. For instance, criminalization of sexuality (including but not limited to same-sex sexuality/homosexuality, sex outside of marriage, or sex between people under the age of 18 years), or the criminalization of sex work or abortion are all criminal laws introduced by the State which restrict a person’s bodily autonomy. These laws violate the full range of human rights of persons. Thus, human rights and social justice groups, movements, and collectives have begun to ask: What does it mean to interact with the criminal legal

system when the “system” both validates and violates rights?¹⁹

The law concentrates on the individual and their activities when a crime occurs. It ignores the complexities of power dynamics in society. Thus, the “criminal” is considered as an isolated actor committing a crime. Laws thus absolve state actors and institutions of responsibility for creating and maintaining these power and exclusion structures, from which “criminal” activities cannot be extracted.

In this section we explore the context and structure of criminal law, unpack what constitutes criminalization, how it operates and circulates through legal systems (both civil and criminal).

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.”²⁰

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

¹⁹ RESURJ. (2020, February 10th) Beyond Criminalization – A Feminist Questioning of Criminal Justice Interventions to Address Sexual and Reproductive Rights Violations.

²⁰ 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/>

Criminalization can be understood as constructed by and through the combination of the law and the legal framework, mediated by sociopolitical and cultural realities. This definition of criminalization recognizes that criminality²¹ is defined by more than just the law. Rather, socio-cultural

practices and attitudes coexist with or are supported by the law, perpetuating and consolidating exclusion and stigma.

Criminalization is a process comprised of these interlocking and mutually constitutive factors.

“Criminalization is the social and political process by which society determines which actions or behaviors – and by whom – will be punished by the state. At the most basic level, it involves passage and enforcement of criminal laws. While framed as neutral, decisions about what kinds of conduct to punish, how, and how much are very much a choice, guided by existing structures of economic and social inequality based on race, gender, sexuality, disability, and poverty, among others.”²²

(Barnard Center for Research on Women, The Crises of Criminalization)

²¹ 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.

²² Barnard Center for Research on Women. (2017). The Crises of Criminalization. <https://bcrw.barnard.edu/publications/the-crisis-of-criminalization/>

Structure of criminal law

The framework of the law consists of three essential components – its substance, structure and culture, along with its enforcement by both state and non-state actors and through both public and private institutions.²³ The written law (substance) influences how society (culture) perceives certain acts and behaviors. Legal culture is essentially the network of values and attitudes relating to law, which impact when, where and why people turn to the law or turn away.²⁴ The actors and institutions implementing the law (**the structure**) are a product of this society and their perceptions of certain acts and behaviors trickle into the substance of the law. This cycle of the substance-structure-culture framework is foundational to recognizing the depth and influence of the law. For example, punishing exploration of sexuality by young people stems from a cultural norm that sexual expression by young people, especially young women and girls, outside the institution of marriage, is bad. This view is engraved into the

mindsets and attitudes of lawmakers and implementers (who are a product of that very society and can include everyone from police to family members). These norms thus get formalized as written law and practiced in its enforcement. Through this Sourcebook, we will look at how the **substance-structure-culture** framework shapes and is shaped by the **enforcement** of the law by families, communities, legal enforcement officers, the police and administrative bodies, to name a few.

Criminal law serves to prohibit “conduct that causes or threatens the public interest; defines and warns people of the acts that are subject to criminal punishment; distinguishes between serious and minor offenses; and imposes punishment to protect society and to satisfy the demands for retribution, rehabilitation, and deterrence”.²⁵

The law also has an “expressive” function in symbolic statements designed to

²³ See Lawrence M. Friedman. (1975) *The Legal System: A Social Science Perspective*. Russell Sage Foundation. pp. 14-16.

²⁴ Lawrence M. Friedman. (1969, Aug). *Legal Culture and Social Development*. *Law & Society Review*. Vol. 4, No. 1. pp. 29-44. p. 34.

²⁵ Matthew Ross Lippman. (2019). *Contemporary Criminal Law: Concepts, Cases, and Controversies*. (5th ed). Sage Publications.

²⁶ See, for instance, Sunstein, Cass R. (1996, May). *On the Expressive Function of Law*. *University of Pennsylvania Law Review*. 144: 2021, Available at SSRN: <https://ssrn.com/abstract=2622561>; International Commission of Jurists. (2023, March). *The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty*. p. 5. <https://icj2.wpenginepowered.com/wp-content/uploads/2023/03/8-MARCH-Principles-FINAL-printer-version-1-MARCH-2023.pdf>

change social norms.²⁶ 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.²⁷ A common example of the 'expressive' function of law is the widespread belief that capital punishment should be imposed for the most 'immoral', 'brutal', 'heinous' offences that shock the *collective conscience of society*²⁸ (all terms loaded with moral, political and often patriarchal

connotations), irrespective of evidence citing that capital punishment does not deter crime.²⁹

The law might either strengthen existing norms or target existing norms. The assumption and hope is that law will have moral weight and convince people that existing norms are flawed and need to be replaced by new ones.³⁰

At its extreme, the law entails deprivation of liberty.³¹

The aims of criminal law can include:

- *to keep people from engaging in harmful acts because they want to avoid prosecution and incarceration or deterrence.*
- *to provide punishment and a fine/compensation as a means to achieve justice or retribution/restitution.*
- *to prevent people who have engaged in harmful behavior from doing further harm. For instance, imprisonment with no opportunity to apply for parole or incapacitation.*
- *to 'cure' people of whatever it is that drove them to engage in harmful behavior. Often in the context of persons who use drugs and sex workers, rehabilitation includes institutionalization of a person without their consent or rehabilitation.*

²⁷ Sunstein, Cass R. (1996, May). On the Expressive Function of Law. *University of Pennsylvania Law Review*. 144: 2021. p. 2026. Available at SSRN: <https://ssrn.com/abstract=2622561>

²⁸ Joel Feinberg. (1965, July). THE EXPRESSIVE FUNCTION OF PUNISHMENT. *The Monist*. Vol. 49, No. 3, *Philosophy of Law*. pp. 397-423. Oxford University Press

²⁹ Amnesty International (2021). DOES THE DEATH PENALTY DETER CRIME? GETTING THE FACTS STRAIGHT. <https://www.amnesty.org/en/wp-content/uploads/2021/06/act500062008en.pdf>

Since the late nineteenth century, criminology has had a growing influence on criminal law, as it was considered to be grounded in scientific logic. However, rather than being objective, criminology's purported scientific logic incorporated ideological elements of exclusion, control, authority, and discipline into legislation under the guise of neutrality.³² Criminal laws were especially destructive in colonial countries, when conquerors used codified and purportedly objective criminal law to "civilize," segregate, and discipline their subjects' bodies and behaviors.³³

Criminal law grew out of and frequently reinforced existing structural disparities. It was used to impose the morality, ideology, and sensibilities of the colonizers on indigenous communities.

For example, Pakistan, Bangladesh and Sri Lanka's present legislation and India's previous statute that criminalized same sex activity was instituted and enforced by the British government to penalize 'unnatural offences' interpreted as 'carnal intercourse against the order of nature'.³⁴ These archaic laws criminalizing sodomy (essentially sexual relations between people of the same sex) and adultery (treating women as property of their husband) and labeling *hijras*³⁵ as criminals (criminalizing an entire community on the basis of their gender identity and expression) demonstrate how State power is used to control and maintain social norms, as well as to discipline those who violate them.³⁶

³⁰ Sunstein, Cass R. (1996, May). On the Expressive Function of Law. University of Pennsylvania Law Review. 144: 2021. P. 2031. Available at SSRN: <https://ssrn.com/abstract=2622561>

³¹ See Cyndi Banks. (2004). The Purpose of Criminal Punishment. In Criminal Justice Ethics: Theory and Practice, Chapter 5. SAGE Publications.; see also UNAIDS. (2012). Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Background and Current Landscape. https://www.unaids.org/sites/default/files/media_asset/JC2322_BackgroundCurrentLandscapeCriminalisationHIV_en.pdf.

³² Sonia Corrêa. (2016, August 3). The Problem Is "Criminal Law". Library, Papers and Articles, We Recommend (blog). Sexuality Policy Watch. <https://sxpolitics.org/the-problem-of-criminal-law/15273>.

³³ Elizabeth Kolsky. (2005). Codification and the Rule of Colonial Difference: Criminal Procedure in British India. Law and History Review. 23, no. 3: 631–83.

³⁴ A number of other countries still have similar laws or remnants of laws imposed by British colonizers. These include: Bangladesh, Bhutan, Brunei, India, Kiribati, Malaysia, Maldives, Marshall Islands, Myanmar (Burma), Nauru, Pakistan, Papua New Guinea, Singapore, Solomon Islands, Sri Lanka, Tonga, Tuvalu and Western Samoa. In Africa: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria and Seychelles. For more information, please see Human Rights Watch (December 2008) 'Sodomy' laws show survival of colonial injustice.

³⁵ Hijra refers to a socio-cultural identity in South Asia (India, Pakistan, Nepal, Bangladesh) of people assigned male at birth whose gender expression and identity relate to female gender. Many members of hijra communities do not identify themselves under the umbrella of 'trans persons'. For more information, see Peoples' Union for Civil Liberties, Karnataka (PUCL-K). (2003, Spetember). Human Rights violations against the transgender community, A study of kothi and hijra sex workers in Bangalore, India. pp. 16-23. <https://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.pdf>; Revathi, A. (2010). The truth about me: A hijra life story. (V. Geetha, Trans.). New Delhi. Penguin Books.

³⁶ Jessica Hinchy. (2019, July 2). The Long History of Criminalising Hijras. Himal South Asia (blog). <https://www.himalmag.com/long-history-criminalising-hijras-india-jessica-hinchy-2019/>

Unpacking criminalization

Criminal law constructs categories of the **criminal, criminal acts, or criminality** when implemented. To do so, it draws on social categories of what is seen as normal and what is not, as an expression of power, inclusion and exclusion.³⁷ Criminal laws formally focus on acts deemed to cause harm and the intention to cause that harm. Yet, in application it fails to recognize that what causes harm, how harm is defined and who or what caused the harm varies widely.

The process and impacts of criminalization are multidimensional and compounding.

A person experiences criminalization in many, simultaneous, and overlapping ways based on their social, political, economic, and cultural position. An intersectional lens is required to deconstruct criminalization.³⁸

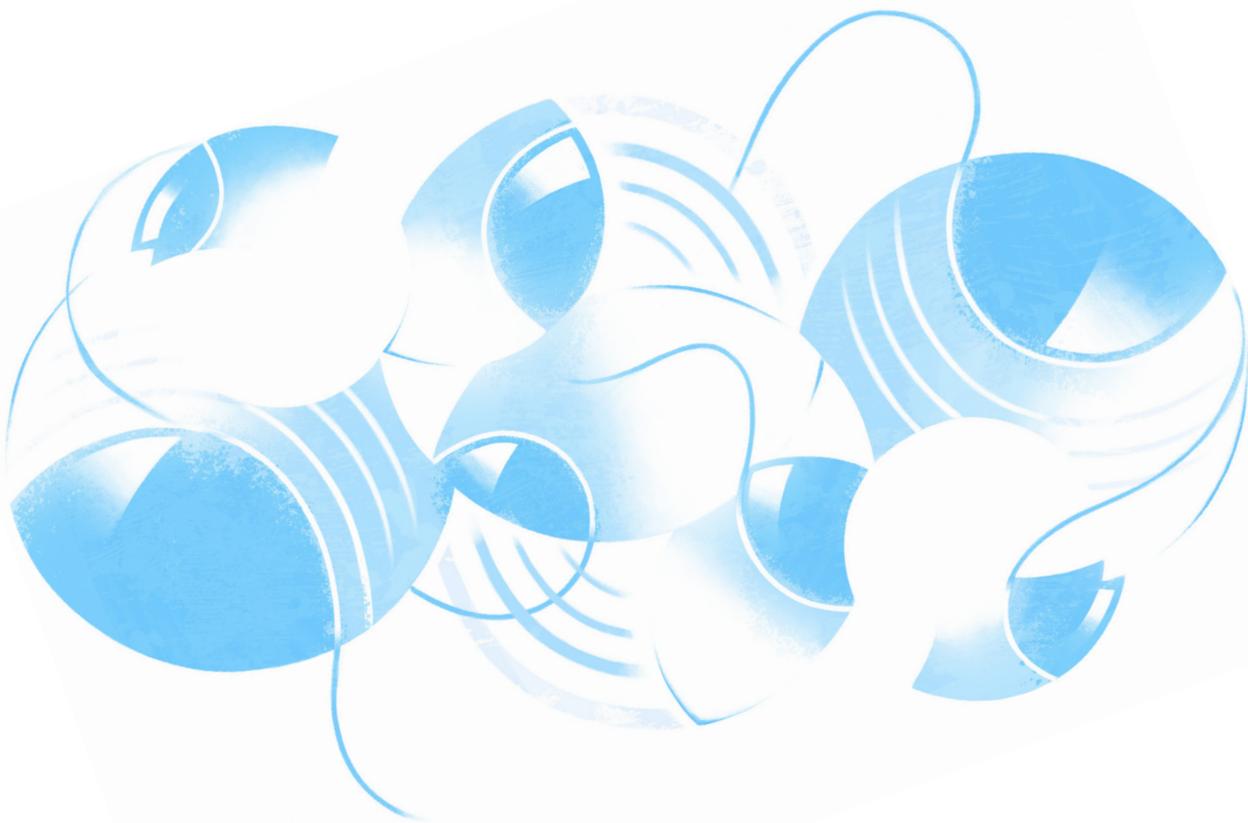
For example, while trans people are frequently subjected to violence and prejudice, Dalit trans people experience additional structural violence and exclusion because of their intersecting caste and gender identities. Similarly, while abortion services and individuals seeking to terminate their pregnancy are criminalized and/or stigmatized, young people, particularly those with disabilities, face more severe impediments to access sexual and reproductive health services. Criminalization is sustained by both state and non-state actors and both public and private institutions.

Criminalization creates the binary of ‘perpetrator/criminal’ and ‘victim/survivor’ to appear dissociated from their social, political and cultural context.³⁹ Legal scholar Oishik Sircar notes that, *“Law deploys itself not only through its enforcement but also by making its subjects internalize its sanctions,*

³⁷ 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>

³⁸ The term ‘intersectionality’ was coined by Kimberle Crenshaw. For an in-depth understanding, see Kimberle Crenshaw. (1989). Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics. University of Chicago Legal Forum. Iss. 1, Article 8; Kimberle Williams Crenshaw. (1994). Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color. In: Martha Albertson Fineman, Rixanne Mykitiuk, Eds. The Public Nature of Private Violence. (p. 93-118). Routledge.

³⁹ See Oishik Sircar. (2009). The Fallacy of Equality: ‘Anti-Citizens’; Sexual Justice and the Law in India. In Ashok Agrwal and Bharat Bhushan (eds.) Justice and Law: The Limits of the Deliverables of Law, Key Texts on Social Justice in India Volume II. Sage. p. 14.



to govern the lives of anti-citizens (criminals).”⁴⁰ When a particular law is enforced, the criminal legal system, through its expressive function in support of or against existing social norms⁴¹, feeds popular imagination of what constitutes criminality and how criminals must be treated (punished). Even when under-enforced, laws are used as instruments for surveillance and discrimination.

Beyond its formal **substance** and **structure**, criminalization also encompasses societal practices and

norms that render certain persons ‘criminal’ based on how they choose to exercise their right to bodily autonomy and renders others as in need of protection. These punitive practices constitute the **enforcement** of law’s formal substance and can include extra-legal sanction that is equally forceful and humiliating. These may include social ostracism and boycott, and even extreme forms of violence. Amnesty International describes three forms of criminalization of sexual and reproductive concerns:⁴²

⁴⁰ See Oishik Sircar. (2009). The Fallacy of Equality: ‘Anti-Citizens’, Sexual Justice and the Law in India. In Ashok Agrwal and Bharat Bhushan (eds.) Justice and Law: The Limits of the Deliverables of Law, Key Texts on Social Justice in India Volume II. Sage. p. 14.

⁴¹ See Sunstein, Cass R. (1996, May). On the Expressive Function of Law. University of Pennsylvania Law Review. 144: 2021. Available at SSRN: <https://ssrn.com/abstract=2622561>

⁴² Amnesty International. (2018). Body Politics: A Primer on Criminalization of Sexuality and Reproduction. Pp. 52-54. <https://www.amnesty.org/en/documents/pol40/7763/2018/en/>

Direct criminalization: “Passing and/or implementing criminal laws that specifically target and punish sexual and/or reproductive actions, decisions, or gender expression. E.g. Criminalization of same sex sexual activity.”

- For instance, same-sex sexuality (regardless of consent) is criminalized in Sri Lanka, Bangladesh and Pakistan under the guise of maintaining family values, preventing sexual perversion and ‘unnatural acts’. Such laws perpetuate societal and state sanctioned violence and discrimination against sexual- and gender-diverse persons, with no legal protection.⁴³

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.” Eg. Criminalization of begging and anti-vagrancy laws which disproportionately target sex workers, trans and gender non-conforming persons.

- For instance, Sri Lankan law does not prohibit trans identities, police often exploit impersonation laws to target trans persons.⁴⁴ This inflects the law according to local cultural norms. Section 399 of the Sri Lankan Penal Code, which criminalizes “cheating by personation,” has been used to identify and arrest trans people based on notions that they are “effeminate” men or “masculine” women impersonating the opposite gender, in effect, criminalizing their gender expression.⁴⁵ Human Rights Watch interviewed trans and gay males in Sri Lanka in 2016, who stated they were imprisoned under the Vagrants’ Ordinance, which prohibits “gross immorality,” “incorrigible rogues,” and “illicit or unnatural intercourse”.⁴⁶ The British Vagrants Ordinance of 1841 sanctions “disorderly” behavior, mostly begging and sex trade. Police have harassed and detained sexual- and gender-diverse people using

⁴³ ILGA. (2020). State-Sponsored Homophobia. The International Lesbian, Gay, Bisexual, Trans and Intersex Association. <https://ilga.org/state-sponsored-homophobia-report>

⁴⁴ The Human Dignity Trust. (2019). Injustice Exposed: The Criminalisation of Transgender People and Its Impact. pp.13–14. <https://www.humandignitytrust.org/wp-content/uploads/resources/Injustice-Exposed-the-criminalisation-of-trans-people.pdf>

⁴⁵ Human Rights Watch. (2016). “All Fingers Are Not The Same”: Discrimination on the Grounds of Sexual Orientation and Gender Identity in Sri Lanka. p.16.

⁴⁶ Human Rights Watch. (2019). Equal Ground, ‘My Rights, My Responsibility’. pp.5–6. https://www.equal-ground.org/wp-content/uploads/EG-Magazine-2019_December.pdf

this outdated criminal law.⁴⁷ Section 365A of the Sri Lankan Penal Code, which criminalizes “gross indecency,” is used to harass and threaten lesbian women. Though rarely used, this clause renders lesbian, bisexual and queer women and trans people at risk of extortion and blackmail.⁴⁸

- In Nepal, the Public Offences and Punishment 2072 (1970) Act has been used to arbitrarily arrest and detain persons for vaguely defined offences of public nuisance and disorder. This has particularly harmed trans women. In 2013, there were reports of Nepali police forces arresting individuals with long hair. This prompted the Supreme Court to order law enforcement forces to stop harassing and arresting individuals based on their “personal interest or appearance”.⁴⁹

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.”⁵⁰ This includes, for instance, 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 and gender non-binary.

- The proposed amendments to the Citizenship Act, 2063 (2006 A.D.) in Nepal are an example of penalization. They demonstrate how even non-criminal law disproportionately affects some communities. Despite the groundbreaking judgment in 2007 by the Nepal Supreme Court, recognizing trans persons as a ‘gender’ category,⁵¹ the 2019 proposed amendments to the Citizenship Act mandate that individuals prove their gender identity through medical certificates to be able

⁴⁷ Amnesty International. (2019). Spectrum. p.3. <https://www.amnesty.org/en/documents/asa37/1477/2019/en/>

⁴⁸ Women’s Support Group. (2014). “Not Gonna Take It Lying Down”: Experiences of Violence and Discrimination as Told by LBT Persons in Sri Lanka. p.31.

⁴⁹ Blue Diamond Society and Heartland Alliance for Human Needs & Human Rights. (2013). The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Nepal. https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NPL/INT_CCPR_NGO_NPL_14738_E.pdf

⁵⁰ Amnesty International. (2018). Body Politics: A Primer on Criminalization of Sexuality and Reproduction. P. 10. <https://www.amnesty.org/en/documents/pol40/7763/2018/en/>.

⁵¹ Sunil Babu Pant & Ors. vs Nepal Govt. & Ors. (Supreme Court of Nepal, December 2007)

to access services.⁵² The proposed revisions contravene the Supreme Court's precedent, deprive trans individuals of self-determination, and open the door to discrimination and pathologization. The Nepal Parliamentary panel approved the law in June 2020, despite opposition from human rights groups. Trans persons cannot access public services or other social transactions that require legal identity credentials without gender-affirming citizenship certificates. Local governments' COVID-19 relief initiatives, which required legal identity documents, highlighted this. Trans persons had trouble getting pandemic assistance kits.⁵³

- 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.⁵⁴

The forms of criminalization illustrated above have adverse impacts on the rights and freedoms of young people, who are perceived as lacking the capacity to take decisions about their sexuality and gender expression.

Young trans and gender non-conforming persons in India face penalization by virtue of the Transgender Persons (Protection of Rights) Act, 2019 which denies the right to self-determination by mandating institutional and medical certification of one's gender.⁵⁵ If a person is below 18 years, they can only make an application

⁵² The Kathmandu Post. (2019, March 19). Nepal Government's Citizenship Bill Clause on Sex Change Certification Alarms LGBT Community. <https://kathmandupost.com/national/2019/03/17/nepal-governments-proposed-amendment-to-the-citizenship-act-could-affect-the-future-rights-of-sexual-minorities>.

⁵³ Blue Diamond Society. (2020). Universal Periodic Review of Nepal: Joint Stakeholder Submission. <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=8109&file=EnglishTranslation>

⁵⁴ United Nations General Assembly. (2019). Protection against violence and discrimination based on sexual orientation and gender identity. Note by the Secretary-General. A/74/181. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/220/72/PDF/N1922072.pdf?OpenElement>

⁵⁵ Rachana Mudraboyina, Sameera Jagirdar and Philip C. Philip. (2019, August 5). A Critique of Transgender Persons (Protection of Rights) Bill. Feminism in India. <https://feminisminindia.com/2019/08/05/critique-transgender-persons-protection-of-rights-bill-2019/>; Tripti Tandon and Aarushi Mahajan. (2019, December 4). Reclaiming Rights: Transgender Persons Bill and beyond. The Leaflet. <https://www.theleaflet.in/reclaiming-rights-transgender-persons-bill-and-beyond/>



for an identity certificate as a trans person through their parent/guardian. Due to stigma 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. The lack of identity documents with accurate gender markers impedes access to 'adolescent'-friendly services and even relief measures as seen during COVID-19.⁵⁶

Another example from India of penalization can be found in the protectionist approach to recognizing the legal capacity of people with mental, psychosocial and intellectual disabilities. The Mental Healthcare Act, 2017 empowers a person with a disability with the right to choose their guardian. However, it also empowers a Board to revoke guardianship rights "in the interest of the person with mental illness" and appoint a person they deem fit to be a guardian. This may place a young person with a disability under control of a guardian not necessarily chosen by them, including regarding their SRHR.⁵⁷

⁵⁶ See Vikramaditya Sahai, Aj Agrawal and Almas Shaikh. (2020). Exclusion Amplified: COVID-19 and the Transgender Community. Centre for Law and Policy Research, Bangalore. <https://clpr.org.in/wp-content/uploads/2020/07/ExclusionAmplified.pdf>

⁵⁷ See Gowthaman Ranganathan. (2017). The Mental Healthcare Act, 2017: An Evaluation. *NLUJ Law Review* 71; 4(2).

In sum, we understand criminalization as more than the mere application of a criminal prosecution to someone, for an action that they allegedly took.

The social-political process of criminalization occurs through a combination of laws (especially those associated with bodily autonomy) and socio-cultural practices and attitudes—all of which can render a person perpetually 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 not explicitly contained within the law, but very much a part of the wider social context. Criminalization is also intrinsically linked with the enforcement of the law in everyday practices by state and non-state institutions and individuals.

One manifestation of criminalization is protectionism. Protectionism occurs when protection of a person with rights devolves into protection as denial of rights.



What Do We Mean by ‘Criminalization of Bodily Autonomy’?

“We must work to keep sexual autonomy at the center of the conversation and to refer to the law as one of the means to this end. Criminal law is not an empty, neutral mechanism; rather, it operates within a judicial system that has some serious flaws, and when we bring it into our activism, it takes on a life and logic that can quickly slip from our grasp. And while the law will remain a site of struggle, as we advance human rights, we must be mindful of these dynamics when setting the terms on which we engage with the law. And the law, as well as its effects, must be used to increase autonomy, not to decrease it.”⁵⁸

(Geetanjali Misra and Vrinda Marwah, Criminal Law, Activism, and Sexual and Reproductive Justice: What We Can Learn from the Sex Selection Campaign in India)

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”.⁵⁹ The right to bodily autonomy is also recognized by multiple international human rights bodies, as is evident from Articles 1, 6, 7, 9, 10, 17 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 6,

7, 11, 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) attends to principles and practices that foster or circumscribe bodily autonomy. The Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with

⁵⁸ Geetanjali Misra and Vrinda Marwah. (2019). Criminal Law, Activism, and Sexual and Reproductive Justice: What We Can Learn from the Sex Selection Campaign in India. In Alice M. Miller & Mindy Jane Roseman (Eds.), *Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law*. University of Pennsylvania Press. p. 198.

⁵⁹ UNFPA. (2021, April 14). What Is Bodily Autonomy? <https://india.unfpa.org/en/video/what-bodily-autonomy>

Disabilities (CRPD) specifically affirm the bodily autonomy of children and young people, and of persons with disability, respectively, through the complex terrain of consent.

Additionally, the right to bodily autonomy encompasses, inter alia, the rights to liberty, security and freedom from cruel and inhumane treatment and torture, along with the right to health (including full recognition

of sexual and reproductive rights), right to information and an enabling environment for informed decision-making and consent.⁶⁰

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.⁶¹ It is grounded in the right to exercise free and fully informed choices.

In its report on the State of World Population 2021, the UNFPA notes that, “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.”⁶²

⁶⁰ UNFPA. (2021). State of World Population 2021: My Body Is My Own - Claiming the Right to Autonomy and Self-Determination. https://www.unfpa.org/sites/default/files/pub-pdf/SoWP2021_Report_-_EN_web.3.21_0.pdf

⁶¹ Carmel Shalev. (2000). Rights to Sexual and Reproductive Health: The ICPD and the Convention on the Elimination of All Forms of Discrimination against Women. Health and Human Rights 4, no. 2 : 46.

⁶² State of World Population. (2021). MY BODY IS MY OWN CLAIMING THE RIGHT TO AUTONOMY AND SELF-DETERMINATION. United Nations Population Fund. Pp. 7 and 8. https://www.unfpa.org/sites/default/files/pub-pdf/SoWP2021_Report_-_EN_web.3.21_0.pdf

This Sourcebook discusses several areas of bodily autonomy⁶³ where criminal law intersects with free and informed choice, including:

Reproduction: This covers abortion, the right to choose when and how many children to have, and the right to use reproductive technologies.

Sex: Sexual behavior, sexual orientation, age of consent, sex outside of marriage, and sex work. It's the right to choose when, how, with whom, and where to have sexual relations, including at work.

Gender: This encompasses the right to self-determination of gender identity, gender expression, and access to gender-appropriate services, facilities, and spaces. It also includes the right to identify as non-conforming or non-binary.

Body modifications: This includes the right to refuse body-modifying surgeries/treatments as well as the right to tattoos, piercings, gender-affirming operations, in conditions of free and informed decision-making.

Because it anchors the state's capacity to define, regulate and surveil bodily autonomy and privacy, indirect and direct criminalization affect not only individuals but entire communities. It restricts informed decision-making by imposing inflexible sexual and gender norms on diverse and fluid sexuality and expression. As shown, criminalizing bodily autonomy discriminates, hinders human rights and inhibits justice. Age, caste, class, religion and (dis)ability overlap to exacerbate or reformulate discrimination. It affects access to contraception, abortion and HIV

services. For example, the criminalization of sex work and the severely punitive approach to it means that sex workers are considered 'offenders' in need of correction and, at the same time, 'victims' in need of rescue and rehabilitation. If they are under the age of 18 years, they are considered victims of trafficking. Hence, sex work is criminalized and severely punished. Sex workers risk violation of their rights by both state and non-state actors and institutions. This also hinders individuals from reporting abuse and violation, limits legal remedies for sexual

⁶³ For reference, also see categories of bodily autonomy as laid down in Elizabeth Wicks. (2016). *The State and the Body: Legal Regulation of Bodily Autonomy*. Hart Publishing, 2.

assault and creates unsafe working conditions.⁶⁴ Young, trans, migratory and racial/ethnic minority sex workers are more at risk of persecution.

Criminalization of bodily autonomy also hinders access to sexual and reproductive health information and services. In the case of abortion, even where it is not completely prohibited, the legal limits within which abortion is permitted are often narrow and inconsistent with contemporary standards of medical practice, especially for young people.

The use of criminal law to control what a person with a uterus can or cannot do with their bodies drives them towards unsafe abortions and puts them and health care providers at risk of prosecution. The risk is magnified for those who are structurally excluded and/or belong to marginalized socio-cultural and economic groups and for persons with disability who are more likely to depend on assistance and services. They may have limited options of turning to private healthcare, seeking an abortion in a different jurisdiction or accessing reasonable accommodation within healthcare services.⁶⁵

“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.”

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

⁶⁴ AINSW et al., (2016). Recommendation on UN Women’s Approach to Sex Work, Sex Trade and Prostitution. <https://www.nswp.org/resource/member-publications/recommendation-un-womens-approach-sex-work-sex-trade-and-prostitution>

⁶⁵ Amnesty International. (2018, March 12). Body Politics: A Primer on Criminalization of Sexuality and Reproduction. <https://www.amnesty.org/en/documents/pol40/7763/2018/en/>; Bansari Kamdar. (2021, June 15) ‘Poor Access to Safe Abortions Is Killing South Asian Women. The Diplomat. <https://thediplomat.com/2021/06/poor-access-to-safe-abortions-is-killing-south-asian-women/>

Protectionism versus protection of rights

In this section we differentiate between approaches that are protectionist and approaches that aim to protect rights, especially those of structurally excluded groups and communities.

Rights-based approaches assume that discrimination and harm to structurally excluded groups are systemic and systematic. Thus, protecting their rights requires addressing and changing inequalities and power hierarchies. These methods safeguard and expand rights, acknowledge rights holders and attempt to increase autonomy.

In contrast, protectionist approaches are often ideologically driven and based on paternalistic assumptions about capacity and ability, especially in protecting those defined as 'weak' or 'vulnerable', as if these are inherent to the individual rather than structurally and socially constituted.

Over-policing and under-protection—more monitoring and discipline and fewer rights for socially excluded groups—are common results.⁶⁶

For instance, gender-based violence and harassment against women and gender-diverse persons in public places is a common problem in South Asia, particularly at night.⁶⁷ Women's rights activists have raised this issue repeatedly with authorities, and are often asked, in response, why they need to step out of the house at night at all.⁶⁸ The most common solutions include measures premised on surveillance, control and policing of women such as patrolling by police, installation of more CCTV cameras and arbitrary gender-discriminatory curfews.⁶⁹ Such measures do not address the underlying reasons that public spaces are unsafe. Instead, they curb freedoms and mobility of women for their 'protection'. Similarly,

⁶⁶ See Ratna Kapur. (2016). Gender Equality: Constitutional Challenges and Competing Discourses. In: S. Choudhary, M. Khosla and Pratap Bhanu Mehta (Eds.), *The Oxford Handbook of the Indian Constitution*. Oxford University Press; Ratna Kapur. (2007). *Challenging the Liberal Subject Law and Gender Justice in South Asia* In: Maitrayee Mukhopadhyay and Navsharan Singh (Eds.) *Gender Justice, Citizenship and Development*. Zubaan.

⁶⁷ For instance, see Hindustan Times. (2017, January 22) Indian women 'occupy the night streets' to protest reported mass molestation. Hindustan Times <https://www.hindustantimes.com/india-news/women-across-india-occupy-the-night-streets-to-protest-reported-mass-molestation/story-ZreaXCV9o6Ba4w-i4oFELNN.html>

⁶⁸ See Srila Roy. (2016). Breaking the Cage. Dissent. <https://www.dissentmagazine.org/article/breaking-cage-india-feminism-sexual-violence-public-space>

⁶⁹ See BBC News. (2015, October 14). Claiming Delhi's streets to break the cage for women. BBC News <https://www.bbc.com/news/world-asia-india-34486891>

women and young girls with disability are often institutionalized and denied access to information and services related to sex and sexuality in the guise of protection.⁷⁰ A report by Human Rights Watch (2014) on the treatment of women and girls with disabilities who are institutionalized in India reveals that many families prefer to leave their daughters with psychosocial or intellectual disabilities in the custody of an institution where they feel they are safe, out of fear that women with such disabilities may become easy targets for sexual violence if at home.⁷¹ They also found that institutionalization was often resorted to, to protect the women and family from shame, in cases where the girls or women with psychosocial or intellectual disabilities had sexual relationships outside marriage or were raped.⁷²

Confining women to their homes for their supposed safety undermines their agency and fails to consider and address the impunity with which gender-based violence is committed. In protest, women's movements have coined the slogan "Your Protection Does Not Protect Me"⁷³ and have been reclaiming the night⁷⁴ and public spaces through 'loitering',⁷⁵ sit-ins, midnight walks and accessing male-dominated spaces (such as tea stalls or truck pit-stops).⁷⁶ Such movements have complicated notions of safety and protection driven by morality and 'respectability' instead of agency, freedom and rights.

In another example, in response to claims by women of unsafe working conditions at night, governments have sought to bar them from working at all

⁷⁰ Nidhi Goyal. (2017). Denial of sexual rights: insights from lives of women with visual impairment in India. *Reproductive Health Matters*. 25:50. (pp.138-146). p. 139. <https://www.tandfonline.com/doi/full/10.1080/09688080.2017.1338492>

⁷¹ Human Rights Watch. (2014). "Treated Worse than Animals" Abuses against Women and Girls with Psychosocial or Intellectual Disabilities in Institutions in India. p. 41. https://www.hrw.org/sites/default/files/report_pdf/india1214.pdf.

⁷² Human Rights Watch. (2014). "Treated Worse than Animals" Abuses against Women and Girls with Psychosocial or Intellectual Disabilities in Institutions in India. p. 42. https://www.hrw.org/sites/default/files/report_pdf/india1214.pdf

⁷³ For instance, see CREA. (2021). Your Protection Doesn't Protect Me. <https://creaworld.org/your-protection-doesnt-protect-me/>

⁷⁴ See Sameera Khan. (2017, May 23). Occupy Public Spaces. *The Hindu*. <https://www.thehindu.com/life-and-style/travel/occupy-public-spaces/article18529297.ece>; Rhitu Chatterjee. (2015, September 17). #WhyLoiter reclaims public — and inner — space for Indian women. *The World*. <https://theworld.org/stories/2015-09-17/whyloiter-reclaims-public-and-inner-space-indian-women>.

⁷⁵ See Sameera Khan, SANKAR, Shilpa Phadke, Shilpa Ranade. (2011). *Why Loiter?: Women and Risk on Mumbai Streets*. Penguin Random House India.

(e.g. working in a mine)⁷⁷ or undertaking certain 'disreputable' occupations (e.g. working as a waitress in an establishment that serves alcohol).⁷⁸ Such protectionist approaches either assume that women cannot partake in certain occupations altogether as they are 'vulnerable' or 'weak' or that they need protection from supposedly immoral environments. They are 'protected' by removing them from the workforce, as opposed to undertaking measures which would protect their rights and enable their right to participation in a safe workspace.⁷⁹ Instead of treating structurally excluded groups as victims in need of protection, we must change the narrative and recognize them as rights-bearers seeking protection of their rights. A similar logic can be found in barring schools

from teaching comprehensive sexuality education, as we elaborate below.

The violation of rights of children engaged in street work in countries of the global South often evokes a powerful and emotional response and may lead to detention and institutionalization (often in conditions of punitive incarceration) for their 'protection' under the assumption that they are 'abandoned' and without homes.⁸⁰ Such responses may be misguided and based on colonialist and imperial ideas of 'exploitation', without looking at cultural, economic and context specificities. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has noted that the opinion of street-connected children should inform policies, plans and interventions

⁷⁶ Natasha Ansari. (2018, April 27) Girls at Dhabas: challenging issues of safety, or 'respectability' in urban Pakistan? Open Democracy. <https://www.opendemocracy.net/en/5050/girls-at-dhabas-safety-respectability-urban-pakistan/>; Girls at Dhabas tumblr page: <https://girlsatdhabas.tumblr.com/>

⁷⁷ See Aubrey Menard (2021, January 27). Women in Mining: A History of Legal Invisibility and Exclusion National Resource Governance Institute. <https://resourcegovernance.org/blog/women-mining-history-legal-invisibility-and-exclusion>; Newsclick Report. (2019, February 7). Allowing Women to Work Nights in Mines Is 'Equal Opportunity for Exploitation'. NewsClick. <https://www.newsclick.in/allowing-women-work-nights-mines-equal-opportunity-exploitation>; International Labour Organization. (2021). Women in Mining: Towards Gender Equality. https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_821061.pdf.

⁷⁸ For a discussion on romantic paternalism, see decision of the Supreme Court of India while deciding a ban on employment of women in bars, Anuj Garg Ors. V. Hotel Association of India Ors. Supreme Court of India. (6 December, 2007), <https://indiankanoon.org/doc/845216/>. Also, see the discussion on protectionist approaches in Ratna Kapur and Brenda Cossman. (1996). *Subversive Sites*. Sage Publications. pp. 207-222.

⁷⁹ For a discussion on 'protection of women' v. 'protection of rights', see Ali Miller. (2004). Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection. *Health and Human Rights*. 7(2), 16-47. <https://doi.org/10.2307/4065347>

⁸⁰ Susan Bissell, Jo Boyden, Philip Cook, William Myers. (2009). Rethinking Child Protection from a Rights Perspective: Some Observations for Discussion [White Paper]. International Institute for Child Rights and Development. p.8 https://iicrd.org/sites/default/files/resources/Rethinking_Child_Protection_from_a_Rights_Perspective_revised_final_0.pdf

designed to address protection of their rights.⁸¹

Another example of how protectionist laws work is the outlawing of sex work. Laws that criminalize all or some aspects of sex work frequently purport to protect women from abuse and/or trafficking (on the incorrect assumption that all sex workers are women, and all clients are men). In practice, however, these rules fail to safeguard against abuse and instead exacerbate violence and discrimination.⁸² Laws criminalizing bodily autonomy frequently expose people who are supposed to be 'protected' to discrimination, violence, harassment, extortion and imprisonment by the state. These laws frequently target behaviors and manifestations of gender, sexuality and identity that transgress legal, social and cultural norms. Not surprisingly, such criminalization harms some people more than others. This is particularly so if they occupy social locations for which they are structurally excluded, for instance

because of their age, race, ethnicity, health status, (dis)ability, chosen form of work, (im)migrant status, class, etc. Young trans, non-binary and gender non-conforming persons, for example, are often mistreated by their family, thrown out of their homes, deprived of their identity documents and cannot access services to obtain gender-affirming identity documentation. All this places them within the realm of punitive policies purported to protect young people. Their lack of documentation impedes their ability to attain an education and even within educational institutions they cannot access sex-segregated activities or spaces and face bullying.⁸³ In these ways, structural exclusion means that people facing multiple forms of discrimination operate within a context of fear: fear of being ostracized, arrested, detained, discriminated against by a wide range of duty-bearers and society at large, or because they encounter policies that deny them legal access to critical information and services.⁸⁴

⁸¹ Office of the High Commissioner for Human Rights, UNICEF and Consortium for Street Children, Aviva. (2012). Protection and promotion of the rights of children working and/or living on the street. p. 16. <https://www.ohchr.org/sites/default/files/Documents/Issues/Children/Study/OHCHRBrochureStreetChildren.pdf>

⁸² Global Network of Sex Work Projects. (2020). Women Sex Workers' Human Rights in the Changing World of Work.

⁸³ See UNDP APTN. (2017). Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia. p.42.

⁸⁴ Global Network of Sex Work Projects. (2016). Policy Brief - Young Sex Workers. p.5. <https://www.nswp.org/sites/default/files/Policy%20Brief%20Young%20Sex%20Workers%20-%20NSWP%2C%202016.pdf>

Through laws, policies or practices, criminalization creates an environment that precludes the possibility of enjoying the right to bodily autonomy as envisaged in international human rights. This includes safe and consensual sexual conduct, access to health services (e.g. contraception services, hormone therapy, or alternative insemination), and accessible, available and diverse information on sexual and reproductive health, or medical procedures (e.g. abortion, gender-affirming procedures), to name a few.

The preoccupation of States, laws, certain human rights groups, and society at large with the need to ‘protect’ young people through a barrage of laws and policies aimed at controlling their bodily autonomy has in fact led to the violation of human rights of young people in various ways.

When we consider the rights and capacities of young people, the distinction between protectionism and rights protection is critical.

Young people’s varying ages and socioeconomic situations necessitate the provision of enabling and safe environments in which

they can make independent and informed decisions in accordance with their changing capacities. This is an affirmative approach to rights protection, as opposed to protectionist measures that may impede autonomy.

Certain overly tight and sweeping limits on young people’s behavior carry the risk of driving the young person to take risks and make judgments without the assistance of trusted advisors.⁸⁵ Child ‘protection’ serves a higher purpose than keeping children safe from danger; it helps them realize their full potential as human beings and citizens of their societies.⁸⁶

⁸⁵ 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? https://www.ippf.org/sites/default/files/ippf_right_to_decide_03.pdf. P. 15.

⁸⁶ Susan Bissell, Jo Boyden, Philip Cook, William Myers. (2009). Rethinking Child Protection from a Rights Perspective: Some Observations for Discussion [White Paper]. International Institute for Child Rights and Development. p. 17. https://iicrd.org/sites/default/files/resources/Rethinking_Child_Protection_from_a_Rights_Perspective_revised_final_0.pdf

Young people are rights-holders who can make autonomous decisions on their health and sexuality in line with their evolving capacities.⁸⁷ 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 is necessary of what real protection is, and when criminal or other formal protection actually creates conditions of safety, to ensure that protection enhances rights rather than limit them.⁸⁸

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

While elaborating on how to assess the best interests of a young person, the Committee on the Rights of Children has noted that, “The terms ‘protection and care’ must also be read in a broad sense, since their objective is not stated in limited or negative terms (such as ‘to protect the child from harm’), but rather in relation to the comprehensive ideal of ensuring the child’s ‘well-being’ and development... There might be situations where ‘protection’ factors affecting a child (e.g. which may imply limitation or restriction of rights) need to be assessed in relation to measures of ‘empowerment’ (which implies full exercise of rights without restriction). In such situations, the age and maturity of the child should guide the balancing of the elements.”⁸⁹

(General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, Committee on the Rights of the Children)

⁸⁷ International Planned Parenthood Federation. (2016). Fulfill!: Guidance document for the implementation of young people’s sexual rights. World Association for Sexual Health and RNW Media. p. 11. [https://www.ippf.org/sites/default/files/2016-09/Fulfill!%20Guidance%20document%20for%20the%20implementation%20of%20young%20people%20and%20sexual%20rights%20\(IPPF-WAS\).pdf](https://www.ippf.org/sites/default/files/2016-09/Fulfill!%20Guidance%20document%20for%20the%20implementation%20of%20young%20people%20and%20sexual%20rights%20(IPPF-WAS).pdf).

⁸⁸ 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? https://www.ippf.org/sites/default/files/ippf_right_to_decide_03.pdf. p. 2.

⁸⁹ United Nations Convention on the Rights of the Child. (2013). General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1). Committee on the Rights of the Children. CRC/C/GC/14. p. 9 and 10.

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

For affirmative measures to protect and promote young people's rights, we need inclusive participatory processes where the rights bearers are also decision makers.

Your protection does not protect me

Here are a few questions that can help us distinguish between protectionist approaches and approaches that seek to protect rights:

- *Are those meant to be 'protected' considered to have autonomy?*
- *Is protection offered or is it mandatory?*
- *Are the perspectives and priorities of those meant to be 'protected' considered?*
- *Are there any curbs on the freedoms and rights of those to be 'protected'? (e.g. criminalization of sexual conduct, early marriage, limited access to SRHR information and services)*
- *Do the protective measures make young people more vulnerable?*



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 breathtaking.”⁹⁰

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

Over the past few decades, cultural narratives around young people’s bodily autonomy combine with the substance, structure and enforcement of criminal law to characterize young people—especially young women and girls—as sexually vulnerable and always in need of special protection and attention. The moral panic surrounding protecting young people’s perceived ‘innocence’

from a real or perceived ‘sexual threat’ has generated ambivalence towards their own sexual expression and assertion of sexual agency, desire and rights related to bodily autonomy.⁹¹ This moral panic is manifested in the common myth that comprehensive sexuality education will provide greater access to information on gender, sex and sexuality and, in turn, promote ‘promiscuity’.⁹²

⁹⁰ Gayle S. Rubin. (2006). Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality. In Richard Parker and Peter Aggleton (Eds.), Culture, Society and Sexuality: A Reader, 2nd Edition. Routledge. p.166.

⁹¹ For a detailed analysis on ‘moral panic’ around young people’s sexuality and gender expression and identity, see Juliana Martinez, Angela Duarte and Maria Juliana Rojas. (2021). Manufacturing Moral Panic: Weaponizing Children to Undermine Gender Justice and Human Rights. Elevate Children Funders Group and Global Philanthropy Project with the research team Sentido <https://globalphilanthropyproject.org/wp-content/uploads/2021/04/Manufacturing-Moral-Panic-Report.pdf>

⁹² Studies over the years have de-bunked this myth and established that sexuality education – in or out of schools – does not increase sexual activity, sexual risk-taking behavior or STI/HIV infection rates. See UNESCO, UNFPA, WHO, UNAIDS, UNICEF & UN WOMEN. (2018). International technical guidance on sexuality education: an evidence-informed approach. p. 4. https://unesdoc.unesco.org/in/documentView-er.xhtml?v=2.1.196&id=p::usmarcdef_0000260770&file=/in/rest/annotationSVC/DownloadWatermarkedAttachment/attach_import_d8d4de18-19d0-4a35-8eb2-ab5eaa5ca5d3%3F_%3D260770eng.pdf&updateUrl=updateUrl4466&ark=/ark:/48223/pf0000260770/PDF/260770eng.pdf.multi&fullScreen=true&locale=fr#%5B%7B%22num%22%3A115%2C%22gen%22%3A0%7D%2C%7B%22name%22%3A%22XYZ%22%7D%2C0%2C842%2C0%5D

Laws, policies and attitudes towards young people within the South Asian context have always been focused on the need to ‘protect’ them—sometimes to prevent the ‘stigma’ of pregnancy, sometimes to protect their own or their family’s honor, and sometimes as a genuine commitment to their safety and security. However, when combined with ideological socio-cultural

ideas of sexuality and the stigma associated with it, this ‘protection’ often leads to restrictive laws and policies that further existing familial control over autonomy and agency.

Such protectionist laws and practices often receive support and momentum from authoritarian, religious, ethnic, extremist and fundamentalist ideologies, where the goal is to control behavior.⁹³

⁹³ See RESURJ. (2016). Shortcomings of Penal Policies in Addressing Sexual Rights Violations. <https://resurj.org/wp-content/uploads/2020/12/Shortcomings-of-Penal-Policies-Meeting-Statement-English.pdf>



Young people as rights bearers

In this section, we show how international human rights recognize that young people have a right to autonomy and to be active participants in decision making that impacts their lives.

The 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.⁹⁴

Article 5 of the CRC states that:

States 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.

This enabling principle recognizes that young people’s divergent life experiences and circumstances impact their maturity, agency, competency and ability to undertake responsibilities.⁹⁵

The CRC recognizes that young people develop skills at different ages and in diverse ways based on their lived experiences and socio-cultural and political realities.⁹⁶

Thus, their capacities vary depending on the nature of the rights being exercised and their circumstances.

Young people need protection, participation and autonomy in varied decision-making contexts. The CRC also states that laws and programs must prioritize young people’s “best interests”.⁹⁷

⁹⁴ UNICEF. (1989). Convention on the Rights of the Child. <https://www.unicef.org/child-rights-convention/convention-text>

⁹⁵ Committee on the Rights of the Child. (2016). General Comment 20 on the Implementation of the Rights of the Child during Adolescence. <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-20-2016-implementation-rights>

⁹⁶ Innocenti Insight, Save the Children, and UNICEF. (2005). The Evolving Capacities of the Child. <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf>

⁹⁷ UNICEF. (1989). Convention on the Rights of the Child. <https://www.unicef.org/child-rights-convention/convention-text>

The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty—published by the International Commission of Jurists—are a timely intervention addressing the detrimental human rights impact of criminal laws targeting vulnerable groups. The March 8 Principles state that, “sexual conduct involving persons below the domestically prescribed minimum age of consent to sex may be consensual in fact, if not in law. In this context, the enforcement of criminal law should reflect the rights and capacity of persons under 18 years of age to make decisions about engaging in consensual sexual conduct and their right to be heard in matters concerning them. Pursuant to their evolving capacities and progressive autonomy, persons under 18 years of age should participate in decisions affecting them, with due regard to their age, maturity and best interests, and with specific attention to non-discrimination guarantees.”⁹⁸

Importantly, while noting that ‘the majority of violence takes place in the context of families’,⁹⁹ the CRC calls on states to ensure that parents do not, in the name of traditional values, tolerate or condone violence, reinforce unequal power relations within family settings and deprive adolescents of the

opportunity to exercise their basic rights.¹⁰⁰ Further, an adult’s judgment of a young person’s best interests cannot override the obligation to respect all their rights under the Convention.¹⁰¹ Evolving capacities should be seen as a positive and enabling process, not an excuse for authoritarian

⁹⁸ International Commission of Jurists. (2023). The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty. pp. 22-23. <https://icj2.wpenginepowered.com/wp-content/uploads/2023/03/8-MARCH-Principles-FINAL-printer-version-1-MARCH-2023.pdf>

⁹⁹ United Nations. (2011, April 18). General comment No. 13 on The right of the child to freedom from all forms of violence. CRC/C/GC/13. Committee on the Rights of the Child. Para 3. <https://www.refworld.org/docid/4e6da4922.html>

¹⁰⁰ Committee on the Rights of the Child. (2016). General Comment 20 on the Implementation of the Rights of the Child during Adolescence. Committee on the Rights of the Child. Para 50. <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-20-2016-implementation-rights>.

¹⁰¹ United Nations. (2011, April 18). General comment No. 13 on The right of the child to freedom from all forms of violence, CRC/C/GC/13. Committee on the Rights of the Child. Para 61. <https://www.refworld.org/docid/4e6da4922.html>

practices that restrict young people's autonomy and self-expression.¹⁰² One example of respecting young people's evolving capacities is the emphasis in international human rights law and domestic laws on informed consent of children with diverse sex characteristics (intersex) and young adults with respect to surgical interventions including those which would seek to assign sex at birth or lead to genital surgeries for modification.¹⁰³

Bangladesh, Nepal and Pakistan ratified the CRC in 1990. India and Sri Lanka ratified it in 1992. Thus, each of these countries is obliged to adhere to the convention including its foundational principles. However, under the rhetoric

of 'protection', laws and policies have been introduced and/or implemented which restrict, punish and in some cases even prohibit the autonomy of young people, regardless of their evolving capacity.

International human rights standards are clear: young people must be recognized as rights holders under the CRC's standard of evolving capacity and move away from law's protectionist impacts.¹⁰⁴ We must consider young people's sexuality and gender expression with autonomy, independence, accurate knowledge and spaces for informed decision-making. They need to be able to explore and enjoy their sexuality without being shamed, forcibly married, expelled from school, separated from friends and family, or harmed.

¹⁰² United Nations. (2006, September 20). General Comment No. 7 on Implementing child rights in early childhood. CRC/C/GC/7/Rev.1. Committee on the Rights of the Child. Para 17. <https://www.refworld.org/docid/460bc5a62.html>

¹⁰³ See United Nations. (2017). Intersex [Fact Sheet]. United Nations for LGBT Equality. <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf>; intersexAsia. More Resources. <https://intersexasia.org/resources/more-resources/>; United Nations Human Rights Council. (2016). Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. A/HRC/31/57. pp. 13-14. documents-dds-ny.un.org/doc/UNDOC/GEN/G16/000/97/PDF/G1600097.pdf?OpenElement, accessed 18 November 2020; United Nations. (2019). Background Note on Human Rights Violations against Intersex People. United Nations Human Rights Office of the High Commissioner. <https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf>

¹⁰⁴ Article 5 of the CRC, "States 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.;" Article 14 (2) of the CRC, "States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child." The Committee defines evolving capacities as an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights. See UN Committee on the Rights of the Child. (2006). GENERAL COMMENT No. 7 (2005) Implementing child rights in early childhood. CRC/C/GC/7/Rev.1. Para 17. <https://www.refworld.org/docid/460bc5a62.html>

Control over young people's bodily autonomy

Control over young people's bodily autonomy can be illustrated in two primary ways. On the one hand, there are laws and policies on the age of sexual consent. These draw a hard line on when and how a person can consent to any form of activity considered sexual. They fail to provide a safe and enabling environment for young people to explore their sexuality and/or gender expression and identity. This is often because the laws and policies presume that anyone below the age of consent would not (or should not) engage in any form of sexual activity or need any services related to their body or their sexual or reproductive health. Laws and policies limiting the scope of comprehensive sexuality education (CSE), also known as life-skills based education in some countries, and the societal stigma associated with such education, make it virtually impossible for young people to access evidence-informed and rights-based information on sexuality. Thus, not only is sexuality considered a taboo issue, in some cases even exploring one's own sexuality is effectively criminalized. This gets further complicated when the law and/or its practice fails to recognize

the legal capacity to make independent decisions for an entire section of the population, i.e., those with disabilities.

The stigma around young people's sexuality, especially outside of marriage, makes it hard for them to get support, guidance and advice. They may not be able to access comprehensive sexual and reproductive health services and information for several reasons. They may be under the age of consent to services, there might be no acceptable, accessible, quality, supportive and safe services available,¹⁰⁵ or they might have no or very limited information about what services exist and how to gain access to them. This leaves them vulnerable to unwanted pregnancies, sexually transmissible infections and more. The situation is exacerbated for those who are otherwise structurally excluded (such as young women and girls, sexual- and gender-diverse persons, and persons with disabilities) as they bear the burden of coerced sex, unwanted pregnancies and heightened risks of sexual violence, discrimination and stigmatization.

¹⁰⁵ The right to health in all its forms and at all levels contains the following interrelated and essential elements: (a) Availability; (b) Accessibility; (c) Acceptability; (d) Quality. The AAAQ standard is laid down in Office of the High Commissioner for Human Rights. (2000). General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art.12). CESCR. E/C.12/2000/4. Para 12.

When conversations around consent are framed in relation to rights violations and criminality, there is a hyper focus on violence and harm rather than agency and autonomy. A binary understanding of consent is thus written into most laws. And yet, consent is always complex and evolving for everyone. It operates along a spectrum. It is more than the right to say 'no' to sexual activity. Consent includes full access to/disclosure of information and an understanding and respect for autonomy. It requires an enabling

environment to be able to say 'no' and to say 'yes' and even to say 'maybe'. Consent necessarily requires access to information about one's rights, information about sexual health, sexual pleasure, reproductive health etc. It also includes the recognition of desires and respect for other people.

Several issues have sparked considerable debate among feminists in South Asia, including response to forced marriage (especially of girls and young women) and the age of consent to sexual activity.



Age of sexual consent

Criminal law generally punishes sexual activity by young people through 'age of consent' laws which are often written as 'statutory rape' laws. Within the legal context of South Asia, this is constructed in a way that stigmatizes the exploration of one's body, desires, and sexuality.¹⁰⁶ This is amplified when criminal law negates consent of young people entirely, with no nuances of capturing desire, sexual expressions, gender expressions, gender diversity, autonomy etc. The looming shadow of punishment with the accompanying stigma and culture of silencing restricts the scope to view pleasure, intimacy, desire and sexuality in a positive light. It increases young people's solitude and uncertainty.¹⁰⁷ Disability-related legal capacity restrictions further complicate this. People with disabilities are constructed as sexless, genderless victims.¹⁰⁸ Thus, young people with disabilities, especially girls and young women, are doubly punished for sexuality or gender nonconformity.

In South Asia, underlying these practices of social control are pervasive ideas of shame and stigma. Cultural and social norms and taboos on sexuality paint menstruating persons as dirty, impure, vulnerable to pollution, and in need of isolation and segregation.¹⁰⁹ These pervasive cultural linkages between shame, stigma, notions of purity and honor affect how young people think and feel about their sexuality growing up. When they are unable to turn to elders, mentors or teachers for support or concerns, young people often turn to peers who are usually similarly positioned in terms of lack of information and perspectives. The increased availability of information on the internet is a double-edged sword, providing access to both accurate and inaccurate information—information designed to explain, and information designed to stoke fear and confusion.

¹⁰⁶ Amnesty International. (2019). Developing Principles to Address the Detrimental Impact on Health, Equality and Human Rights of Criminalization with a Focus on Select Conduct in the Areas of Sexuality, Reproduction, Drug and HIV. <https://www.amnesty.org/en/documents/ior10/0164/2019/en/>

¹⁰⁷ Partners for Law in Development and Tulir. (2019). Southern Region Consultation on Adolescent Sexuality and the Law. Available at: <https://pldindia.org/research/publications/gender-and-sexuality/>

¹⁰⁸ See Renu Addlakha, Janet Price Shirin Heidari. (2017). Disability and sexuality: claiming sexual and reproductive rights. *Reproductive Health Matters*. 25:50, p.4-9; Nidhi Goyal. (2017). Denial of sexual rights: insights from lives of women with visual impairment in India. *Reproductive Health Matters*. 25:50, p.138-146.

¹⁰⁹ 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/>

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. In India and Nepal, the age of consent is 18 years old.¹¹⁰ In Bangladesh and Pakistan, the age of consent is 16.¹¹¹ In Sri Lanka, the age of consent is set at 16 years,¹¹² but there is a provision that differentiates for 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, in case 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.¹¹³ Despite recommendations by the Law Commission of Sri Lanka, there has been no amendment to decriminalize consensual sex with a person below the age of 16 years.¹¹⁴ In the South Asian context, where the principle of Romeo and Juliet laws¹¹⁵ (close-in-age exemptions to age of consent laws) are not commonly recognized or applied, the age of sexual consent becomes a hard line drawn by the state to decide the age at which a person is capable and ready to consent.

¹¹⁰ For India, see Section 2(d) of the Protection of Children from Sexual Offences Act (POCSO); Section 375 of the Indian Penal Code, 1860. For Nepal, see Section 219 of the Muluki Criminal (Code) Act, 2074 (2017).

¹¹¹ For Bangladesh, as per Section 375 of the Bangladesh Penal Code, 1860, rape is committed against any person under the age of 14, unless such person is their wife, 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.

¹¹² See section 363(e) of the Sri Lankan Penal Code, 1883.

¹¹³ See section 364 of the Sri Lankan Penal Code, 1883.

¹¹⁴ Law Commission of Sri Lanka. (2014). Explanatory note on the sentencing policy with regard to statutory rape and matters connected thereto. http://lawcom.gov.lk/web/images/stories/reports/explanatory_note_on_the_sentencing_policy.pdf

¹¹⁵ Romeo and Juliet laws refer to exceptions to age of consent clauses for sexual activity when both partners are close to each other in age. This exception has been adopted by jurisdictions across the world in recognition that blanket criminalization of all sexual activity occurring below the age of consent would be unjust.

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, develop respectful relationships, and dismantle gender stereotypes and negative social norms. Furthermore, comprehensive sexuality education contributes to their embracing diversity, consent, respect and equality. This contributes to their own individual development, to more equal societies and the fulfilment 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 behaviour that tend to perpetuate discrimination and violence against women and girls.¹¹⁶

(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)

Though there are examples of initiatives that are supported and funded by governments,¹¹⁷ they often do not

challenge the discomfort and stigma around sex and sexuality and may not be affirming of sexuality and gender diversity

¹¹⁶ Tlaleng Mofokeng, Victor Madrigal-Borloz, Farida Shaheed, Dorothy Estrada-Tanck, Ms. Ivana Radacic, Elizabeth Broderick, Meskerem Gesettechane and Melissa Upreti. (2023, March). A COMPENDIUM ON COMPREHENSIVE SEXUALITY EDUCATION. Working Group on discrimination against women and girls. p.4. <https://www.ohchr.org/sites/default/files/documents/issues/health/sr/Compendium-Comprehensive-Sexuality-Education-March-2023.pdf>

¹¹⁷ One prominent example is the Adolescence Education Programme in India which aimed to enable adolescents to articulate their issues, know their rights, counter, shame and fear, build self-esteem and confidence, and develop the ability to take on responsibility for self, relationships and (to an extent) the society around them. <https://ae parc.ncert.org.in/>; Another example is the Rashtriya Kishor Swasthya Karyakram (RKSK), 2014 which recognizes sexual and reproductive health services as an integral component of adolescent health and aims to provide confidential and barrier-free information and services. <https://nhm.gov.in/index4.php?lang=1&level=0&linkid=152&lid=173>

due to religious and community norms.¹¹⁸ In India, there have been instances of societal and political pushback against national-level programs incorporating aspects of CSE.¹¹⁹ In 2021, following outrage on social media, the National Council for Education Research and Training even removed from its website a teacher-training manual towards increasing the inclusion of transgender children in school education.¹²⁰

It is important to keep in mind that 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 18.¹²¹ Many young people enter early marriages or less formal romantic co-habitation,

often between peers of similar ages.¹²² There is also a vast amount of violence. The WHO reports that, “1 in 4 young women (aged 15-24 years) who have been in a relationship will have already experienced violence by an intimate partner by the time they reach their mid-twenties.”¹²³ At the same time, there is considerable evidence to show that young people engage in non-coercive sexual behavior with others, and experience their sexuality in positive and pleasurable ways.¹²⁴ Moreover, the media emphasis on tropes of the ‘sex offender’ being a stranger, irredeemably predatory, evil and dangerous have played into the rationale for legal prohibitions that often run counter to young people’s sexual expression and choices. These sensationalizing reports hide the fact that most violence against

¹¹⁸ See TARSHI. (2019). What makes Sexuality Education Comprehensive?: Exploring the Indian Context, a Working Paper. pp. 75-83. https://tarshi.net/downloads/What_Makes_Sexuality_Education_Comprehensive-a_Working_Paper_by_TARSHI.pdf.

¹¹⁹ Feminism in India. (2017, August 24). On Denying Young People the Right to Know: A Policy History Of CSE In India. <https://feminisminindia.com/2017/08/24/policy-history-cse-india/>; TARSHI. (2019). What makes Sexuality Education Comprehensive?: Exploring the Indian Context, a Working Paper. p. 46. https://tarshi.net/downloads/What_Makes_Sexuality_Education_Comprehensive-a_Working_Paper_by_TARSHI.pdf

¹²⁰ Sayantan Datta. (2021, November). NCERT Removes Teacher-Training Manual on Transgender-Inclusive School Education After Backlash. The Wire. <https://thewire.in/lgbtqia/ncert-removes-teacher-training-manual-on-transgender-inclusive-school-education-after-backlash>

¹²¹ UNFPA, UNAIDS, and UNESCO. (2021). My Body Is My Body, My Life Is My Life. https://asiapacific.unfpa.org/sites/default/files/pub-pdf/unfpa_my_body_is_my_body_my_life_is_my_life.pdf

¹²² UNFPA, UNAIDS, and UNESCO.

¹²³ World Health Organization (2021, March 9). Devastatingly pervasive: 1 in 3 women globally experience violence. Joint New Release. <https://www.who.int/news/item/09-03-2021-devastatingly-pervasive-1-in-3-women-globally-experience-violence>

women and girls is committed by people they know.¹²⁵ The conception of the ‘sex offender’ solely in this manner frames young people’s sexuality as always ‘dangerous’ and ‘in danger’. The logic of protectionism suggests: young people need to be protected from their own experiences of sexuality.

This has strengthened the powerful hold of the punitive, neoliberal, carceral and surveillance practices of the criminal legal system, and reduced the conversation on young people’s sexuality to their experience of violence and abuse and restricted it to heteronormative interactions alone.¹²⁶

¹²⁴ The United Nations Population Fund (UNFPA), The Joint United Nations Programme on HIV/AIDS (UNAIDS), and United Nations Educational, Scientific and Cultural Organization (UNESCO). (2018). International technical guidance on sexuality education: An evidence-informed approach, p. 12. <https://www.unfpa.org/sites/default/files/pub-pdf/ITGSE.pdf>; The YP Foundation. Comprehensive Sexuality Education. Accessed 17 February 2022. <https://theypfoundation.org/focus-area/comprehensive-sexuality-education/>.

¹²⁵ World Health Organization (2021, March 9). Devastatingly pervasive: 1 in 3 women globally experience violence. Joint New Release. <https://www.who.int/news/item/09-03-2021-devastatingly-pervasive-1-in-3-women-globally-experience-violence>

¹²⁶ Joseph J. Fischel. (2016). Sex and Harm in the Age of Consent. University of Minnesota Press.

Forced marriage

In South Asia, there is a close correlation between 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). Most countries in the region either align the age of sexual consent to that of marriage or do not recognize sexual consent outside of marriage at all (often through penalties for adultery).

The conflation of age of marriage with the age of sexual consent has in fact made young people, especially young women and girls, more vulnerable to being at the receiving end of punitive laws and practices.

Women's rights movements in South Asia have persistently demanded that state and non-state actors and institutions recognize the harms of forced marriage, especially of girls and young women,

including non-consensual sexual activity (often conflated with consensual sexual activity below the age of consent), early childbearing, gender-based violence, low levels of education and lack of economic independence. The predominant discourse often conflates early marriage with child marriage¹²⁷ and a common advocacy demand is the prohibition, non-recognition and criminalization of such marriages. However, these tend to ignore questions of consent and context, or the evolving capacity of young people to make decisions about sexuality and relationships. Rather, the moral panic around sexual activity among young people is evident in the widespread use of phrases such as 'child brides'¹²⁸ and 'modern day slavery'.¹²⁹ A glaring example of this moral panic was seen during the 'drive' or 'crackdown' against child marriage by the state government

¹²⁷ Sexual Rights Initiative. (2013, August). Analysis of the Language of Child, Early, and Forced Marriages. https://www.sexualrightsinitiative.org/sites/default/files/resources/files/2019-04/SRI-Analysis-of-the-Language-of-Child-Early-and-Forced-Marriages-Sep2013_0.pdf

¹²⁸ For instance, see ICRW, United Nations Population Fund (UNFPA), Australian Agency for International Development (AusAID), Asian Forum of Parliamentarians on Population and Development (AFPPD). (2012). Child Marriage in Southern Asia: Policy options for action. <https://asiapacific.unfpa.org/sites/default/files/pub-pdf/Child%20Marriage%20in%20Southern%20Asia.pdf>; Girls Not Brides: <https://www.girlsnotbrides.org/>

¹²⁹ For instance, see Girls Not Brides. (2021). Child marriage and modern slavery. <https://www.girlsnotbrides.org/learning-resources/resource-centre/child-marriage-and-modern-slavery/>; United Nations Children's Fund (UNICEF). (2021). The Relationship between Child Labour and Child Marriage: A Discourse Analysis. <https://www.unicef.org/rosa/media/15836/file/The%20Relationship%20between%20Child%20Labour%20and%20Child%20Marriage:%20A%20Discourse%20Analysis%20.pdf>; Srila Roy. (2015, August 24). Early marriage and the limits of freedom. Open Democracy. <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/early-marriage-and-limits-of-freedom/>

of Assam, India in 2023.¹³⁰ Temporary jail spaces had to be created¹³¹ to accommodate more than 3,000 people who were arrested over two weeks for abetting and committing the offence of child marriage.¹³² However, evidence suggests the need to carefully disentangle the real multi-faceted circumstances that surround such incidents. While forced marriage is a reality requiring attention, not all marriages of young people under the age of 18 are, in fact, forced.¹³³ 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.¹³⁴

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 and also access SRHR services.¹³⁵ 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.¹³⁶

¹³⁰ Rokibuz Zaman. (2023, March 9). In Assam, POCSO use in drive against child marriage raises legal concerns. Scroll. in. <https://scroll.in/article/1044978/in-assam-pocso-use-in-drive-against-child-marriage-raises-legal-concerns>

¹³¹ Biswa Kalyan Purkayastha. (2023, February 9). Temporary Jails Set Up In Assam To Accommodate Child Marriage Arrests. The Quint. <https://www.thequint.com/news/india/temporary-jails-set-up-in-assam-for-child-marriage-arrests#read-more>

¹³² See Sanskrita Bharadwaj. (2023, February 17). Solutions To Assam's Child-Marriage Problem In Schools, Not In Mass Arrests Ordered By CM. Article-14. <https://article-14.com/post/solutions-to-assam-s-child-marriage-problem-in-schools-not-in-mass-arrests-ordered-by-cm-63eeea6e577cb>

¹³³ See Partners for Law in Development. (2020, March 25). Why Girls Run Away to Marry: Adolescent Realities and Socio-Legal responses in India. available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3560854

¹³⁴ Suzanne Petroni, Madhumita Das, and Susan M Sawyer. (2018, April 1). Protection versus Rights: Age of Marriage versus Age of Sexual Consent. The Lancet Child and Adolescent Health 3. no. 4: 274–80.

¹³⁵ Suzanne Petroni, Madhumita Das, and Susan M Sawyer. (2018, April 1). Protection versus Rights: Age of Marriage versus Age of Sexual Consent. The Lancet Child and Adolescent Health 3. no. 4 (1 April 2018): 274–80.

¹³⁶ See Partners for Law in Development. (2020, March 25). Why Girls Run Away to Marry: Adolescent Realities and Socio-Legal responses in India. available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3560854

In several South Asian countries such as Pakistan,¹³⁷ Bangladesh,¹³⁸ India¹³⁹ and Sri Lanka,¹⁴⁰ 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.

Across the region, #FlawsinLaws campaign partners discussed the typical trajectory of situations they confront. When young people either engage in sexual activity or exercise their right to decide who they want to marry, families often disapprove for multiple reasons, ranging from caste and religion to sexual and gender identities and

socio-economic status, or simply because the family and/or community seek to exert control over autonomy and decision-making. In a study conducted in Sri Lanka, the most common cause for young girls to elope was their family's disapproval of their romantic relationship.¹⁴¹

As a result of these impulses, the family often files a slew of criminal charges against the male partner including kidnapping, sexual assault and rape.¹⁴² 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 will¹⁴³ and have entertained criminal complaints ranging from kidnapping,

¹³⁷ For instance, see CNN (2022, December 29). Pakistan court frees convicted rapist after 'agreement' to marry his victim. <https://edition.cnn.com/2022/12/29/asia/pakistan-convicted-rapist-freed-marry-victim-intl-hnk/index.html>; Haroon Janjua. (2022, December 30). Anger as Pakistan court frees rapist after he agrees deal to marry his victim. The Guardian. <https://www.theguardian.com/global-development/2022/dec/30/pakistan-court-frees-rapist-after-he-agrees-deal-to-marry-his-victim>

¹³⁸ See Center for Reproductive Rights. (2018). Ending Impunity for Child Marriage in Bangladesh: Normative And Implementation Gaps [Policy Brief]. pp. 13-16. https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/64829505_ending_impunity_for_child_marriage_bangladesh_2018_final-web.pdf

¹³⁹ Poorvi Gupta. (2020, August 25) How India's Rape-Survivors End Up Marrying Their Rapists. Article 14. <https://article-14.com/post/how-india-s-rape-survivors-end-up-marrying-their-rapists>

¹⁴⁰ Equality Now, Dignity Alliance International. (2021). Sexual Violence In South Asia: Legal and other barriers to justice for survivors. p. 46. https://equalitynow.storage.googleapis.com/wp-content/uploads/2021/04/20043321/Sexual_Violence_in_South_Asia_Legal_and_other_Barriers_to_Justice_for_Survivors_-_Equality_Now_-_2021_1.pdf

¹⁴¹ S. M. H. M. K. Senanayake. (2017). Reasons of Female Children for Elope with Boyfriends in Anuradhapura district of Sri Lanka. Medico-Legal Journal of Sri Lanka. 5, no. 1: 9.

¹⁴² See Enfold Proactive Health Trust, UNFPA and UNICEF. Raha & Ramakrishnan. (2022). Implication of the POCSO Act in India on Adolescent Sexuality: A Policy Brief. pp. 10, 16. <https://enfoldindia.org/wp-content/uploads/2022/12/POSCO-Act-Policy-Brief.pdf>

¹⁴³ See Priyadarshini Thangarajah and Ponni Arasu. (2011). Queer Women and the Law in India. In Arvind Narrain and Alok Gupta (Eds.), *Law like Love: Queer perspectives on Law*. Yoda Press. pp. 325-337; Bina Fernandez and Gomathy N.B. (2003). The Nature of Violence Faced by Lesbian Women in India. Tata Institute of Social Sciences.

abduction to wrongful confinement against their chosen partners.¹⁴⁴

In cases of elopement, parents may file a missing person complaint with the police or contact their school and friends.

In these situations, the young person (predominantly a young girl) is sent to a 'shelter home' till she reaches the age of majority, or returned to her parents' home, while the boy is kept at a juvenile detention center.

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 women, and those with a disability, lack agency while young men are framed as violators.

As we worked together on the campaign and follow-up, we frequently discussed the highly contested theme of forced marriage versus consensual marriage by young people. It is easier to speak of stopping marriages under a certain age, say 18 years of age, than to

address education, empowerment, communication and capacity. The issue of forced marriages (of individuals of any age) is a socio-cultural problem encompassing social, cultural, political and economic realities and ideas of morality and tradition.¹⁴⁵ There is little evidence that criminalization and protectionism will solve deep-rooted sociocultural practices of gender- and age-based discrimination.

Addressing the issue of forced marriages requires us to dismantle the 'compulsory' nature of marriage by interrogating why it is considered the sole preserve for status, economic protection and/or the socially sanctioned means to access sexual desire for most women.

In Pakistan, our partner Aahung has worked on several projects aimed at reducing forced marriages of girls and young women. Over a decade of this work, they realized that this complex social issue cannot be ended by creating skill centers, introducing incentive programs or rebranding laws. Rather, the solutions are to be found in foregrounding young

¹⁴⁴ See Ponni Arasu and Priya Thangarajah. (2012). Queer Women and Habeas Corpus in India: The Love that Blinds the Court. *Indian Journal of Gender Studies*. 19(3) 413. pgs. 4-6, 8-17.

¹⁴⁵ Oxfam. (2020, March 1). Uprooting Our Beliefs: Examining Social Norms Contributing to Violence against Women and Girls, Including Child Marriage. <https://policy-practice.oxfam.org/resources/uprooting-our-beliefs-examining-social-norms-contributing-to-violence-against-w-621153/>



people's agency and autonomy to make decisions in their specific community contexts. This would mean giving due regard to how young people often exercise their right to make decisions on bodily autonomy in a context in which family and community provide the grounding for their identities. Aahung found that empowering young women and girls and building an environment where their bodily autonomy is

recognized is the best practice for building girls' and young women's ability to resist unwanted marriage. Organic value-based shifts happen as young girls move from being perceived as individuals in need of protection to individuals who can exercise agency. In turn, this enables them to navigate their social and family environments without alienating their loved ones, seeming like outliers or being the targets of violence or backlash.

Age is not the best or singular factor to measure autonomy

Age—emerging over the last two centuries, in part as product of colonization¹⁴⁶—has been the main indicator of success in preventing forced marriages of girls and young women. Robyn Linde has theorized how the British and French empires felt growing

pressure especially concerned young girls who were in ‘moral danger.’¹⁴⁷ While expanding on how numerical, age-based legal norms about children diffused globally from the West, Robyn states that, “...the idea of childhood diffused to the colonies was age-specific, meaning that it was not defined by behavior, rite, ritual, race, class, status, or gender, but rather by age.”¹⁴⁸

“The new interest in child welfare validated and institutionalized ideas about childhood as a vulnerable period of life when children need protection, structure, and guidance.”¹⁴⁹

(Robyn Linde, The globalization of childhood: The international diffusion of norms and law against the child death penalty)

Age is a standard indicator that simplifies data collecting and processing. Moreover, today raising the ages for sex or marriage, against some older practices, is used to measure change and ‘success’ in efforts to

pressure from their citizens to do more for the people of the colonies, and this

prevent forced marriages. However, groups dealing with young people worry

¹⁴⁶ Linde, R. (2014). The globalization of childhood: The international diffusion of norms and law against the child death penalty. *European Journal of International Relations*, 20(2). 544–568. <https://doi.org/10.1177/1354066113475464>

¹⁴⁷ Linde, R. (2014). The globalization of childhood: The international diffusion of norms and law against the child death penalty. *European Journal of International Relations*, 20(2). p.553. <https://doi.org/10.1177/1354066113475464>

¹⁴⁸ Linde, R. (2014). The globalization of childhood: The international diffusion of norms and law against the child death penalty. *European Journal of International Relations*, 20(2). p.554. <https://doi.org/10.1177/1354066113475464>

¹⁴⁹ Linde, R. (2014). The globalization of childhood: The international diffusion of norms and law against the child death penalty. *European Journal of International Relations*, 20(2). p.553. <https://doi.org/10.1177/1354066113475464>

that a singular and undue focus on delaying sexual activity, cohabitation or marriage may divert attention and resources from gender inequality, discriminatory social structures, and rigid and heteronormative gender roles, all of which result in gender-based harms.¹⁵⁰

Delaying sexual activity or marriage does not by itself lower the risk of gender-based violence, discrimination, reduced education and livelihood

prospects, restricted mobility, and limited access to SRHR services and information. Providing young people with information on sex and sexuality, gender expression and identity, and bodily autonomy, encouraging critical thinking about gender stereotypes, and building strong support networks may be more effective and meaningful in expanding their choices and giving them the skills and environment to exercise autonomy.¹⁵¹

¹⁵⁰ See The CEFMU and Sexuality Working Group. (2022). Key Takeaways, A Webinar: WHAT COUNTS AS SUCCESS IN CHILD MARRIAGE INTERVENTIONS? https://acr.ippf.org/sites/amr/files/2022-03/Key-Takeaways_ECFM-2022_English.pdf

¹⁵¹ See American Jewish World Service. UNDERSTANDING CEFMU: FROM AGE TO AGENCY. <https://ajws.org/our-impact/measuring-success/research-early-child-marriage/understanding-cefm-from-age-to-agency/>

How Protectionist Laws, Policies and Practices Harm Young People

“Sexual conduct and reproductive conduct are in themselves deemed harm(ful) 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.”¹⁵²

(Alice M. Miller with Tara Zivkovic, Seismic Shifts: How Prosecution Became the Go-To Tool to Vindicate Rights)

In this section we look at examples from South Asian countries to illustrate the ways in which protectionist laws, policies and practices can harm young people and curtail their rights. We focus on the ways that the legal age of sexual consent and marriage can be used to further control and effectively criminalize young people’s sexual and gender expression.

The partners for the #FlawsInLaws campaign and this Sourcebook investigated the impact of criminalization of young people’s sexuality within their respective country contexts. We discovered a wealth of data, cases and experiences highlighting

the ways criminalization resulted in or facilitated violations of fundamental rights through acts of commission or omission, as well as the non-recognition of reasonable accommodation for young people with disabilities (especially girls and young women).

In India, for example, the Protection of Children from Sexual Offences Act (POCSO) was enacted in 2012. It was hailed as the first gender-neutral legislation addressing child sexual abuse. It put in place legal mechanisms that were presented as child friendly. POCSO, which purports to focus on abuse of young people and children

¹⁵² Alice M. Miller with Tara Zivkovic. (2019). 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: Rethinking Human Rights and Criminal Law. University of Pennsylvania Press. p. 47.

under 18, in effect criminalizes all forms of sexual activity and expression by and with young people who are below the age of 18 and introduced a mandatory reporting clause.¹⁵³ This criminalizes non-reporting by any person who has knowledge about sexual activity by a person below the age of 18. This law and its mandatory reporting provision have 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. Interestingly, data indicates that a significant proportion of cases under POCSO are in fact consensual relationships between young people

who fall in the ages of 15-18 years.¹⁵⁴ A qualitative study of the implementation of POCSO in five states also shows that in most cases where the young person (usually a young girl) was in a romantic relationship with the accused (usually a young boy) the police complaint was lodged by a family member, usually the parents of the young person.¹⁵⁵ This dissonance between protection from child sexual abuse and restricting young people's autonomy (protectionism v. protection of rights) has also been flagged by the judiciary in India, which does not have much discretion while implementing strictly defined criminal provisions.¹⁵⁶

¹⁵³ See section 19 (1) read with section 21 (1) of the Protection of Children from Sexual Offences Act (POCSO) 2012. Section 19 (1) states: 'Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to, - (a) the Special Juvenile Police Unit; or (b) the local police. (2) Every report given under sub-section (1) shall be— (a) ascribed an entry number and recorded in writing; (b) be read over to the informant; (c) shall be entered in a book to be kept by the Police Unit.' Section 21(1) states: 'Any person, who fails to report the commission of an offence under subsection (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.' For a detailed analysis, see National Law School of India University, Bangalore. (2018, June 15). An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children, Centre for Child and the Law. <https://feministlawarchives.pldindia.org/wp-content/uploads/Mandatory-Reporting-Paper-CCL-NLSIU.pdf>

¹⁵⁴ Swagata Raha. (2021, March). Criminalizing Adolescent Sexuality – The Protection of Children from Sexual Offences Act and the Rights of Adolescents. The P39A Criminal Law Blog. <https://p39ablog.com/2021/03/04/criminalizing-adolescent-sexuality-the-protection-of-children-from-sexual-offences-act-and-the-rights-of-adolescents/>.

¹⁵⁵ Centre for Child and the Law and National Law School of India University. (2018). Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues. <https://feministlawarchives.pldindia.org/wp-content/uploads/Implementation-of-the-POCSO-Act-2012-by-speical-courts-challenges-and-issues-1-1.pdf?>

¹⁵⁶ Swagata Raha. (2021, March 4). Criminalizing Adolescent Sexuality – The Protection of Children from Sexual Offences Act and the Rights of Adolescents. The P39A Criminal Law Blog. <https://p39ablog.com/2021/03/criminalizing-adolescent-sexuality-the-protection-of-children-from-sexual-offences-act-and-the-rights-of-adolescents/>

The YP Foundation, one of the #FlawsInLaws partners, runs the Feminist Adolescent and Youth-Led Action (FAYA) Programme. FAYA provides stigma-free and rights-affirming information on SRHR by implementing out-of-school comprehensive sexuality education sessions.¹⁵⁷ During FAYA's implementation, POCSO was shown to be a barrier to ensuring that young people have access to comprehensive sexuality education. Trainers frequently discussed issues ranging from sex, attraction, love, sexual intimacy, exploration, masturbation, to abortion and contraception through FAYA. This encouraged participants to share their own journeys through the complex terrain of adolescence. Trainers were frequently faced with the dilemma of providing a safe space for participants to explore such issues while also adhering to the law, which requires reporting of even the suspicion of an offense. At the same time, and in absolute contradiction to what the law claims to do, in those instances where the trainers

approached the police with concerns about incidents of harm and violations of young people's rights, the police asked them hostile questions and blamed them for the delay in reporting. This also led to a reluctance among trainers to work on SRHR issues. The trainers also shared their experiences with police victim-blaming and instances where the panchayat (India's local government system, essentially a council of elders representing a village) arranged for the girl to be married to the perpetrator without her consent.

Pakistan's legal landscape is somewhat unique in the region. Pakistan's constitutional and Sharia law operate in parallel, i.e., either 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 marriage¹⁵⁸ wants to marry out of her free will, constitutional law is used by family members and societal

¹⁵⁷ The YP Foundation. Feminist and Adolescent Youth-Led Action. accessed 15 November 2021, <https://theypfoundation.org/programmes/faya/>; "A Rapid Programme Review of Adolescent Reproductive and Sexual Health Program (ARSH) and RSKS by the WHO revealed that the mandatory reporting obligation and absence of an exception for consensual sexual relationships between minors, resulted in confusion among service providers who are "inclined to deny SRH services to young people in some states.". Alka Barua, et.al, (2020). Adolescent health programming in India: a rapid review. *Reproductive Health*. 17, 87. <https://doi.org/10.1186/s12978-020-00929-4>

¹⁵⁸ Under Pakistan's Child Marriage Restraint Act 1929, the legal age of marriage for boys and girls is 18 and 16 years respectively. In April 2014, the Sindh Assembly adopted the Sindh Child Marriage Restraint Act 2013, which changed the minimum age to 18 years for both girls and boys.

actors to stop the marriage. On the other hand, Sharia law is frequently used to justify forcing young women and girls to marry. In the Sharia system, the age of marriage begins at puberty. Following this, marriages are often arranged to control the burgeoning sexuality of young people. Control over their 'chastity' and the 'honor' of the family and community often deprives them of their sexual liberty.¹⁵⁹ As we see, all these laws are used as per the convenience of the family and community, as tools of control, to mete out punishment when contravened rather than as a means of 'protection,' let alone empowerment.

Aahung has grappled with multiple cases of young girls, statutorily below the age of marriage, wanting to marry the partner of their choosing but being denied the autonomy to do so. Through the #FlawsInLaws campaign, Aahung raised an important question for reflection: Does the law protect rights or is it held over our heads to keep us in line?

In contrast to other countries in the region, Nepal is often considered to be

relatively progressive when it comes to its laws and policies on bodily autonomy. Yet, regressive legal provisions and policies remain, rendering it difficult for young women and girls, as well as sexual- and gender-diverse persons, to access their rights. For example, despite the right to change one's legal gender, the National Civil (Code) Act, 2017 continues to define marriage as between a man and a woman, thereby prohibiting marriage between same sex and gender-diverse couples. 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 restrictive and protectionist ideologies. This limits its focus to puberty, health, menstruation and safe motherhood. YUWA has advocated to broaden the scope of CSE to include rights language and to center the autonomy of young people but has met with some reluctance from parents and teachers because of the social stigma associated with sexuality.¹⁶⁰

¹⁵⁹ See Suzanne Petroni, Madhumita Das, and Susan M Sawyer. (2018, April 1). Protection versus Rights: Age of Marriage versus Age of Sexual Consent. *The Lancet Child and Adolescent Health* 3, no. 4: 274–80; Paras 27 and 38; Office of the UN High Commissioner for Human Rights. (2023, February 2). Adverse impact of forced marriage on the full and effective enjoyment of all human rights by all women and girls. Human Rights Council. A/HRC/52/50

¹⁶⁰ YUWA. (2021). *Sexuality Education Curriculum Review of Nepal* (as per International Technical Guidance on Sexuality Education).

One of the most common concerns with criminalization of young people's sexuality has been barriers to access to abortion services and post-abortion care. Hidden Pockets Collective is working to highlight the barriers young unmarried women face in accessing abortion services in parts of India. In India, abortion is restricted but not criminalized. However, lack of information and misinformation means that people needing abortions and service providers often either believe it to be prohibited or available only to married women.¹⁶¹ Under POCSO, with all sexual activity for those under 18 criminalized, combined with the requirement of mandatory reporting, young people seeking to terminate their pregnancies only have illegal and potentially unsafe avenues. The COVID-19 pandemic highlighted the challenges in abortion services available to young people, especially young people with

disabilities and queer young people.¹⁶² The YP Foundation's Safe Abortion for Everyone (SAFE) Programme shows how the law and government awareness efforts increase abortion stigma and make service providers nervous about performing abortions. Service providers' ethical dilemmas over POCSO's reporting requirement and their dedication to high-quality care for children are revealed in interviews. These young people often prefer not to have either their parents or the legal system involved.¹⁶³ After hearing about mandated reporting, many abortion-seekers don't return to those service providers, and some physicians recommend other clinics.¹⁶⁴

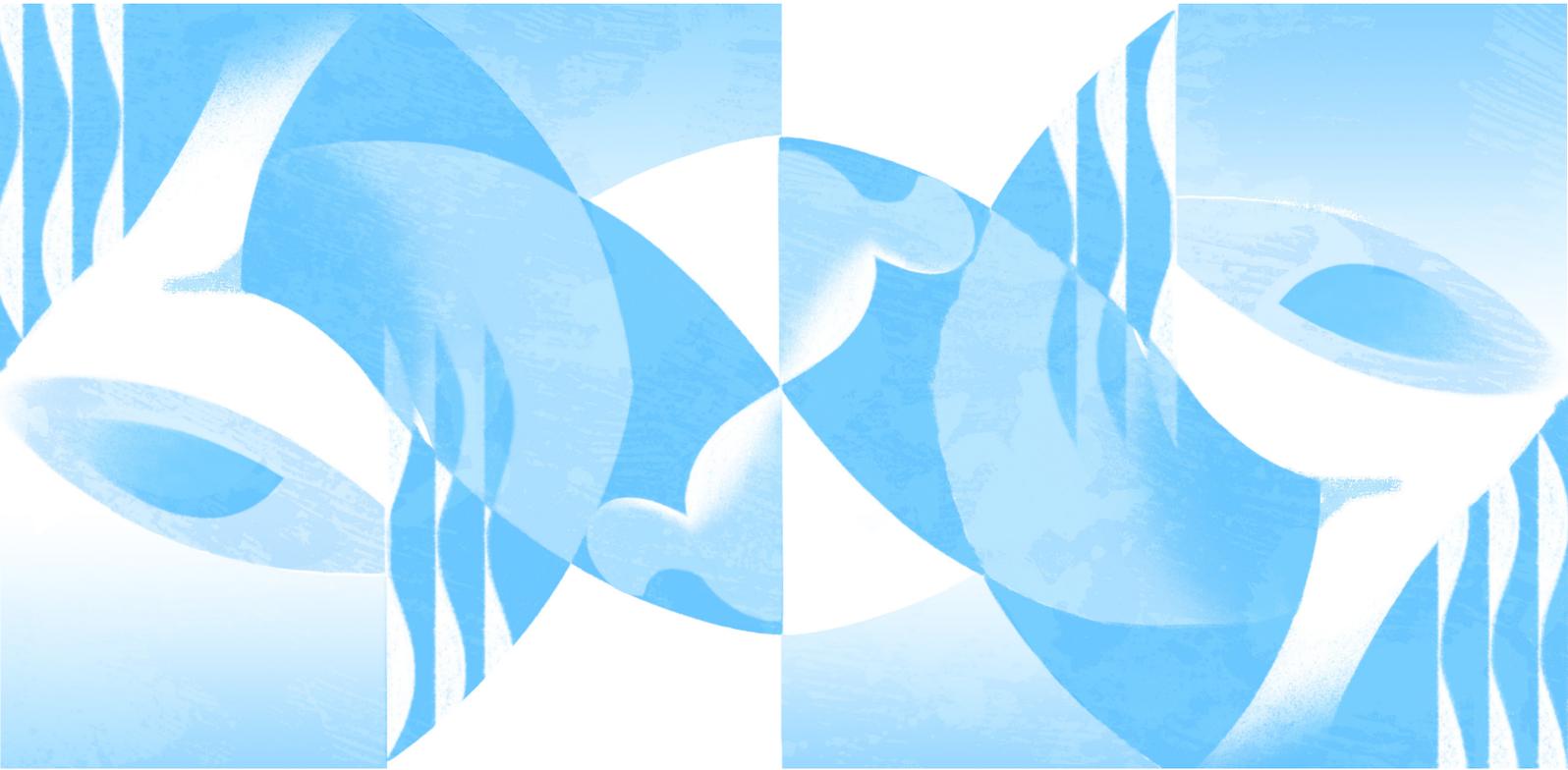
Recognizing that mandatory reporting may discourage young people from approaching doctors for safe termination of pregnancies, the Supreme Court of India in 2022 read down the mandatory

¹⁶¹ Hidden Pockets Collective. (2021). Abortion Is Care. <https://soundcloud.com/hidden-pockets/sets/abortion-is-care>.

¹⁶² Hidden Pockets Collective. (2020, December 28). Abortion in Pandemic: Reality Check at the End of 2020. Hidden Pockets Collective (blog). <https://hiddenpocketscollective.org/2020/12/28/abortion-in-pandemic-reality-check-in-december/>.

¹⁶³ Aparna Chandra, Mrinal Satish, Shreya Shree Mini Saxena. (2021). Legal Barriers to Accessing Safe Abortion Services in India: A Fact Finding Study. Center for Reproductive Rights. https://reproductiverights.org/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India_Final-for-upload.pdf

¹⁶⁴ Aparna Chandra et al., Mrinal Satish, Shreya Shree Mini Saxena. (2021). Legal Barriers to Accessing Safe Abortion Services in India: A Fact Finding Study. Center for Reproductive Rights. https://reproductiverights.org/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India_Final-for-upload.pdf



reporting provision of POCSO. At the request of the young person seeking the termination of the pregnancy and the guardian, the registered medical practitioner is exempted from disclosing their identity and personal details.¹⁶⁵ This will ease the tension between the

legal obligation of reporting a ‘crime’ and the right to privacy and reproductive autonomy of young people.¹⁶⁶ The Court importantly noted that, “it could not possibly be the legislature’s intent to deprive minors of safe abortions”.¹⁶⁷

¹⁶⁵ X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi Anr. Supreme Court of India. (2022, September 29). Paras 79-81. https://main.sci.gov.in/supremecourt/2022/21815/21815_2022_2_1501_38628_Judgement_29-Sep-2022.pdf

¹⁶⁶ X v. The Principal Secretary, Health and Family Welfare Department, Govt. of Delhi Anr. Supreme Court of India. (2022, September 29). Para 81. https://main.sci.gov.in/supremecourt/2022/21815/21815_2022_2_1501_38628_Judgement_29-Sep-2022.pdf; Saumya Kalia, (2022, November 21). Why India’s Laws Make Abortion Traumatic & Dangerous For Minors. Article 14. <https://article-14.com/post/why-india-s-laws-make-abortion-traumatic-dangerous-for-minors-637ae38587df5>

¹⁶⁷ X v. The Principal Secretary, Health and Family Welfare Department, Govt. of Delhi Anr. Supreme Court of India. (2022, September 29). Para 81. https://main.sci.gov.in/supremecourt/2022/21815/21815_2022_2_1501_38628_Judgement_29-Sep-2022.pdf

Contestations within feminist movements

Despite evidence that penalization in the name of protection does not reduce forced marriages or sex by individuals below the age of consent, some movement actors still look to the criminal legal system for remedy.¹⁶⁸

Evidence suggests that punitive approaches neither address the structural roots of gender-based harms nor effectively address the immediate impacts. Instead punitive approaches themselves cause or exacerbate harms for the young people the laws seek to protect.¹⁶⁹

In contrast to the valorization of punitive approaches, the collaborative South Asian initiative called Feminist Inquiries into Rights and Equality (FIRE)¹⁷⁰ and the CEFMU and Sexuality Working Group and collaborating organizations¹⁷¹ are examples of collective initiatives within feminist movements to counter protectionist narratives and to advocate for anti-carceral, gender-transformative and holistic approaches to address gender-based harms.

¹⁶⁸ Suzanne Petroni, Madhumita Das, and Susan M Sawyer. (2019). Protection versus Rights: Age of Marriage versus Age of Sexual Consent. *The Lancet. Child and adolescent health*. 3(4):274-280. doi: 10.1016/S2352-4642(18)30336-5.

¹⁶⁹ Consortium with CEDAW and CRC Committee Members. (2020). Promote Prevention, Question Criminalisation Reframing Responses to Child Marriage, A Closed Dialogue Between Members of the South Asian Feminist Inquiries into Rights and Equality (FIRE). p.1. https://www.academia.edu/44731809/Promote_Prevention_Question_Criminalisation

¹⁷⁰ FIRE (Feminist Inquiries Into Rights and Equality) is a coalition comprising five organisations: PLD - Partners for Law in Development (India), Worec Nepal (Nepal), Bangladesh Legal Aid and Services Trust - BLAST (Bangladesh), Social Scientists Association (Sri Lanka), and IRAW Asia Pacific (Malaysia).

¹⁷¹ 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.

Centering rights-affirming approaches to protection of young people's rights

Globally, organizations and groups working with and led by young people are at the forefront of experimenting with how to expand practices and models of restorative and transformative justice. They acknowledge that even though naming, recognizing and acting to address harms is important, policies framed around repressive protectionism and punishment cannot address inequality, discrimination and stereotypes that render some more vulnerable or likely to be a target of abuse. For instance, regulations that seek to reduce the risk of trafficking by limiting young women's mobility, divert from and often foreclose the space to have timely conversations around mobility, opportunities for education and employment, and safe migration. Similarly, the practice of detaining young women and girls in 'protective custody' to prevent them from engaging in consensual relationships with persons of a different gender, caste, class or religion does not help address inter-personal harm and violence that occurs within relationships and is often not spoken about and unaddressed.

Rather, seeking answers about the causes behind the harm and its effects on parties involved can produce more meaningful and sustainable interventions. This means investing energy and resources in evidence-based reform and prevention efforts looking towards root causes, structural inequalities and power dynamics that contribute to harm. We need a counter-narrative that foregrounds the framework of the bodily autonomy, privacy and dignity of young people.

We can empower young people through developmentally appropriate comprehensive sexuality education from an early age, with knowledge, skills, attitudes and values that will empower them to: realize their health, well-being and dignity; increase confidence to negotiate consenting and safe sex; develop respectful social and sexual relationships; consider how their choices affect their own well-being and that of others; and understand and ensure the protection of their rights throughout their lives.¹⁷²

¹⁷² UNESCO, UNFPA, WHO, UNAIDS, UNICEF & UN WOMEN. (2018). International technical guidance on sexuality education: an evidence-informed approach. p. 2. https://unesdoc.unesco.org/in/document-Viewer.xhtml?v=2.1.196&id=p::usmarcdef_0000260770&file=/in/rest/annotationSVC/Download-WatermarkedAttachment/attach_import_d8d4de18-19d0-4a35-8eb2-ab5eaa5ca5d3%3F_%3D260770eng.pdf&updateUrl=updateUrl4466&ark=/ark:/48223/pf0000260770/PDF/260770eng.pdf.multi&fullScreen=true&locale=fr#%5B%7B%22num%22%3A115%2C%22gen%22%3A0%7D%2C%7B%22name%22%3A%22XYZ%22%7D%2C%2C842%2C%5D

IPPF (International Planned Parenthood Federation) has affirmed that a holistic approach to protection of rights goes beyond a limited conceptualization of protection as simply a list of ‘protection rights’ (i.e. the right to be protected from harm). Instead it embraces a broader vision of protection as the positive promotion of optimal development and well-being. Such an approach promotes respect for the young person as a rights-bearing individual rather than as a passive ‘beneficiary’ of services or as a ‘victim’. It also situates concepts such as ‘evolving capacities’ and ‘best interests’ in the context of all rights to which children and young people are entitled.¹⁷⁴

(Gerison Lansdown and Marie Wernham, Are protection and autonomy opposing concepts?)

Instead of utilizing repressive protectionist policies that limit freedoms and prevent young people from achieving their rights, we can defend their rights by empowering them.¹⁷³

There is no one-size-fits-all strategy to designing programs and initiatives that allow young people to explore their sexuality and their gender identity and expression in a non-judgmental, positive and rights-affirming way.

These methods may vary across cultural, religious and political contexts. Aahung uses the phrase ‘life skills-based education’ to describe their comprehensive curriculum, which spans the spheres of critical reproductive health information, prevention of abuse and the critical skills needed for communicating discomfort and mistreatment. They provide information in a safe space and, since the program primarily operates through school systems, it also engages administrative decision makers, teachers and the school

¹⁷³ Gerison Lansdown and Marie Wernham. Chapter 3: Are protection and autonomy opposing concepts? In International Planned Parenthood Federation, Understanding young people’s right to decide. https://www.ippf.org/sites/default/files/ippf_right_to_decide_03.pdf. p.5.

¹⁷⁴ Gerison Lansdown and Marie Wernham. (2012, February). Chapter 3: Are protection and autonomy opposing concepts? In International Planned Parenthood Federation, Understanding young people’s right to decide. https://www.ippf.org/sites/default/files/ippf_right_to_decide_03.pdf. p.2



community, including parents, on the need to promote the wellbeing and rights of young people.¹⁷⁵ Hidden Pockets innovatively delivers SRHR trainings through workshops and podcasts to

young girls in juvenile homes, so that they have the necessary information and access to services for their health and wellbeing even in such spaces of involuntary confinement.¹⁷⁶

¹⁷⁵ See Aahung’s website, <https://www.aahung.org/site/whatwedo/Life-Skills-Based-Education>

¹⁷⁶ See Hidden Pockets’ website, <https://hiddenpocketscollective.org/restorative-justice-work/>

Moving Above and Beyond the Criminal Law

“Harm requires repair. Punishment is not repair. Punishment is passive—it is done to us—accountability is active. It requires that we acknowledge what we have done, recognize its impact, express genuine remorse, make things as right as possible (ideally in ways defined by those harmed), and try to become someone who will not cause harm again. Accountability is difficult work, and, unlike the passivity of punishment, it produces positive change. In restorative justice processes, people look into the eyes of those that they hurt, listen to their pain, own their responsibility for that pain, and affirm their responsibility to fix it. Punishment only works to shame people. Punishment assumes that the only thing society can do with someone who has used their power to cause harm is to diminish that person and their power. Accountability instead assumes that that person, upright in themselves, can use their power to correct the harm.”¹⁷⁷

(Amanda Alexander and Danielle Sered, Making Communities Safe Without the Police)

People rendered as ‘criminal’ often experience a wide range of harms. Their criminalization reinforces existing patterns of privilege and disadvantage. The stark realities of pre-trial detention, incarceration and custodial violence, family separation, financial devastation, and ostracism from social life makes it difficult to conceive of criminal law as

‘protecting’ structurally excluded and marginalized persons. In India, Dalits, Bahujans, Adivasis and those belonging to religious minorities (especially Muslims) receive higher sentences and are discriminated against within and outside of the legal system.¹⁷⁸ At the same time, pervasive discrimination and institutional casteism result in low

¹⁷⁷ Amanda Alexander and Danielle Sered. (2021, November 1). Making Communities Safe Without the Police. Boston Review. <https://bostonreview.net/articles/making-communities-safe-without-the-police/>

¹⁷⁸ For instance, see National Law University, Delhi. (2016). Death Penalty India Report. Available at <https://www.project39a.com/dpir>

registration of crimes and an even lower rate of convictions under protective legislation such as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989.¹⁷⁹

When entire communities are rendered criminal by a system that calls itself 'justice', we must critically look at the way this system fails those it purports to protect. These are not failures of implementation of laws, rather they are systemic flaws of the criminal legal system. The harms caused by the criminal legal system and its ineffectiveness in reducing crime make it more relevant for us to rethink our over-reliance on criminal law to address social problems. The

resulting framework 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 for recognition of harms.

In this section, we discuss the experiences of young people in the criminal legal system and consider alternatives to this system. We consider restorative justice practices and note concerns that emerge in implementing them. We then explore transformative justice practices. 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.

¹⁷⁹ Sankar Sen. (2018, April 18). SC/ST (POA) Act More Unused than Misused. The Tribune accessed October 17, 2021, <https://www.tribuneindia.com/news/archive/comment/sc-st-poa-act-more-unused-than-misused-575516>; International Dalit Solidarity Network. INDIA: Non-Implementation of the Scheduled Castes & Scheduled Tribes (PoA) Act, 1989. Accessed October 17, 2021, <https://idsn.org/india-non-implementation-of-the-scheduled-castes-scheduled-tribes-poa-act-1989/>; Udhav Naid. (2020, September 14). Implementation of SC/ST Act inadequate, say leaders. The Hindu. <https://www.thehindu.com/news/cities/chennai/implementation-of-scst-act-inadequate-say-leaders/article32604617.ece>.

Re-thinking justice in the criminal legal system

Access to justice is a major concern and a glaring challenge in South Asia. However, as we have been asking throughout this Sourcebook, does justice only entail access to the criminal legal system? Criminal legal systems in South Asia are riddled with obstacles that force people who have been harmed to relive their trauma or prove their innocence,¹⁸⁰ assuming that the person is able to access the system at all. In consultations for this Sourcebook, partners shared experiences of hostility from law enforcement agents and the deep societal stigma associated with being ‘victim’ or ‘survivor’ of gender-based harms, including violence. These experiences also show how the state’s punitive power over structurally excluded groups is magnified when justice is meted out by actors and institutions that are structurally unjust. During our conversations, partners were already less willing to interact with the police

and criminal judicial system due to their prior lack of assistance and the known possibility for greater harm to young people. Based on this experience, some partners regarded working with the police counterproductive.

In a closed-door public hearing organized by the People’s Union for Civil Liberties and the National Network of LBI Women and Trans persons, India, 31 queer and trans persons shared testimonies highlighting the gender-based violence and discrimination they faced by their families.¹⁸¹ Importantly, many participants shared how on approaching the police for protection from violent families, they had either been turned down or coercively reunited with those they were trying to escape.¹⁸² Police were complicit—by tacitly approving familial violence, pressuring queer and trans persons to leave their partners and return to their families, or inflicting

¹⁸⁰ Human Rights Watch. (2020, December 17). South Asia: Justice, Services Can Curb Sexual Violence. <https://www.hrw.org/news/2020/12/17/south-asia-justice-services-can-curb-sexual-violence>.

¹⁸¹ A Report on the findings from a closed-door public hearing on April 1, 2023, Organised by PUCL and National Network of LBI Women and Transpersons, <https://thenazariyafoundation.org/doc/nazariyapdf/Apno-ka-Lagta-hai.pdf>

¹⁸² PUCL and National Network of LBI Women and Transpersons. (2023, April 1). APNON KA BAHUT LAGTA HAI: Our Own Hurt Us the Most. Centering Familial Violence in the Lives of Queer and Trans Persons in the Marriage Equality Debates. A Report on the findings from a closed-door public hearing on April 1, 2023, Organised by PUCL and National Network of LBI Women and Transpersons. pp. 79-86, , <https://thenazariyafoundation.org/doc/nazariyapdf/Apno-ka-Lagta-hai.pdf>

violence against queer and trans persons themselves.¹⁸³ Even when queer couples had received protection from courts against their families, the enforcement of such orders was based on moralistic assumptions of duties of 'children' towards their families and compulsory heterosexuality.

In 2018, India-based Counsel to Secure Justice (CSJ) surveyed adult survivors of gender-based harms and their families about justice and the criminal legal system.¹⁸⁴ It emerged that those who have been harmed want to participate and have a voice in the justice process. They wanted additional opportunities to express their abuse-related feelings, explain the harm, tell their stories and participate in justice outcomes. Their participation would help them feel

valued, trusted and healed.¹⁸⁵ Young people and their support systems do not have these options in traditional criminal judicial systems.

It is critical to seek approaches to addressing the harms and violations that do not limit young people's agency, autonomy and visibility. While recognizing that young people are vulnerable to institutional violence, empowering the state and criminalizing the harms they have experienced provides no real remedy. The linear narrative of 'protection' in laws and regulations often causes more harm than good, failing to address gender-based abuse or provide justice to young people. Since our criminal justice systems lack accountability and empathy, holistic 'justice' is rarely achieved.

¹⁸³ PUCL and National Network of LBI Women and Transpersons. (2023, April 1). APNON KA BAHUT LAGTA HAI: Our Own Hurt Us the Most. Centering Familial Violence in the Lives of Queer and Trans Persons in the Marriage Equality Debates. A Report on the findings from a closed-door public hearing on April 1, 2023, Organised by PUCL and National Network of LBI Women and Transpersons. pp. 79-86. <https://thenazariyafoundation.org/doc/nazariyapdf/Apno-ka-Lagta-hai.pdf>

¹⁸⁴ See Counsel to Secure Justice and Centre for Criminology and Victimology. (2018). Perspectives of Justice: Restorative Justice and Sexual Abuse in India. National Law University Delhi. <https://csjindia.org/wp-content/uploads/2018/10/Perspectives-of-Justice-by-CSJ-and-NLU-Delhi-April-2018.pdf>

¹⁸⁵ Counsel to Secure Justice and Centre for Criminology and Victimology., (2018). Perspectives of Justice: Restorative Justice and Sexual Abuse in India. National Law University Delhi. p. 38. <https://csjindia.org/wp-content/uploads/2018/10/Perspectives-of-Justice-by-CSJ-and-NLU-Delhi-April-2018.pdf>

What are existing alternatives to the criminal legal system?

There is no single alternative to the criminal legal system. Rather, throughout South Asia, groups and collectives have explored a range of alternatives to address interpersonal and societal harms. With a recognition that access to formal systems, especially for women, rural and indigenous communities is a challenge, multiple existing informal and/or parallel systems function as ‘alternatives’ to the formal legal system and, particularly, the criminal legal system. 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.

Nari Adalats¹⁸⁶ in India are one example of an alternative justice forum created by women that is gender-sensitive, cost-effective and time-efficient for structurally excluded women.¹⁸⁷ They are led by women who use their knowledge of local practices, customs and social networks to gather evidence and address domestic issues, in particular domestic violence and marital conflict.¹⁸⁸ These informal, conciliatory, non-adversarial ‘courts’ have been considered by some as ‘a new regime of justice for women’.¹⁸⁹ Another example of an alternative system is the Tamil Nadu Muslim Women Jamaat,¹⁹⁰ which began as a site of justice for women facing issues within their family—including dowry, divorce and

¹⁸⁶ The Nari Adalat is an innovative initiative that has emerged as a community response to the injustice and domestic violence faced by women. It came about with the implementation of the Mahila Samakhya Programme initiated by the Government of India for the empowerment of women. This program was started in 1989 in three states of India, namely, Uttar Pradesh (U.P.), Gujarat and Karnataka. See Manju Agrawal and Kakul Hai. (2016, January 1). Women Courts: An Alternative Justice System for Women. Tata Institute for Social Sciences. The Indian Journal of Social Work. Volume 77, Issue 1. <https://journals.tiss.edu/ijsw/index.php/ijsw/article/viewFile/122/121>

¹⁸⁷ Ravi J. Matthai Centre for Educational Innovation. (2014). Mahila Samakhya, 2014. A National Review. Indian Institute of Management Ahmedabad. p. xvii, pp. 74-77, https://www.education.gov.in/sites/upload_files/mhrd/files/upload_document/Report-MSP.pdf

¹⁸⁸ Sushma Iyengar. (2010). A Study of Nari Adalats and Caste Panchayats in Gujarat. NewsReach. pp. 17-18. <https://www.pradan.net/sampark/wp-content/uploads/2019/08/A-Study-of-Nari-Adalats-and-Caste-Panchayats-in-Gujarat-By-SUSHMA-IYENGAR.pdf>

¹⁸⁹ Sushma Iyengar. (2010). A Study of Nari Adalats and Caste Panchayats in Gujarat. NewsReach. p. 14. <https://www.pradan.net/sampark/wp-content/uploads/2019/08/A-Study-of-Nari-Adalats-and-Caste-Panchayats-in-Gujarat-By-SUSHMA-IYENGAR.pdf>

¹⁹⁰ Sharifa Khanam. (2019). The Tamil Nadu Muslim Women’s Jamaat: Who Are We And What Do We Do? A Presentation by Sharifa Khanam, STEPS, Pudukkottai, India. <http://mazefilm.de/wp-content/uploads/2019/02/khanum.pdf>; see Srilatha Batliwala. (2020). All About Movements. CREA. pp. 71-75. https://creaworld.org/wp-content/uploads/2020/12/All-About-Movements_Web.pdf

domestic violence—and were denied justice by the traditional jamaat (usually led by influential men of the community).¹⁹¹

However, all alternatives are not necessarily affirming of diverse genders, sexualities and bodily autonomy. For example, Gram Nyayalayas in India,¹⁹² the Jirga in Pakistan,¹⁹³ Shalish in Bangladesh¹⁹⁴ or the Mediation Boards in Sri Lanka have faced criticism by feminist and human rights activists¹⁹⁵ There also

exist customary courts¹⁹⁶ and panchayats. These existing informal systems are often deeply wrought with gender biases, casteism and ableism. For instance, Jirgas in Pakistan or khap panchayats¹⁹⁷ in India have been critiqued for legitimizing and sanctioning violence and social boycotts against individuals or groups that challenge conservative community norms, such as adults choosing to marry outside their caste or religion¹⁹⁸ or women not following rigid gender

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¹⁹¹ See Vidya Venkat. (2008, April 25). An Act of Faith. Frontline. <https://frontline.thehindu.com/other/article30195597.ece>

¹⁹² Department of Justice. Gram Nyayalaya | Department of Justice. Ministry of Law and Justice, Government of India. Accessed 16 February 2022, <https://doj.gov.in/gn/introduction>

¹⁹³ Jirga is a form of a traditional or tribal justice system practiced by the Pakhtun ethnic group that lives in Pakistan and Afghanistan; Asma Hamid et al., (2021, March 22). The Dispute Resolution Review: Pakistan. The Law Reviews (blog). <https://thelawreviews.co.uk/title/the-dispute-resolution-review/pakistan>.

¹⁹⁴ Shalish is a social system for the informal adjudication of petty disputes. See Shalish, Banglapedia. <https://en.banglapedia.org/index.php/Shalish>; Amnesty International. (1993). Taking the law in their own hands: the village salish. ASA 13/012/1993, <https://www.amnesty.org/en/documents/asa13/012/1993/en/>; Dina M. Siddiqi. (2011). Transnational Feminism and “Local” Realities: The Imperiled Muslim Woman and the Production of (In)Justice. *Journal of Women of the Middle East and the Islamic World*. 9 (2011) 76–96. DOI: 10.1163/156920811X578548

¹⁹⁵ Mediation Boards Commission. Accessed 16 February 2022 from <http://mediation.gov.lk/index>.

¹⁹⁶ Raja Devasish Roy. (2005). Traditional Customary Laws and Indigenous Peoples in Asia. Minority Rights Groups International. Available at <https://minorityrights.org/publications/traditional-customary-laws-and-indigenous-peoples-in-asia-april-2005/>

¹⁹⁷ Khaps are traditionally a group of villages organized by caste and geography. Village elders gather regularly and form quasi-judicial bodies to deliberate upon day-to-day civil matters, such as marriage, non-payment of debt, property concerns and the non-observance of social customs specific to that particular Khap. Punishments include fines, ostracism, corporeal punishment and values such as community honor are highly placed. Khap Panchayats are extra-constitutional and do not fall in with the Gram Panchayat structure which is based on democratically conducted elections and finds constitutional support with the Constitution (73rd Amendment) Act, 1996; see <https://feminisminindia.com/2018/03/22/legal-justice-khap-panchayats/>

¹⁹⁸ See Sruthisagar Yamunan. (2018, March 28). Catastrophic crisis for rule of law: Supreme Court cracks down on khap panchayats, ‘honour’ crimes. Scroll.in. <https://scroll.in/article/873523/catastrophic-crisis-for-rule-of-law-supreme-court-cracks-down-on-khap-panchayats-honour-crimes>; Priyanshi. (2018, March 22). Legal Justice And The Fault In Our Khap Panchayats. *Feminism in India*. <https://feminisminindia.com/2018/03/22/legal-justice-khap-panchayats/>

roles.¹⁹⁹ Moreover, the members of these informal systems are often those who hold power in their communities and seek to uphold community morality rather than protect the rights of the persons involved, especially if the person is a young person and/or marginalized.²⁰⁰

It is important to distinguish alternatives that are grounded in punitive policies and practices from non-punitive accountability mechanisms such as restorative and transformative justice (described ahead). Non-punitive accountability refers to interventions which allow those who have caused harm the opportunity to transform their behavior while bringing a remedy to those who have been harmed, focusing on accountability instead of punishment.²⁰¹

RESURJ, a global South-led transnational feminist alliance, in their 2020 report on the shortcomings of criminalization in addressing sexual and reproductive rights violations, explored preventive measures as one of the ways to divert from over-reliance on criminal laws.²⁰² Preventive measures include addressing the root causes of gender-based harms and other human rights violations. These measures come into being through policy and programming and can be either state or non-state actor led. Instead of criminalizing early marriages, for instance, preventive measures would include tackling lack of access to education, lack of decision-making power for young people, especially young girls, economic inequalities etc.²⁰³ CSE is a vital early intervention. Rather than

¹⁹⁹ For instance, see Robina Khan and Allah Nawaz. (2020, April). Jirga and Panchayat as the Precursor to Honour Killing in Pakistan. *Dialogue* (1819-6462). Vol. 15 Issue 1. pp. 104-114; Javeria Younes. (2017, July 7). How the Parallel Judicial System of Jirga Perpetuates Injustice For Pakistani Women. *Courting the Law*. <https://courtingthelaw.com/2017/07/07/commentary/how-the-parallel-judicial-system-of-jirga-perpetuates-injustice-for-pakistani-women/>; Ali Hassan Bangwar. (2021, December 19). Jirga: The license to victimise women. *The Express Tribune*. <https://tribune.com.pk/story/2334558/jirga-the-licence-to-victimise-women>

²⁰⁰ International Center for Research on Women, Center for Domestic Violence Prevention, and Beyond Borders. (2016). 'Whose Justice, Whose Alternative? - Locating Women's Voice and Agency in Alternative Dispute Resolution Responses to Intimate Partner Violence'. <https://www.icrw.org/wp-content/uploads/2016/10/ICRW-Mediation-Paper-FINAL.PDF>

²⁰¹ Eerkes, D., Ketwaroo-Green, J., Pearson, S., Reid, B., Hackett, C., Juurlink, I., Martin, L., Scanlon, S., & Bokma, S. (2021). Essential Elements for Non-Punitive Accountability: a Workbook for understanding alternative responses to campus gender-based violence. *Courage to Act: Addressing and Preventing Gender-Based Violence at Post Secondary Institutions in Canada*. pp. 8-9.

²⁰² RESURJ. (2020). Beyond Criminalization: A Feminist Questioning of Criminal Justice Interventions to Address Sexual and Reproductive Rights Violations. Available at: <https://resurj.org/resource/desk-review-report-beyond-criminalization-a-feminist-questioning-of-criminal-justice-interventions-to-address-sexual-and-reproductive-rights-violations/>

²⁰³ RESURJ, 22.



criminalization, focus on a rights-based CSE approach has been highly successful in addressing inter-personal harms and power hierarchies and also sexual and

reproductive health.²⁰⁴ However, RESURJ rightly notes that while preventive measures are effective, their impact often takes longer to be seen.²⁰⁵

SASA!²⁰⁶ focuses on the linkages between HIV and gender-based violence. It is a community mobilization approach—originally started in Uganda and now widely practiced elsewhere—to address intimate partner violence and reduce risks of HIV contraction. Developed by Raising Voices and Centre for Domestic Violence Prevention, it is an evidence-based community social norms change approach. It calls into question the public perception of and impunity for violence against women and challenges how power functions in intimate relationships and in the broader community. It engages with individuals, couples, families and community leaders and has proved successful in reducing physical violence and other gender-based harms and improving communication.²⁰⁷

²⁰⁴ RESURJ, 32.

²⁰⁵ RESURJ, 37.

²⁰⁶ SASA! means ‘now’ in Kiswahili and is an acronym for the approach’s four phases: Start, Awareness, Support and Action.

²⁰⁷ See SASA! Study. <https://raisingvoices.org/women/the-sasa-approach/sasa-study/>

The **Stepping Stones** methodology emerged in an effort to address HIV/GBV linkages. It started in Uganda (1995) to enable women, men and young people of all ages to explore their social, sexual and psychological needs, to analyze the communication blocks they face, and to practice different ways of addressing their relationships.²⁰⁸ Since then it has been used in over 40 countries and adapted for over 17 settings for participatory HIV prevention programs that aim to improve sexual health by building stronger, more gender-equitable relationships.²⁰⁹ Stepping Stones involves participatory learning approaches, including critical reflection, role play, drama and meetings with the community. The sessions are usually conducted in schools and focus on listening and communication, behavior, sex and love, contraception, conception and menstruation, taking risks and problems relating to sexual activity, safe sex and condoms, gender-based violence, communication skills, dealing with grief and loss etc.²¹⁰ Beyond quantitative results of reduced risk-taking behavior and intimate partner violence,²¹¹ there have been positive changes in the attitudes and awareness of the male participants,²¹² demonstrating the effectiveness of prevention interventions on behavior shaped by patriarchal stereotypes.

²⁰⁸ <https://steppingstonesfeedback.org/about/stepping-stones-training-programme/>; National Prosecution Authority (NPA) and UNICEF. (2008). Compendium of Case Studies: Mapping and Review of Violence Prevention Programmes in South Africa. p. 36.

²⁰⁹ See Tina Wallace. (2006). Evaluating Stepping Stones: A review of existing evaluations and ideas for future M & E work. ActionAid International; Jewkes R, Nduna M, Levin J, Jama N, Dunkle K, Puren A, Duwvury N. (2008, August 7). Impact of stepping stones on incidence of HIV and HSV-2 and sexual behaviour in rural South Africa: cluster randomised controlled trial. *BMJ*. 337: a506, available at <https://www.bmj.com/content/337/bmj.a506>

²¹⁰ National Prosecution Authority (NPA) and UNICEF. (2008). Compendium of Case Studies: Mapping and Review of Violence Prevention Programmes in South Africa p. 36,

²¹¹ See Jewkes R, Nduna M, Levin J, Jama N, Dunkle K, Puren A, Duwvury N. (2008, August 7). Impact of stepping stones on incidence of HIV and HSV-2 and sexual behaviour in rural South Africa: cluster randomised controlled trial. *BMJ*. 337: a506, available at <https://www.bmj.com/content/337/bmj.a506>

²¹² National Prosecution Authority (NPA) and UNICEF. (2008). Compendium of Case Studies: Mapping and Review of Violence Prevention Programmes in South Africa. p. 41.

The practice of '**Community Conversations**' has been used by a range of civil society groups and widely by the UN Development Programme (UNDP) in Africa, which deals with the underlying causes of the spread of HIV/AIDS, such as unequal power relations, gender issues, stigma or discrimination. Rather than punitive responses or conventional prevention strategies of awareness-raising such as lectures, these facilitated dialogues encourage open communication, compassion, acceptance and accountability.²¹³ Individuals are encouraged to analyze their behavior, and those of their families and neighbors, and the impact on their lives. Community Conversations create a space for mutual learning and result in new perspectives and creativity as well as capacity building for addressing the complex challenges of HIV and AIDS.²¹⁴ They seek to enhance leadership of community leaders and grassroots organizations so that these processes are sustainable and culturally appropriate and sensitive.²¹⁵ Although Community Conversations is a core component of UNDP's HIV response, the results extend beyond the realm of HIV. The process allows for open and frank discussions about otherwise 'taboo' issues, such as gender, harmful traditional practices, and sexual relations.²¹⁶ This practice has now been adopted for conversations on security, gender-based violence and land rights issues with greater community engagement and participatory decision-making.²¹⁷

²¹³ UNDP. (2005). Leadership for Results: UNDP's Response to HIV/AIDS, Community Capacity Engagement Strategy Note, The Answer Lies Within. pp. 4-5.

²¹⁴ UNDP. (2005). Leadership for Results: UNDP's Response to HIV/AIDS, Community Capacity Engagement Strategy Note, The Answer Lies Within . p. 5.

²¹⁵ UNDP. (2005). Leadership for Results: UNDP's Response to HIV/AIDS, Community Capacity Engagement Strategy Note, The Answer Lies Within . p. 7.

²¹⁶ UNDP. (2004). Upscaling Community Conversations in Ethiopia: Unleashing Capacities of Communities for the HIV/AIDS response. p. 5.

²¹⁷ See UNDP. (2004). Upscaling Community Conversations in Ethiopia: Unleashing Capacities of Communities for the HIV/AIDS response.

Diversion practices as alternatives

The UN Committee on the Rights of the Child has noted that juvenile justice mechanisms should promote the use of alternative measures such as diversion and restorative justice (explained ahead) that respond to ‘children in conflict with the law’²¹⁸ in an effective manner. This would not only serve the best interests of these ‘children’, but also the short- and long-term interest of the society at large.²¹⁹ The CRC also states that the arrest, detention or imprisonment of a child may be used only as a measure of last resort.²²⁰

Diversion practices refer to ways that young people accused of infringing criminal law can be ‘diverted’ from judicial proceedings.²²¹ UNICEF defines

‘diversion’ as “[t]he conditional channeling of children in conflict with the law away from formal judicial proceedings towards a different way of resolving the issue that enables many—possibly most—to be dealt with by non-judicial bodies. This helps avoid the negative effects of formal judicial proceedings and a criminal record, provided that human rights and legal safeguards are fully respected.”²²² These practices can include care, counselling probation, education and training programs, and juvenile penal mediation among others.

The principles of ‘diversion’²²³ from the criminal legal system have been incorporated in India in the form of the

²¹⁸ ‘Child in conflict with the law’ refers to a person who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence.

²¹⁹ UN Committee on the Rights of the Child. (2007, April). General comment No. 10 (2007): Children's Rights in Juvenile Justice. CRC/C/GC/10. Para 3.

²²⁰ Article 37 (b), UN CRC.

²²¹ See Swagata Raha. (2018, July). Report on the Judicial Colloquium on Juvenile Justice. Centre for Child Rights, National Law University, Odisha. p. 22. <https://www.nluo.ac.in/wp-content/uploads/2019/11/Judicial-Colloquim-on-Juvenile-Justice-Report.pdf>

²²² UNICEF. (2017). DIVERSION NOT DETENTION: A study on diversion and other alternative measures for children in conflict with the law in East Asia and the Pacific. p. x. <https://www.unicef.org/eap/media/2401/file/Diversion%20not%20Detention.pdf>

²²³ See Office of the UN High Commissioner of Human Rights. (1985). United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985. Rule 11, Diversion.

Juvenile Justice (Care and Protection of Children) Act, 2015,²²⁴ which states that measures without resorting to judicial proceedings should be promoted.

In 2017 UNICEF published a regional study of East Asia and the Pacific which analyzed diversion practices implemented with 'children in conflict with the law' in 12 East Asian countries and 14 Pacific Island countries. The study found that unconditional diversion, usually in the form of a police warning, is more often used in practice than it is incorporated in national legislation.²²⁵ In practice, almost all East Asian and Pacific countries included applied diversion from judicial proceedings in the form of school attendance, vocational training, life skills programming, religious activities, community work

hours, counselling and curfew.²²⁶

Diversion practices do not imply that the young person in question will not be held accountable for their actions. Rather, they create opportunities for accountability outside the criminal legal system and try to minimize the stigma, shame and harmful consequences of incarceration that are not necessarily linked to accountability or justice.

Unfortunately, there is limited documentation of institutionalized diversion practices in South Asia. There is also limited evidence of whether young people had sufficient agency over decision-making in these programs. Further, the question of whether young people who are not 'diverted' are ultimately directed to the criminal legal system is also under-explored.

²²⁴ See section 3(xv) where the principle of diversion states that measures without resorting to judicial proceedings should be promoted. Section 3(xii) where the principle of institutionalization should be taken as a measure of last resort.

²²⁵ UNICEF. (2017). DIVERSION NOT DETENTION: A study on diversion and other alternative measures for children in conflict with the law in East Asia and the Pacific. p. xvii. <https://www.unicef.org/eap/media/2401/file/Diversion%20not%20Detention.pdf>

²²⁶ Ibid.

Restorative practices as alternatives

“Restorative justice is not a particular program or a blueprint restorative justice should be built from the bottom up, by communities in dialogue assessing their needs and resources and applying the principles to their own situations. Restorative justice is not a map, but the principles of restorative justice can be seen as a compass pointing a direction. At a minimum, restorative justice is an invitation for dialogue and exploration.”²²⁷

(Howard Zehr, Little Book of Restorative Justice)

Restorative practices have been explored as viable alternatives to circumvent the concerns with the criminal legal system in South Asia.

A range of communities across the world, including indigenous communities or those following customary and tribal laws, as well as people of color in the global North, have used restorative approaches to address harm and repair relationships independently of the legal system. These behaviors are crucial for communities that prioritize justice, healing and reintegration.²²⁸

These traditions, practices and ideas have inspired ‘restorative practices’, which aim to proactively change how we handle and respond to harm in our communities without relying on a state or quasi-state (in the case of parallel legal systems) organization. Restorative practices aim to improve communities, reduce crime, repair harm and rebuild relationships. Thus, ‘restoration’ encompasses many procedures, concepts and ideas that aim to foster connection and caring. It emphasizes building community and dismantling hierarchy and oppression.²²⁹

²²⁷ Howard Zehr. (2020). Little Book of Restorative Justice. Good Books. Available at <https://charterforcompassion.org/images/menus/RestorativeJustice/Restorative-Justice-Book-Zehr.pdf> p. 10,

²²⁸ Counsel to Secure Justice. (2020). Restorative Practices: A Preliminary Reading. p. 2.

²²⁹ Enfold Proactive Health Trust. (2021). Handbook for Facilitation of Restorative Practices in Child Care Institutions. p.6.

Restoration is not strictly defined, for in cases such as murder, harm cannot be repaired. It is, however, possible to attempt reparation—through acknowledging one’s responsibility, apologizing, restitution, taking steps to prevent re-occurrence etc.²³⁰

Restorative Justice (RJ) can be considered as a sub-set of restorative practices. RJ is based on principles that guide and seek to address violations and crimes. 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.²³¹

Restorative justice recognizes that it is not always possible to replace what the harmed person has lost and does not attempt to undo the harm, rather it is a way to fulfil the needs arising out of harm.²³²

In interviews conducted by RESURJ with activists from South Asia, restorative practices emerged as not only a viable but also a highly desirable alternative to the criminal legal system especially in cases of early and child marriage and intimate partner violence, even though implementation is limited.²³³

*Despite their similarities, restorative practices are distinct from practices that originate from indigenous and customary justice systems. Customary justice is not always guided by restorative goals, principles and safeguards.*²³⁴

(United Nations Office on Drugs and Crime, Handbook on Restorative Justice Programmes)

²³⁰ Howard Zehr. (2020). Little Book of Restorative Justice. Good Books. pp. 28-29. Available at <https://characterforcompassion.org/images/menus/RestorativeJustice/Restorative-Justice-Book-Zehr.pdf>

²³¹ RESURJ. (2020). Beyond Criminalization: A Feminist Questioning of Criminal Justice Interventions to Address Sexual and Reproductive Rights Violations. p. 11. <https://resurj.org/wp-content/uploads/2020/12/EN-GLISH-Beyond-Criminalization-A-Feminist-Questioning-of-Criminal-Justice-Interventions-to-Address-Sexual-and-Reproductive-Rights-Violations.pdf>

²³² RESURJ. (2020). Beyond Criminalization: A Feminist Questioning of Criminal Justice Interventions to Address Sexual and Reproductive Rights Violations. p.11. <https://resurj.org/wp-content/uploads/2020/12/EN-GLISH-Beyond-Criminalization-A-Feminist-Questioning-of-Criminal-Justice-Interventions-to-Address-Sexual-and-Reproductive-Rights-Violations.pdf>.

²³³ RESURJ. (2020). Beyond Criminalization: A Feminist Questioning of Criminal Justice Interventions to Address Sexual and Reproductive Rights Violations. pp. 38-39. <https://resurj.org/wp-content/uploads/2020/12/EN-GLISH-Beyond-Criminalization-A-Feminist-Questioning-of-Criminal-Justice-Interventions-to-Address-Sexual-and-Reproductive-Rights-Violations.pdf>

In cases of transitional and post-conflict justice, mechanisms such as the Truth and Reconciliation Commissions of South Africa²³⁵ and East Timor, and the Gacaca courts in Rwanda²³⁶ have sought to come to terms with mass violence, ethnic cleansing and state pogroms.²³⁷ While they invoke the idea of restorative practices, they are focused on the transition from conflict to a just and stable society. They aimed to provide victims with an opportunity to seek answers about the past, locate loved ones, create a space for remorse, forgiveness and reparations, and shine a light on the historical and social precursors to the violence.²³⁸ Since the Sourcebook focuses on alternatives to the criminal legal system, from the perspective of young people's rights, we will not go into detail about mechanisms used as a response to large-scale state violence and as a part of transitional justice.

²³⁴ United Nations with Thailand Institute of Justice. (2020). Handbook on Restorative Justice Programmes, 2nd ed. United Nations Office on Drugs and Crime. Pp. 12-13. https://www.unodc.org/documents/justice-and-prison-reform/20-01146_Handbook_on_Restorative_Justice_Programmes.pdf

²³⁵ Following four decades of apartheid and conflict, the new South African Government enacted the Promotion of National Unity and Reconciliation Act, Act 34 of 1995 which established the Truth and Reconciliation Commission, whose essential objective was to “promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past”. The Commission had to inquire into the causes, nature and extent of the gross violations of human rights” committed between 1 March 1960 and 6 December 1993. It also had to facilitate the granting of amnesty to persons who confessed to violations, to make known “the fate or whereabouts of victims” and, finally, to compile a report that provided a comprehensive account of its activities and findings, including the recommendation of measures to prevent violation of human rights.

²³⁶ After the Rwanda Genocide, the Rwandan Patriotic Front was confronted by the need to deliver justice for the killings of more than three-quarters of the country’s Tutsi population, as well as numerous Hutu who opposed the killings or tried to protect Tutsi. The government set up community-based courts to try genocide-related crimes using the customary Gacaca model. See PRI. (2010). The contribution of the Gacaca jurisdictions to resolving cases arising from the genocide: Contributions, limitations and expectations of the post-Gacaca Phase. https://cdn.penalreform.org/wp-content/uploads/2013/06/Gacaca_final_2010_en.pdf; Human Rights Watch. (2011, May 31). Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts. <https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts>

²³⁷ See United Nations with Thailand Institute of Justice. (2020). Handbook on Restorative Justice Programmes. 2nd ed. United Nations Office on Drugs and Crime. p. 13. https://www.unodc.org/documents/justice-and-prison-reform/20-01146_Handbook_on_Restorative_Justice_Programmes.pdf

²³⁸ See Laura Mc. Leod. (2015). Reconciliation through Restorative Justice: Analyzing South Africa's Truth and Reconciliation Process. Beyond Intractability. <https://www.beyondintractability.org/library/reconciliation-through-restorative-justice-analyzing-south-africas-truth-and-reconciliation>

Three prominent approaches to restorative justice include victim-offender conferences, family group conferences and circle approaches.²³⁹

Victim-offender conferences primarily involve creating a structured meeting or conference led by a trained facilitator. Persons representing the community may be involved as facilitators and/or program overseers, but they do not usually participate in meetings.²⁴⁰ Similar to this are victim-offender dialogues where facilitators may conduct indirect meetings via telephone, written correspondence, video conferencing, or 'shuttle mediation' where they serve as messengers, depending on what both parties agree to.²⁴¹

A family group conference²⁴² is often used to divert children accused of crimes 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.²⁴³ The model is now also widely used (modified as per country and community contexts) as a police-initiated diversion approach in Canada, the Czech Republic, Ireland, Lesotho, South Africa, South Australia and the United States, among others.²⁴⁴ 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, as is, to distinct and diverse socio-cultural contexts.

The circle approach is the most common practice and has been used by multiple

²³⁹ Howard Zehr. (2020). Little Book of Restorative Justice. Good Books. p. 44. Available at <https://charterforcompassion.org/images/menus/RestorativeJustice/Restorative-Justice-Book-Zehr.pdf>

²⁴⁰ Howard Zehr. (2020). Little Book of Restorative Justice. Good Books. p. 47. Available at <https://charterforcompassion.org/images/menus/RestorativeJustice/Restorative-Justice-Book-Zehr.pdf>

²⁴¹ Counsel to Secure Justice and Centre for Criminology and Victimology. (2018). Perspectives of Justice: Restorative Justice and Sexual Abuse in India. National Law University Delhi. p. 47. Available at <https://csjindia.org/wp-content/uploads/2018/10/Perspectives-of-Justice-by-CSJ-and-NLU-Delhi-April-2018.pdf>

²⁴² See Howard Zehr. (2020). Little Book of Restorative Justice. Good Books. pp. 47-50 Available at <https://charterforcompassion.org/images/menus/RestorativeJustice/Restorative-Justice-Book-Zehr.pdf>

²⁴³ Estelle Zinsstag, Marlies Teunkens & Brunilda Pali. (2011). Conferencing: A way forward for restorative justice in Europe. European Forum of Restorative Justice. p. 165. Available at https://www.euforumrj.org/sites/default/files/2019-11/final_report_conferencing_revised_version_june_2012_0.pdf.

²⁴⁴ United Nations with Thailand Institute of Justice. (2020). Handbook on Restorative Justice Programmes, 2nd ed. United Nations Office on Drugs and Crime. Pp. 27-28. Available at https://www.unodc.org/documents/justice-and-prison-reform/20-01146_Handbook_on_Restorative_Justice_Programmes.pdf

organizations in South Asia. The circle process is rooted in indigenous tradition in Africa and in First Nations peoples'²⁴⁵ cultures and traditions. Different communities have practiced circle processes, where the circle is understood as a way of life, rather than simply a technique or strategy to repair harm.²⁴⁶ For example, circles have been a significant part of the way of life of communities of Maori, Sioux, Nguni, Navajo Nation, Tagish and Tlingit. Different forms of circles include conflict resolution circles, early intervention circles and healing circles.

Since the 1970s, there has been detailed documentation of restorative practices, especially in cases of young people accused of crimes. These practices have been utilized in criminal legal systems, juvenile justice systems, schools and workplaces. Some restorative practices, such as circles, can be used in response to a wrongdoing, i.e., to address a harm that has already taken place such as a crime or a fight in an

organization or school. Schools in Australia, Brazil, Canada, New Zealand, UK, USA and India are using restorative practices to build a more positive, respectful and caring culture. They are used to address bullying, exclusion and disciplinary issues, but are not confined these.²⁴⁷

In what follows we discuss the experiences of several organizations, groups and collectives as they implement these approaches in their practice of RJ.

In India, organizations such as Enfold Proactive Health Trust, Ashiyana Foundation and Council for Secure Justice have been using the restorative circle approach consistently and successfully within child care institutions (CCI).²⁴⁸ CCI have been defined under the Indian Juvenile Justice (Care and Protection of Children) Act, 2015 as spaces providing care and protection to those under the age of 18. This includes shelters, observation homes, special homes, places of safety etc.²⁴⁹

²⁴⁵ René R. Gadacz. (2006, February 7). First Nations in Canada. The Canadian Encyclopedia. Accessed 17 February 2022. <https://www.thecanadianencyclopedia.ca/en/article/first-nations>

²⁴⁶ Restorative Solutions. (2017, October 20). The Indigenous Origins of Circles and How Non-Natives Learned About Them. <http://restorativesolutions.us/restorative-justice-blogposts/the-indigenous-origins-of-circles-and-how-non-natives-learned-about-them>.

²⁴⁷ Enfold. Restorative Justice. <http://enfoldindia.org/programs/restorative-justice/>

²⁴⁸ Enfold Proactive Health Trust. (2021, May). Handbook for Facilitation of Restorative Practices in Child Care Institutions. p.10. <http://enfoldindia.org/wp-content/uploads/2019/06/Restorative-Circle-Handbook-for-CCI.pdf>

²⁴⁹ The Juvenile Justice (Care and Protection of Children) Act, 2015. (n.d.). Sec. 2(21) Constitution of India.

Enfold approaches the restorative circle as a safe space where the dignity of all involved is respected. It is also a useful tool to foster social and emotional development, as well as develop and enhance life skills and conflict resolution.²⁵⁰ Participants are usually seated in the shape of a circle to symbolize that everyone in the space is equal and connected to each other, and that there is no power center. Only the person holding a ‘talking piece’ may speak.²⁵¹ Restorative circles may be of different types, depending on the situation, such as talking circles, community building circles, reintegration circles, and circles of support and accountability.²⁵²

Ashiyana Foundation sees the circle as a safe learning space to build trust, share challenges and develop empathy,

respect, and accountability.²⁵³ They have been using weekly restorative circles in CCI to facilitate life skills, for reflection, and even to mark special occasions such as birthdays, where each participant is invited to share positive qualities about the person. ‘Craft circles’ are also conducted twice a month in observation homes.²⁵⁴ Through their evaluations, Ashiyana found that children reported feeling accepted, learnt to trust, and developed socio-emotional skills. Children and young people also developed a greater sense of accountability and empathy.²⁵⁵

Counsel to Secure Justice (CSJ) has used a circle process prior to and during the pandemic aimed at supporting young people who have been harmed to explore their ideas of justice.²⁵⁶ They implemented a pilot project

²⁵⁰ Enfold Proactive Health Trust. (2021, May). Handbook for Facilitation of Restorative Practices in Child Care Institutions. p.6. <http://enfoldindia.org/wp-content/uploads/2019/06/Restorative-Circle-Handbook-for-CCI.pdf>

²⁵¹ Enfold Proactive Health Trust. (2021, May). Handbook for Facilitation of Restorative Practices in Child Care Institutions. p.6. <http://enfoldindia.org/wp-content/uploads/2019/06/Restorative-Circle-Handbook-for-CCI.pdf>

²⁵² Enfold Proactive Health Trust. (2021, May). Handbook for Facilitation of Restorative Practices in Child Care Institutions. p.6. <http://enfoldindia.org/wp-content/uploads/2019/06/Restorative-Circle-Handbook-for-CCI.pdf>

²⁵³ Enfold Proactive Health Trust. (2021, May). Handbook for Facilitation of Restorative Practices in Child Care Institutions. p.11. <http://enfoldindia.org/wp-content/uploads/2019/06/Restorative-Circle-Handbook-for-CCI.pdf>

²⁵⁴ Enfold Proactive Health Trust. (2021, May). Handbook for Facilitation of Restorative Practices in Child Care Institutions. Pp. 10-11. <http://enfoldindia.org/wp-content/uploads/2019/06/Restorative-Circle-Handbook-for-CCI.pdf>

²⁵⁵ Enfold Proactive Health Trust. (2021, May). Handbook for Facilitation of Restorative Practices in Child Care Institutions. Pp. 10-11. <http://enfoldindia.org/wp-content/uploads/2019/06/Restorative-Circle-Handbook-for-CCI.pdf>

²⁵⁶ Counsel to Secure Justice. (2020). Bonds of Hope: Connecting to Children in the Observation Homes of Rajasthan. https://csjindia.org/wp-content/uploads/2020/12/UNICEF-Study-April-2020_Final-1.pdf

in observation homes in Rajasthan where restorative circle processes were designed using tools for social emotional learning.²⁵⁷ Circle processes were facilitated, with over 100 children in observation homes. Each circle consisted of 7-13 participants. The aim of this was to provide a safe space to share, develop socio-emotional learning and empathy for harmed persons and their caregivers, foster a sense of accountability and reduce bullying. CSJ has also been conducting victim support circles for children who have faced gender-based harms, including violence and other human rights violations. These circles involve the person harmed and their family or other support persons.²⁵⁸ During assessments, they saw similar results as Ashiyana. Participants in such processes also felt respected and heard; they developed more positive socio-emotional skills such as anger management, being able to identify emotions, etc. They demonstrated an increase in empathy, positive relationship building, and building of conflict

resolution skills, thus reducing levels of violence and bullying in CCIs.²⁵⁹

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.²⁶⁰ 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.

It is important to distinguish informal justice mechanisms from restorative justice processes. While informal justice systems, such as traditional mediation and arbitration (as it exists in or connect to the state system) can have restorative outcomes, they can equally have carceral outcomes or outcomes that work to maintain the status quo or existing structures of power and privilege. The power often sits unquestioningly with the mediator or arbitrator, who has the final

²⁵⁷ Counsel to Secure Justice. (2020). Bonds of Hope: Connecting to Children in the Observation Homes of Rajasthan. https://csjindia.org/wp-content/uploads/2020/12/UNICEF-Study-April-2020_Final-1.pdf

²⁵⁸ See Counsel to Secure Justice. Center for Criminology and Victimology. (2018). Perspectives on Justice: Restorative Justice and Child Sexual Abuse in India. National Law University Delhi. <https://nludelhi.ac.in/download/publication/2017/Perspectives%20of%20Justice.pdf>. p. 48.

²⁵⁹ Enfold Proactive Health Trust. (2021, May). Handbook for Facilitation of Restorative Practices in Child Care Institutions. p. 13. <http://enfoldindia.org/wp-content/uploads/2019/06/Restorative-Circle-Handbook-for-CCI.pdf>

²⁶⁰ Nepal Forum for Restorative Justice. Accessed 17 February 2022, <http://www.nepaljustice.org/>

say. Conversely, restorative processes are about understanding the power dynamics within a conflict, naming them and potentially rebalancing them. This means that restorative justice processes will consider socio-political and other structural factors (such as the class, caste, race, gender etc. of those involved) to better understand the context of the conflict, why it arose and how to disrupt existing structures of power. Traditional mediation and arbitration processes do not often intentionally include this level of analysis.

In addition to this, restorative processes are not designed to 'resolve' a conflict. Instead they focus on exploring why it happened, what the harms were, what can be done to address those at their root and, importantly, to ensure they are prevented in the future. An

important key to restorative justice processes is also that those involved participate voluntarily.²⁶¹

Some of the restorative practices highlighted above work in tandem with the criminal legal system (with the support of state institutions). However, these practices can operate independently of criminal legal settings such as in childcare institutions, workplaces, schools and youth groups. It is notable that restorative justice practices tend to work at either the relatively micro level (individuals, pairs, families) or at the very macro, in the case of national reconciliation processes. Other restorative practices, such as community conversations or in the example of Stepping Stones or Raising Voices, tend to be more focused at the community level. Many such practices focus on juveniles, but very few take on 'violent' crimes.

²⁶¹ Derek Brookes and Ian McDonough. (2006). The Differences between Mediation and Restorative Justice/ Practice.



Transformative justice as an alternative

Transformative justice removes itself entirely from the legal system or other state institutions as spaces to address harm. It has gained popularity within social movements working towards prison abolition in the US. Philly Stands Up! defines transformative justice 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.**²⁶²

While restorative justice models often work as alternatives adjacent to or in tandem with criminal legal processes, leaving the overall system intact, transformative justice approaches work outside or beyond these systems.²⁶³

Transformative justice challenges the victim-offender binary and tries to address discrimination and violence in our communities by understanding the issues that generate these in the first place. It promotes better resourcing to communities—to enable them to address problems without relying on the police or legal system.

Practitioners of transformative justice 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. They do not see it as limited to a practice to address discrimination and violence that have already occurred.

Some examples of organizations that are actively engaging with transformative justice practices in the South Asian context include:

²⁶² ‘Philly Stands Up: What is Transformative Justice’, accessed 17 February, 2022, <https://www.phillystand-sup.org/transjust>.

²⁶³ 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.

Alternative Justice²⁶⁴ is a collective working to create community-based, survivor-informed, anti-carceral strategies to address sexual harm, abuse and conflict in India. Alternative Justice is a space that welcomes collective learning, curiosity and resource-sharing, in which survivors of sexual harm and abuse have access to multiple and varied community-based processes that support healing, allow them to seek tangible accountability from those who act abusively and also create conditions that cultivate real transformation within communities. They do this through holding intentional space for people to learn about transformative justice and community accountability and build their skills around various issues that undergird this work. They seek to move from learning to acting through (i) hosting communities of practice and (ii) co-creating open-source resources; and (iii) supporting communities when harm does occur through healing circles, accountability processes and survivor support.

Narrative Practices India²⁶⁵ is a collective that is exploring narrative ideas and practices in diverse contexts with the hope of nurturing collective accountability and exploring possibilities of preferred ways of being. They believe that problems are rooted in oppressive structures rather than in communities, beings or people's bodies and identities; that communities and people are experts on their own lives and exist in relationships with each other; that we are all performing our stories or being made to perform them; that stories are how we make sense of our experience, of our world and of ourselves; and that stories from our everyday lived experience help us in co-creating maps to navigate these oppressive systems to exist in worlds of imperfect solidarities.

Imperfect Solidarities²⁶⁶ in Nepal was a discussion seminar series held in Kathmandu between April 2019 and January 2020 where the intricate and imperfect workings of solidarity building and collective action were explored. Shame, stigma, vulnerability, accountability, alternative justice and healing as a community were discussed.

²⁶⁴ 'Alternative Justice'. (n.d.). <https://www.alternativejustice.in/>

²⁶⁵ 'Narrative Practices in India'. (n.d.). <https://www.narrativepracticesindia.com/>

²⁶⁶ 'Imperfect Solidarities'. (n.d.). <https://www.instagram.com/imperfect.solidarities/>

The Centre for Community Dialogue and Change²⁶⁷ in India utilizes Theatre of the Oppressed as a creative tool for personal and social transformation. Originally developed out of Augusto Boal's work with the Brazilian peasant population, Theatre of the Oppressed is a tool that has been used to explore community and relationship building, developing critical thinking skills and exploring multiple strategies for solving problems within the community.

Transformative justice does not demand abdication of all engagement with the state. Generation Five, one of the few organizations working with young people and using the framework and terminology of Transformative Justice notes that:

*“...the response of social movements must be two-fold. On the one hand, it is essential that we continue to hold the State accountable for its failure to provide adequate services and funding to support families and communities in dealing with violence. The State must also be held accountable for the ways in which its policies create the conditions that allow violence to continue. At the same time, it is critical that our social movements recognize that liberation from violence is one of people's most basic needs.”*²⁶⁸

²⁶⁷ 'The Centre for Community Dialogue and Change'. (n.d.) <http://www.ccdc.in/home>.

²⁶⁸ Generation Five. (2007). *Toward Transformative Justice: A Liberatory Approach to Child Sexual Abuse and Other Forms of Intimate and Community Violence (A Call to Action for the Left and the Sexual and Domestic Violence Sectors)*. p.9.

Concerns with implementing alternatives

Our consultations with partners touched on some of the challenges in implementing alternatives. Institutional acknowledgement of systemic oppression, discrimination and violence, especially against oppressed castes, religious minorities, women, and sexual- and gender-diverse persons remains a challenge in many South Asian countries. Some partners were concerned that focusing on alternatives could reduce pressure on the state to honor its duty to investigate and prosecute rights abuses and gender-based harms. These options may not work without legal representation to address power dynamics. Interim safety and protection measures may be difficult without state backing and money.²⁶⁹ When schools, local governments, police and parents scrutinize and threaten to prosecute preventive practices like CSE and life skills-based education, restorative methods may not be understood or recognized, let alone seen as legitimate.

Another concern is the tendency to romanticize traditional community-based practices, and a critique of how we define 'community'. Not all action led by community leaders is necessarily transformative or restorative in nature and can often serve to perpetuate stereotypes and forms of structural exclusion that benefit those in power. For instance, in the case of harms and violence caused within relationships, those facilitating alternative dispute mechanisms may often prioritize community stability and 'family unity' over the rights of the person harmed.²⁷⁰ While exploration of this in detail is beyond the scope of this Sourcebook, our partners highlighted several instances of how community pressure could lead to mediation without consent, forced 'resolutions' and, ultimately, increased risk for young people.

Fears for the physical and emotional safety of young people can be addressed

²⁶⁹ 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/EN-GLISH-Beyond-Criminalization-A-Feminist-Questioning-of-Criminal-Justice-Interventions-to-Address-Sexual-and-Reproductive-Rights-Violations.pdf>

²⁷⁰ Beyond Borders, Center for Domestic Violence Prevention (CEDOVIP), and ICRW. (2016). Whose Justice, Whose Alternative? Locating Women's Voice and Agency in Alternative Dispute Resolution Responses to Intimate Partner Violence. p. 15. <https://www.icrw.org/wp-content/uploads/2016/10/ICRW-Mediation-Paper-FINAL.PDF>

by organizations and trained facilitators by opting for indirect communication with the person accused or following independent processes for the people involved. Power dynamics such as family relationships, age, caste, religion, fear of financial repercussions, and trauma may influence decisions to participate in or withdraw from alternative processes. Young people may face pressure from their family, school, the person accused or even friends. Organizations that have worked with restorative practices insist that facilitators must

be trained to minimize these risks and ensure voluntary and fully informed participation.²⁷¹ These organizations also strongly emphasize working with a trauma-informed lens, carefully accounting for the impact of trauma, preventing re-traumatization and intentionally enabling healing.²⁷²

In 2002, the United Nations adopted the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters²⁷³ noting the need for legal and procedural safeguards in restorative justice.

The Basic Principles and the UNODC handbook on Restorative Justice Programmes (2020) offer important guidance on the use and implementation of restorative justice, as well as fundamental safeguards to ensure its appropriate use. They cover issues such as: consent to participate in and withdraw from the process, power imbalances and coercion, voluntary and reasonable agreements, safety of participants, confidentiality, due process, right to consult a lawyer, and duties of facilitators.

²⁷¹ Counsel to Secure Justice and Centre for Criminology and Victimology. (2018). Perspectives of Justice: Restorative Justice and Sexual Abuse in India. National Law University Delhi. Pp. 71- 72. <https://csjindia.org/wp-content/uploads/2018/10/Perspectives-of-Justice-by-CSJ-and-NLU-Delhi-April-2018.pdf> ; see also Eerkes, D., Ketwaroo-Green, J., Pearson, S., Reid, B., Hackett, C., Juurlink, I., Martin, L., Scanlon, S., & Bokma, S. (2021). Essential Elements for Non-Punitive Accountability: a Workbook for understanding alternative responses to campus gender-based violence. Courage to Act: Addressing and Preventing Gender-Based Violence at Post Secondary Institutions in Canada. pp. 67-72.

²⁷² Counsel to Secure Justice. (2020). Frequently Asked Questions on Restorative Justice. p. 9. <https://csjindia.org/wp-content/uploads/2020/11/FAQ-RJ.pdf>

²⁷³ 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>

These are conflicts and challenges with conceiving of and implementing alternatives to the criminal legal system, that we as feminists and activists are consistently grappling with. As scholar Leigh Goodmark notes, “[r]estorative justice is certainly out of step with feminist

theories that prioritize a state response to gender-based harms and see retributive punishment as an essential component of that response. But restorative justice is true to many of the central tenets of feminist thought. Restorative justice is, in fact, a feminist practice.”²⁷⁴

²⁷⁴ Leigh Goodmark. (2018, November). Restorative Justice as Feminist Practice. *The International Journal of Restorative Justice* 1, no. 3 : 373.



Envisioning a Framework to Challenge Criminalization

“If criminal law is the last resort in responding to foul abuses and systemic violations, what should be the first resort?... This is unknown territory: the gateway for protection against gendered violence, for instance, has been through the door of criminal law. But we want to encourage advocates and scholars to consider how to put criminal responses in relationship to other forms of state action that fully recognize wrongs done but do not solely or exclusively rely on penal sanctions in the process.”²⁷⁵

(Alice M. Miller and Mindy Jane Roseman with Zain Rizvi, Introduction to Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law)

“Sometimes we have to do the work even though we don’t yet see a glimmer on the horizon that it’s actually going to be possible.”²⁷⁶

(Angela Y Davis, Freedom Is a Constant Struggle: Ferguson, Palestine, and the Foundations of a Movement)

Criminalization of bodily autonomy sets the boundaries within which we construct our understanding of harm, punishment, criminality and incarceration. It shapes our relationships with people and how we think of society. Criminalization often does more harm than good, and it increases the power and likelihood of the state to discriminate, surveil and control.

²⁷⁵ Alice M. Miller and Mindy Jane Roseman with Zain Rizvi. (2019). Introduction. In Alice M. Miller and Mindy Jane Roseman (Eds.) Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law. University of Pennsylvania Press. p.14.

²⁷⁶ Angela Y Davis. (2016). Freedom Is a Constant Struggle: Ferguson, Palestine, and the Foundations of a Movement. Haymarket Books, Chicago. p. 29.

The categories of criminal, prisoner and convict expand the distance between 'us' (non-criminal and potential victims) and 'them' (perpetrators of crimes). They also construct criminality as an isolated and individualized problem or deviation from the 'norm'. This diverts us from pressing and uncomfortable conversations regarding how we are all accountable for sustaining the conditions which create and perpetuate harm, societal inequalities and structural exclusion. Since those in power benefit more from this power imbalance, they are also often more committed to perpetuating these unequal status

quos. This series of binary constructions also makes it difficult to imagine healing, transformation of social structures and the creation of a fairer and more just world.

Over-reliance on criminal legal systems as a site of justice has also authorized state over-reach (mostly in the name of 'protection' of certain groups of structurally excluded persons such as women and young people). The growing reliance on law and the legal system for realization of rights has led to heightened contestations regarding how feminist movements engage with the criminal legal system.²⁷⁷

*"To harness State power as a counterbalance to a patriarchal power is a dangerous game to play because the State is the biggest patriarch around."*²⁷⁸

(Partners for Law in Development, Criminalization and Sexuality)

Increased collaborations between feminist movements and state institutions to address gender-based violence are also a growing theme in feminist and critical legal theory.²⁷⁹ Elizabeth Bernstein invokes the idea of 'carceral feminism'²⁸⁰ to describe the mobilization of criminal law and the neoliberal state to address

²⁷⁷ Aya Gruber. (2021, June 22). Against Carceral Feminism. Aeon (blog). <https://aeon.co/essays/in-the-fight-for-gender-justice-criminal-law-should-be-a-last-resort>.

²⁷⁸ Partners for Law in Development. (2015). "Criminalization and Sexuality," Critical Reflections: Exploring the Continuum between Sexuality and Sexual Violence. p.8.

²⁷⁹ For instance, see Mimi E. Kim (2018) From carceral feminism to transformative justice: Women-of-color feminism and alternatives to incarceration. Journal of Ethnic & Cultural Diversity in Social Work. 27:3, 219-233.

²⁸⁰ See Elizabeth Bernstein. (2007). The Sexual Politics of the 'New Abolitionism. differences. 18(3):128-51. available at https://5caf0743-d1d1-4146-81d1-b9cb805ebb43.filesusr.com/ugd/e6fc65_7cce5336e36c46e-f87a7c96b00322545.pdf

trafficking into the sex industry, while Janet Halley's discussion of 'governance feminism'²⁸¹ explores how feminists become incorporated into state, state-like and state-affiliated power. Prabha Kotiswaran analyzes Indian feminist movements' engagement with the lawmaking process related to sexual violence.²⁸² These frames of analysis help to interrogate the increasing collaborations between feminist actors working on gender-based violence with the carceral state or that part of the government most associated with the institutions of police, prosecution and courts and the system of jails, prisons, probation and parole.²⁸³ The over-reliance on mechanisms like surveillance, arrest and incarceration also sends the wrong message, that gender-based violence is solely a crime perpetrated by one individual, as opposed to being a larger socio-political phenomenon that requires structural solutions.

Within the South Asian context, various women's rights and social justice movements have been increasingly apprehensive about the growing reliance on criminal laws to address social challenges.²⁸⁴ Movements and collectives focused on broader intersectional understandings of gender-based violence (as opposed to earlier iterations of the narrower issue of 'violence against women') persistently raise 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.

Further, the exclusive reliance on criminal legal systems shifts our attention and resources away from exploring non-punitive, and potentially more long-lasting, measures to achieve

²⁸¹ See Janet Halley. (2018). Where in the Legal Order Have Feminists Gained Inclusion? In Janet Halley, Prabha Kotiswaran, Rachel Rebouché, and Hila Shamir (Eds.). *Governance Feminism: An Introduction*. University of Minnesota Press. p. x and Chapter 1.

²⁸² See Prabha Kotiswaran. (2017). A Bittersweet Moment: Indian Governance Feminism and the 2013 Rape Law Reforms. *Economic and Political Weekly*. vol LII nos 25 & 26. pp. 78-87. available at https://5caf0743-d1d1-4146-81d1-b9cb805ebb43.filesusr.com/ugd/e6fc65_2d9fe7577251425abe0b3b9395d462fe.pdf

²⁸³ Mimi E. Kim (2018) From carceral feminism to transformative justice: Women-of-color feminism and alternatives to incarceration. *Journal of Ethnic & Cultural Diversity in Social Work*. 27:3, 219-233. p. 220.

²⁸⁴ For instance, see the discussion in the Introduction to Nivedita Menon. (2004). *Recovering Subversion: Feminist Politics Beyond the Law*. Permanent Black. See also page 206.; Flavia Agnes. (1992, April). Protecting Women Against Violence? - Review of a Decade of Legislation, 1980-89. *Economic and Political Weekly*. WS-19.

the same goals. This international criminal law's principle of criminal law as the last resort²⁸⁵ can be seen as global recognition of the need to limit state interference and control over the private lives of rights-holders.²⁸⁶ This is especially important to prevent dominant social norms and state power from defining whom we can be with and how we can express ourselves, while punishing anyone who deviates.²⁸⁷ However, this is frequently ignored.

In the context of young people, criminal law has not generally served to protect the best interests of the child, as called upon to do by the UN CRC. Rather, the over-use and discriminatory use of criminal law in the arena of young people's sexuality stigmatizes ordinary parts of growing up and hampers what might otherwise be a conversation on the affirmative or positive parts of sexuality,

along with concerns.²⁸⁸ As described in previous sections, protectionist approaches often undermine the autonomy of young people and create an environment where they are policed and disciplined. Approaches that foreground protection of young people's rights such as their rights to health expression, association and information would focus on creation of enabling environments for realization of these rights, while ensuring their rights to freedom from violence and discrimination.

As we turn from definitions to practices, the urgency of reformulating our understanding of criminality, the victim-offender binary, and the extraction of the law from its social, political and cultural context becomes imperative. This is especially so when we look at the impact of criminalization and penalization on young people.

²⁸⁵ International Commission of Jurists. (2023, March). The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty. p.5. <https://icj2.wpenginepowered.com/wp-content/uploads/2023/03/8-MARCH-Principles-FINAL-printer-version-1-MARCH-2023.pdf>

²⁸⁶ Amnesty International., (2018, March 12). 'Body Politics: A Primer on Criminalization of Sexuality and Reproduction.' <https://www.amnesty.org/en/documents/pol40/7763/2018/en/>

²⁸⁷ Partners for Law in Development. (2015). 'Criminalization and Sexuality', Critical Reflections: Exploring the Continuum between Sexuality and Sexual Violence.

²⁸⁸ RESURJ. (2016). Shortcomings of Penal Policies in Addressing Sexual Rights Violations. <https://resurj.org/wp-content/uploads/2020/12/Shortcomings-of-Penal-Policies-Meeting-Statement-English.pdf>



Doing this effectively requires that we interrogate the social, cultural, political and economic realities within which the criminal legal system exists. We cannot divorce the power structures in society that reify discrimination and violence (the culture) and biases of those drafting and implementing the law (structures) from the way criminal laws are designed (the substance) and enforced by those entrusted with enforcement as well as institutions such as families, communities, schools, medical establishments etc. Challenging criminalization is a critical and nuanced method of engaging with criminal laws and the criminal legal system to address and challenge structural exclusion.

To build a framework that challenges criminalization, we need to envision rights and justice. This is not to suggest that one should not be using the law and the legal system as a tool to increase rights recognition. Rather, this Sourcebook situates socio-cultural and political realities at the center and proposes a language to question existing state systems. It poses the question of whether inherently unjust power structures can ever embody a feminist and holistic achievement of justice.

Or, as Black lesbian feminist poet Audre Lorde put it, “the master’s tools will not dismantle the master’s house.”²⁸⁹

²⁸⁹ Lorde, Audre. (2007). The Master’s Tools Will Never Dismantle the Master’s House. In *Sister Outsider: Essays and Speeches*. Berkeley, CA: Crossing Press. 110- 114. (Original work published in 1984).

The first step towards integrating a challenging criminalization framework into our advocacy is to explore how to transform conditions that contribute to and perpetuate harm and rights violations, instead of focusing all our energy on individual actions.

We 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 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).

How can we advance alternatives in our communities?

While there is no single response to this, we propose a few questions which can be used as a lens to interrogate and reflect on in the work we do on addressing harm.²⁹⁰ The alternatives you unravel will likely be different based on the specific forms

of criminalization you are experiencing, the way in which they manifest in your communities and the kinds of relationships you already hold within those communities.

²⁹⁰ Some of these questions are adapted from 'Invisible No More: A Study and Discussion Guide' available at invisiblenomorebook.com/study-guide

Thinking together: What do policing and criminalization look like in your context?

- What do policing and criminalization of young people look like in the work you do with your communities?
 - Are your members and/or people who receive services from you criminalized? In what ways?
 - Are there ways in which young queer, trans, Bahujan, Adivasi and/or other structurally excluded communities are particularly targeted or impacted? Is this connected to their political work?
 - Do you work directly with the criminal legal system in some way? How do you see criminalization of young people emerging within this work?
 - How does your organization or group assess how the issues you work on affect young people who experience violence? How do you incorporate what you learn about this impact into your campaign strategies, demands and evaluation?
-

Imagining alternatives for your communities

- Why do we want to explore alternatives to criminalization in our communities?
- How would you tackle some of the problematic attitudes and beliefs that result in criminalization or policing of young people's bodies and mobility?
- How would you replace these problematic attitudes and beliefs with more constructive ones that are also acceptable to the communities you work with?
- Under ideal conditions, what does safety for young people look and feel like for your community? What conditions enable this to be possible?
- What are the differing perspectives around alternatives? What are inclusive and engaging ways to develop a shared understanding?

- In the context of your work, what can justice look like outside of a fixed binary (of right/wrong, perpetrator/victim)? How would such a system work? What would the outcomes look like?
 - How does this connect to our vision of a more just and inclusive world for young people?
-

Transforming visions into reality

- What are the concrete steps you take (or could take) to make these visions a reality?
- What actions does (or could) your group take to decrease contact between young people and law enforcement? To reduce the harm of those contacts?
- What actions does (or could) your group or organization take to use organizational or community resources instead of calling on law enforcement in the face of conflict, harm or violence?
- What actions does (or could) your group or organization take to use organizational or community resources to create rights-affirming restorative or transformative justice systems in the communities with whom you work?
- What actions does (or could) your group take to build environments that increase young people's capacities to de-escalate conflict, prevent violence and augment collaboration and wellbeing?
- What skills might you need to practice and build in this way? How and where can you learn these skills?
- What is stopping you from doing this? Are there ways to overcome these barriers together?
- What are three next steps you can take individually or collectively to make some of this happen?

‘#FlawsInLaws: Rethink My Freedom; Reimagine My Rights; Realize My Future’ Partners

Our campaign partners have all been working in the field of gender and sexuality and access to rights for young people for several years. They are:

Aahung: A Karachi-based NGO established in 1995, Aahung works on improving the reproductive health of men, women and young people. Through capacity building and information dissemination, Aahung focuses on the creation of an enabling environment in Pakistan where people have comfort with their body, are practicing healthy behaviors and are able to exercise their rights. At the school level Aahung develops the capacity of teachers to integrate quality life skills-based education (LSBE) into the school curriculum. Teachers are equipped with accurate knowledge, and effective teaching methodology to be able to discuss adolescent issues in the classroom as well as more challenging topics, such as child sexual abuse prevention. Aahung advocates for every individual’s rights to be respected, protected and fulfilled.

ARROW: A regional non-profit women’s organization based in Kuala Lumpur, Malaysia, ARROW was established in 1993 upon a needs assessment arising out of a regional women’s health project with a vision to create a resource center that would ‘enable women to better define and control their lives’. ARROW has consultative status with the Economic and Social Council (UN ECOSOC) of the United Nations. It works closely with many national partners in countries, regional and global networks around the world, and is able to reach stakeholders in 120 countries.

Bandhu: Bandhu Social Welfare Society started its journey in Bangladesh in 1996 with a mission to address the health care needs and human rights issues of sexual minority populations. Bandhu works towards achieving a vision of a Bangladesh where every person, irrespective of their gender and sexuality, is able to lead a quality life with dignity, human rights and social justice. Today, 20 years on, Bandhu is sincerely continuing to serve communities with unwavering commitment and is paving the way for obtaining their social justice, equality, and sexual and reproductive health and rights (SRHR).

CREA: A feminist international human rights organization based in the global South and led by women from the global South, CREA's work draws upon the inherent value of a rights-based approach to sexuality and gender equality. It promotes, protects and advances human rights and the sexual rights of all people by building leadership capacities of activists and allies; strengthening organizations and social movements; creating and increasing access to new information, knowledge and resources; and enabling supportive social and policy environments.

Hidden Pockets Collective: Hidden Pockets Collective is an India-based charity Trust, running projects in Karnataka, Bihar and Kerala. It believes in a sexual and reproductive justice framework and approaches activism with this framework. The Collective is working on alternative approaches that aim to achieve justice, not just legal in nature, but espousing a comprehensive approach be it using technology, collaborative research or awareness-raising.

Youth Advocacy Network (YANSL): Youth Advocacy Network Sri Lanka was formed after the First Beijing+20 youth review in Sri Lanka. The network monitors documents and agreements. It also lobbies government representatives on key areas related to SRHR and gender equality. The focus of the network is SRHR of young people in Sri Lanka. It works with young people, young women and girls, young people living with hearing disabilities, young journalists and policy makers.

The YP Foundation: The YP Foundation (TYPF), India, is a youth development organization that facilitates young people's feminist and rights-based leadership on issues of health equity, gender justice, sexuality rights and social justice. TYPF ensures that young people have the information, capacity and opportunities to inform and lead the development and implementation of programs and policies that impact their lives and are recognized as skilled and aware leaders of social change.

YUWA: Established in 2009, YUWA is a registered not-for-profit, purely youth-run and -led organization in Nepal working to promote meaningful and inclusive youth participation through empowerment and advocacy. YUWA was formed by a group of committed youths, unofficially working in this sector since 2005. The initial focus was to develop leadership skills of the involved youths, to train as youths, as indispensable activists and to advocate for change agents. Young people are valued as partners in decision making on all levels and bring with them a wide and

diverse array of knowledge, skills and experience in this sector. Since its formal establishment, YUWA has been working in the area of young people’s sexual and reproductive health and rights such as comprehensive sexuality education, and safe abortion through youth mobilization, resource generation, capacity strengthening, awareness, campaigning and advocacy at national and regional levels. YUWA concentrates on holistic youth issues and especially focuses on these thematic issues: sexual and international level reproductive health and rights, active citizenship and has a cross-cutting research unit.



Additional Resources

Long reads

- Amnesty International. (2018). Body Politics: A primer on criminalization of sexuality and reproduction. ([link](#))
- Angela Y. Davis. (2003) Are Prisons Obsolete? Seven Stories Press ([link](#))
- Barnard Center for Research on Women. Responding to Violence, Restoring Justice. ([link](#))
- Critical Resistance. (2012) The CR Abolition Organizing Toolkit. ([link](#))
- Enfold Proactive Health Trust, Bangalore. (2021, May). Handbook for Facilitation of Restorative Practices in Child Care Institutions. ([link](#))
- Deborah Eerkes, Jessica Ketwaroo-Green, Sam Pearson, Bailey Reid, Chris Hackett, Imre Juurlink, Leah Martin, Sarah Scanlon, & Samantha Bokma. (2021). Essential Elements for Non-Punitive Accountability: A Workbook for understanding alternative responses to gender-based violence. Courage to Act: Addressing and Preventing Gender-Based Violence at Post Secondary Institutions in Canada. ([link](#))
- Generation 5. (2017). Ending Child Sexual Abuse: A transformative justice handbook. ([link](#))
- Partners for Law in Development. (2019). Grassroots Experiences of Using The Prohibition of Child Marriage Act, 2006 ([link](#))
- RESURJ. (2020). Beyond Criminalization: A feminist questioning of criminal justice interventions to address sexual and reproductive rights violations ([link](#))
- Swagata Raha. (2020). Pathways and Possibilities of restorative justice in India's juvenile justice system. In D.P. Verma & Shruti Jane Eusebius (Eds.), Juvenile Justice Law in India: A Critical Study. ([link](#))

Short reads

- Amita Pitre and Lakshmi Lingam. (2021, February 22). Age of consent: challenges and contradictions of sexual violence laws in India. *Sexual and Reproductive Health Matters*, 29(2). ([link](#))
- Counsel to Secure Justice. (2020). Restorative Justice: Primer. ([link](#))
- Godfrey Dalitso Kangaude and Ann Skelton. (2018, October 12). (De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa. *SAGE Open*, 8(4). ([link](#))
- Incite! (2008). The Critical Resistance- Incite! Statement on Gender Violence and The Prison Industrial Complex Reflections. ([link](#))
- Mimi E. Kim. (2018, May). From carceral feminism to transformative justice: Women-of-color feminism and alternatives to incarceration. *Journal of Ethnic & Cultural Diversity in Social Work*. 27(1):1-15. ([link](#))
- Phil Scraton and Deena Haydon. (2002). Challenging the criminalization of children and young people: Securing a rights-based agenda. In John Muncie, Gordon Hughes and Eugene McLaughlin (Eds.), *Youth Justice: Critical Readings in History, Theory and Policy* (1 ed., pp. 311-328). [21] SAGE. ([link](#))
- Prabha Kotiswaran. (2017, March 24). Feminist Approaches to Criminal Law. In Markus Dubber and Tatjana Hörnle (Eds.), *Handbook of Criminal Law*. ([link](#))
- RESURJ. (2016). Shortcomings of penal policies in addressing sexual rights violations. Outcome Statement. ([link](#))
- United Nations Office on Drugs and Crime. (2020). Handbook on Restorative Justice Programmes. *Criminal Justice Handbook Series*. ([link](#))

Legal materials

- Constitutional Court of South Africa. (2013). *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35 ([link](#))
 - Committee on the Rights of the Child. (2016). General comment No. 20 (2016) on the implementation of the rights of the child during adolescence. ([link](#))
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Books

- Alice M. Miller and Mindy Jane Roseman (Eds.), (2019). *Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law*. University of Pennsylvania Press.
 - Elizabeth Wicks. (2016). *The State and the Body: Legal Regulation of Bodily Autonomy*. Hart Publishing.
 - Janet Halley, Prabha Kotiswaran, Rachel Rebouché, and Hila Shamir. (2018). *Governance Feminism: An Introduction*. University of Minnesota Press.
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Websites

- Alternative Justice ([link](#))
- INCITE! ([link](#))
- Injusta Justicia ([link](#))
- TransformHarm ([link](#))

Videos and visuals

- CREA. (2020) Abort the stigma toolkit. ([link](#))
- Dean Spade. (2014, February 7). No one is disposable. Barnard Centre for Research on women. ([link](#))
- Mimi Kim and Shira Hassan. (2020, October 13). Modern roots of transformative justice. Barnard Centre for Research on women. ([link](#))
- Shira Hassan, Martina Kartman, Rachel Herzing, Mia Mingus, Priya Rai, Lea Roth, and Sonya Shah. (2020, October 13). Everyday practices of transformative justice. Barnard Centre for Research on women. ([link](#))



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.



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

Website: <https://creaworld.org/>

Contact us: crea@creaworld.org