Criminal law and the risk of harm: a commentary on the impact of criminal laws on sexual and reproductive health, sexual conduct and key populations

Veronica Birga, a Luisa Cabal, b Lucinda O’Hanlon, c Christina Zampas d

a Senior Human Rights Officer, Chief of the Women’s Rights and Gender Section, United Nations Office of the High Commissioner for Human Rights
b Special Adviser, Gender and Human Rights, Joint United Nations Programme on HIV/AIDS (UNAIDS)
c Human Rights Adviser, Reproductive Health and Research, World Health Organization Correspondence: ohanlonl@who.int
d Independent consultant and Reproductive and Sexual Health Law Fellow, Faculty of Law, University of Toronto, Toronto, Canada

DOI: 10.1080/09688080.2018.1543991

Criminal law is one of the most powerful tools that a State can use to exert control over individuals. It provides a means by which the State may legitimately restrict individual conduct, so as to prevent harm or address harms that have already occurred. In some areas, however, the criminal law itself can be harmful and, for this reason, must be carefully regarded to ensure that it is not employed in ways which are unjust or undermining of human rights, including the right to the highest attainable standard of health and sexual and reproductive health and rights (SRHR). In the areas of consensual sexual conduct, including adultery, sex work and same-sex relations; drug use; HIV exposure and transmission; abortion and other sexual and reproductive health and rights, human rights bodies as well as international, regional and national courts have expressed concerns about the impact of criminal law on the enjoyment of human rights, including on gender equality and the right to health.

**Common threads**

There are important connections across the areas of drug use, abortion, HIV exposure and transmission, and consensual sexual conduct, including adultery, sex work and same-sex relations. Concerns have been expressed about the impact of criminal law on the enjoyment of human rights. 1–15 Criminal laws governing sexual conduct, reproduction and drug use are often based on moral or religious beliefs, which reinforce existing stereotypes, including gender stereotypes, and/or justify them. They seek to curtail and punish deeply personal decisions and choices about one’s life and one’s body. Where criminal law is used to regulate sexuality, sexual health and sexual conduct, it expresses certain societal values about appropriate forms of sex. Dictating who may have sex with whom, and for what purpose, these laws generally privilege sex in the context of marriage over non-married, heterosexual over homosexual, and reproduction over non-procreative. They perpetuate heteronormative gender binary stereotypes of procreation, family structures, binary roles of men and women in society, and sexuality. Other justifications for such laws involve purported public safety issues, which encompass concerns regarding public health, the maintenance of civic order, and child welfare. Another argument used to justify the criminal law relates to maintaining social and cultural purity as well as national identity, such as when citing non-conforming sexual orientation and gender identity as inimical to local norms and values based on binary norms of male and female, decrying same-sex conduct and non-conforming gender identity as being “foreign imports.” Many of the justifications have been considered by national and international human rights bodies and tribunals and overwhelmingly rejected as contrary to human rights law.
Across the areas of SRHR mentioned above, studies have shown a link between punitive laws and practices, and negative health outcomes. For instance, studies have documented serious disruptions in the availability of, and access to, HIV and other health services following criminalisation of same-sex conduct, and widely publicised prosecutions of gay men and other men who have sex with men. Evidence shows that criminalisation of abortion does not decrease the number of abortions, but does increase the number of unsafe abortions, jeopardising women’s and girls’ health and lives. There is evidence that decriminalisation of sex work fosters positive health outcomes amongst sex workers, while criminalisation creates conditions that harm sex workers’ health. Where police can make use of criminal laws to arrest or harass sex workers, sex workers are driven underground, and are less likely to seek the health care they need and have a right to access. This makes it harder for health workers to reach them. In jurisdictions where extramarital or premarital sexual behaviour is criminalised, people who engage in such conduct are unable to access needed health services, including contraceptives, treatment for sexually transmitted infections (STIs) or safe, legal abortion services, with detrimental effects on their health. This is particularly the case for women, who are disproportionately impacted by laws criminalising adultery and thus exposed to severe punishments such as flogging or even the death penalty. With regard to criminal laws on HIV exposure, non-disclosure and transmission, punitive approaches have damaged and impeded HIV prevention efforts rather than protecting individuals from HIV transmission, promoting fear and disincentives for people to test or openly discuss their HIV status, condom use and other forms of safer sex. Criminalisation of possession and use of injecting drugs hinders access to health care and compromises the HIV response, as fear of arrest impedes people’s access to, and the uptake of, HIV services.

The negative impact that the use of criminal law in these areas has on human rights is documented by academics, researchers, and civil society organisations. Taking into account the severe impact on health outcomes, the right to health is one of the primary rights at stake. The laws also frequently result in violations of the right to be free from discrimination and the right to privacy, and undermine the autonomy of individuals to make decisions about their bodies and their lives, a central tenet of human rights norms. They can also rise to the level of torture and other ill-treatment and can become forms of violence, including violence against women.

The application of criminal law in these areas of SRHR further heightens stigmatisation of the populations impacted, which can lead to discrimination and denial of health and social services (e.g. housing for sex workers; life-saving health care for drug users). The stigmatising effect of criminal law serves also to fuel violence by state and non-state actors, often committed with impunity, against the population groups whose conducts are criminalised.

Fragmentation

Despite increasing concerns expressed by international and national bodies and courts concerning the human rights impact of criminal law across these areas, advocacy for decriminalisation has often been approached in a fragmented manner, both by courts and by advocates. Through the lens of human rights, harm reduction and public health activists have pushed for decriminalisation of HIV transmission, exposure and non-disclosure, drug use, same-sex relations, sex work, abortion and adultery with some success. Some challenges are still being faced. For example, same-sex practices are criminalised in approximately 70 countries and territories. Across the globe, nearly all countries maintain penal code provisions setting forth the circumstances in which abortion is a crime and may involve punishment of the abortion provider, the woman seeking the abortion, people who help women obtain abortion, or some combination of the three. Sex work is criminalised or otherwise punished through a variety of laws in over 100 countries globally.
Courts have not been consistent in recognising the harms of such criminal laws. Importantly, the various issues have been driven by the respective stakeholders. For example, it has been women’s rights groups leading the charge on decriminalisation of abortion and on adultery, although the latter not always with a direct focus on the harms presented by application of criminal law in this area. HIV activists have led much of the work around decriminalisation of HIV exposure and transmission and LGBT activists have tackled criminalisation of same-sex conduct. These various stakeholders have not had adequate opportunity for collaboration or the experience of exchange. Important lessons learned could be shared across these movements in the strategies employed to effectively challenge unjust criminal laws. It would also be important to enhance understanding of how efforts to address these criminal laws influence each other and where the potential for progress in one area can support positive developments in other areas, or maybe even hinder progress.

Moving forward

Stakeholders, including nation States, the United Nations, donors and civil society can play a greater role in breaking silos and increasing collaborative approaches across movements, to address overreach in use of criminal law in these areas and enhance collaboration among movements, institutions and communities. To this end, UNAIDS and OHCHR (the Office of the High Commissioner for Human Rights) convened an expert meeting in Bellagio, Italy in 2017, to examine the human rights impacts of criminal laws in the areas of SRHR, including consensual sexual conduct, drug use and HIV criminalisation, and to consider how recognising similarities across these areas may inform responses to these laws. There was consensus on the urgent need for intersectional approaches and collaboration across the areas to critically examine the deployment and impact of criminal law. Such approaches were considered valuable for enhancing experience-sharing to support more effective advocacy, while also appreciating the need to ensure that collective progress is made across areas. It was also agreed that in promoting such intersectional approaches, specific attention must be paid to the impact of disproportionate and discriminatory use of criminal law in terms of gender, race, class, ethnicity, sexual orientation, gender identity, disability and other social and national characteristics.

The harms of criminal law in these areas is a topic that is being raised in a variety of contexts, including amongst prominent jurists and influential civil society movements. There is a momentum to build greater solidarity across movements through the entry point of examining the health and human rights impacts of criminal laws. The momentum must be harnessed in this political moment when human rights frameworks, and evidence-based policy-making based on science, are increasingly under attack.

It is particularly critical to support the development of joined up, holistic strategies for challenging unjust criminal laws at all levels, including at the United Nations, with particular attention to the intersecting impacts of such laws. In addition, robust conversations are necessary amongst diverse stakeholders, including those within global and regional bodies, on how criminal laws in the areas examined negatively impact health and human rights. Greater efforts to collect state-of-the-art evidence of such impact is also important. Such evidence should inform policy discussions at international, regional and national levels. For example, the recently issued expert consensus statement on the science of HIV in the context of criminal law illustrates how the application of up to date scientific evidence in criminal cases has the potential to limit unjust prosecutions and convictions for non-disclosure, exposure or transmission of HIV. In addition, the opportunity presented by the Sustainable Development Goals (SDG) agenda should be seized to identify discriminatory criminal laws which are barriers to the achievement of the Goals, particularly goals 3 (good health and well-being) and 5 (gender equality).

Conclusion

Criminalisation of adultery, same-sex relations, drug use, abortion, sex work, and HIV transmission, exposure and non-disclosure have common threads not only in the justifications put forth for having such laws but also in their negative impact on health and human rights. In this context, taking action to reform discriminatory law is an urgent task if the global commitment to “leave no one behind” is to become a reality. The Secretary General of the United Nations and United Nations agencies have made explicit recommendations to remove such laws and joined up action should be mobilised to implement these recommendations. This agenda must be pursued in a collaborative fashion to strategically benefit
from lessons learned and to achieve collective results across movements. In the words of Yoko Ono “A dream you dream alone is only a dream. A dream you dream together is reality.” We hope that together, we can make the elimination of unjust criminal laws a reality.

Disclosure statement

No potential conflict of interest was reported by the authors. The authors alone are responsible for the views expressed in this commentary and they do not necessarily represent the views, decisions or policies of the institutions with which they are affiliated.

References

1. Grover A. Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2011. (UN Doc. A/66/254).
2. Toonen v. Australia, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994) (Human Rights Committee).
3. Dudgeon v. UK, Application No. 7525/76, Judgement of 22 October 1981 (European Court of Human Rights).
4. Norris v. Ireland, Application No. 10581/83, Judgment of 26 October 1988 (European Court of Human Rights).
5. Modinos v. Cyprus, Application No. 15070/89, Judgment of 22 April 1993 (European Court of Human Rights).
6. LC v. Peru, Communication No. 22/2009, UN Doc. CEDAW/C/50/D/22/2009 (25 November 2011) (CEDAW).
7. Mellet v. Ireland, Communication No. 2324/2013, UN Doc. CCPR/C/116/D/2324/2013 (2016) (Cleveland S, concurring) (Human Rights Committee).
8. Committee on the Elimination of Discrimination Against Women, General Recommendation No. 33, UN Doc. CEDAW/C/GC/33 (2015), para 47.
9. Committee on Economic, Social and Cultural Rights, General Comment No. 22, UN Doc. E/C.12/GC/22. 2016. para. 40.
10. Working Group on Discrimination against Women in law and in practice, UN Doc. A/HRC/29/40. 2015. pp. 19, 49 and 73.
11. Office of the High Commissioner for Human Rights. Study on the impact of the world drug problem on the enjoyment of human rights. UN Doc. A/HRC/30/65. 2015. p. 61.
12. Navtej Singh Johar and Ors. v Union of India, Thr. Secretary, Ministry of Law and Justice, Judgment of 6 September 2018, WP (C) No. 76 of 2016 (Supreme Court of India)
13. Decision No. C-221 of 5 May 1994, La Corte Constitucional, Gaceta Constitucional Ediciona Extraordinaria (Constitutional Court of Colombia).
14. National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998) (Constitutional Court of South Africa).
15. Brazilian Supreme Court, Writ of habeas Corpus, 124.306 Rio de Janeiro State, Majority Opinion.
16. UNAIDS, The Gap Report. 2014.
17. Schwartz SR, Nowak RG, Orazulike I, et al. The immediate effect of the same-Sex marriage prohibition Act on stigma, discrimination, and engagement on HIV prevention and treatment services in men who have sex with men in Nigeria: analysis of prospective data from the TRUST cohort. Lancet HIV. 2015;2(7):e299–e306.
18. Risher K, Adams D, Sithole B, et al. Sexual stigma and discrimination as barriers to seeking appropriate healthcare among men who have sex with men in Swaziland. J Int AIDS Soc. 2013;16(3 suppl 2):18715.
19. Starks AM, Ezeh AC, Barker G, et al. Accelerate progress — sexual and reproductive health and rights for all: report of the guttmacher — Lancet Commission. Lancet. 2018;391:2642–2692.
20. World Health Organization, Safe abortion: technical and policy guidance for health systems. 2nd ed. Geneva: WHO; 2012.
21. Decker MR, Crago A. Chu S, et al. Human rights violations against Sex workers: burden and effect on HIV. Lancet. 2015;385(9963), 186–199.
22. Amnesty International. What I am doing is not a Crime — the Human Cost of Criminalizing Sex Work in the City of Buenos Aires. 2016.
23. Human Rights Watch. Off the streets: arbitrary detention and other Abuses against Sex Workers in Cambodia. 2010.
24. World Health Organization. Sexual health, human rights and the law. Geneva: WHO; 2015. pp. 20.
25. Expert meeting on the Scientific, medical, legal and human rights aspects of Criminalization of HIV non-disclosure, exposure and transmission, Geneva, Switzerland, 31 August – 2 September 2011. Available from: http://dl.dropboxusercontent.com/u/1576514/ReportUNAIDSExpertMeetingOnCriminalization_9Feb2012.pdf.
26. Oslo declaration on HIV Criminalization. 2012. Available from: http://www.hivjustice.net/oslo-declaration/.
27. Grover A. Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2010. (UN Doc. A/HRC/14/20).
28. Barré-Sinoussi A, Karim SS, Albert J, et al. Expert consensus statement on the science of HIV in the context of criminal Law. J Int AIDS Soc. 2018;21:e25161.
29. DeBeck K, Cheng T, Montaner TS, et al. HIV and the criminalisation of drug use among people who inject drugs: a systematic review. Lancet HIV. 2017;4(8):E357–E374.
30. UNDP, Global Commission on HIV and the Law, Risks, Rights and Health. 2012. Available from: http://www.hivlawcommission.org/resources/report/FinalReport-Risks, Rights&Health-EN.pdf.
31. Amnesty International. On the Brink of Death: Violence Against Women and the Abortion Ban in El Salvador. 2014. Available from: http://www.amnestyusa.org/research/reports/on-the-brink-of-death-violence-against-women-and-the-abortion-ban-in-el-salvador.
32. Center for Reproductive Rights, Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion. 2014. Available from: https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/El-Salvador-CriminalizationOfAbortion-Report.pdf.
33. Amnesty International. The Total Abortion Ban in Nicaragua: Women’s Health and Lives Endangered, Medical Professionals Criminalized. 2009. Available from: http://www.amnestyusa.org/pdfs/amr430012009en.pdf.
34. Open Society Foundations. 10 Reasons to Decriminalize Sex Work: A Reference Brief. 2012. Available from: https://www.opensocietyfoundations.org/sites/default/files/10-reasons-decriminalize-sex-work-20150410_0.pdf.
35. Canadian HIV/AIDS Legal Network. Women, Sex Work and HIV. 2012. Available from: http://www.aidslaw.ca/site/women-and-hiv-women-sex-work-and-hiv/?lang=en.
36. Ipas. When Abortion is a Crime: The Threat to Vulnerable Women in Latin America. 2013. Available from: http://www.ipas.org/en/Resources/Ipas%20Publications/When-Abortion-is-a-Crime-The-threat-to-vulnerable-women-in-Latin-America.aspx.
37. Human Rights Watch. Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities. 2012., Available from: https://www.hrw.org/report/2012/07/19/sex-workers-risk/condoms-evidence-prostitution-four-us-cities.
38. Amnesty International. She is not a criminal: the impact of Ireland’s Abortion Law. 2015. Available from: http://www.amnestyusa.org/pdfs/Ireland_She_Is_Not_A_Criminal.pdf.
39. UNAIDS. Ending Overly Broad Criminalization of HIV Non-disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations (Guidance Note) (2013), http://www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalization_0.pdf.
40. Office of the High Commissioner for Human Rights. Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law. 2012. pp. 28–37.
41. KL v. Peru, Communication No. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003. 2005. (Human Rights Committee).
42. Case of R.R. v. Poland, Application no. 27617/04, Judgment of 28 November 2011 (European Court of Human Rights).
43. VC v. Slovakia, Application No. 18968/07, Judgment of 8 November 2011 (European Court of Human Rights).
44. NB v. Slovakia, Application No. 29518/10, Judgment of 12 June 2012, (European Court of Human Rights).
45. I.G., M.K. and R.H. v. Slovakia, Application No. 15966/04 (European Court of Human Rights).
46. IV v. Bolivia, Inter American Court of Human Rights, 30 November 2016.
47. Committee on the Elimination of Discrimination Against Women, General Recommendation 35, UN Doc. CEDAW/C/GC/35. 2017.
48. International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), State-Sponsored Homophobia, A World Survey of Laws: criminalization, protection and recognition of same sex love (2016).
49. Finer L, Fine JB. Abortion Law around the world: progress and pushback. Am J Public Health. 2013;103 (4):585–589.
50. Center for Reproductive Rights, The World’s Abortion Laws. 2014. Available from: http://www.reproductiverights.org/pub_fac_abortion_laws.html.
51. Cook R. Stigmatized Meanings of Criminal Abortion Law. In: Cook RJ, Erdman JN, Dickens BM, editor. Abortion law in transnational perspective: cases and controversies. University of Pennsylvania Press; 2014. pp. 347–369.
52. UNAIDS, Addressing the detrimental health and human rights impacts of criminal laws. Available from: http://www.unaids.org/en/resources/presscentre/featurestories2018/may/criminal-laws.
53. Amnesty International, Body Politics. Available from: https://www.amnesty.org/en/documents/pol40/7764/2018/en/.
54. Accountability International, Challenging Criminalisation Globally. Available from: https://accountabilityinternational/projects/challenging-criminalisation-globally/.