Shortcomings of Penal Policies in Addressing Sexual Rights Violations
April 16-17 2016

Outcome Statement

Introduction

We,[1] a group of feminist advocates for sexual, reproductive and gender justice from across the globe, met in New York on April 16-17 2016 to scrutinize and identify the shortcomings and challenges of penal policies in addressing sexual and reproductive rights violations. After two days of fruitful discussions, case study presentations, and debates, we produced this brief statement to summarize the findings of the meeting and as a contribution to further the debate.

States across different regions of the world often respond to issues of sexual and reproductive rights within the framework of the criminal justice system. This approach of criminalization as a solution is not only employed by states: the dominant approach within donor agencies and feminist movements has also been to support advocacy for redressing violations of rights using criminalization. Criminalization as a solution has been invested in for decades.

However, and despite all the effort exerted in adopting laws that criminalize sexual and reproductive rights violations, the structural problems that lead to these rights violations often times remain intact. From our experience in advocating for sexual and reproductive justice, criminal law has not adequately addressed impunity. Criminal law has also been largely unsuccessful in sufficiently addressing/reducing sexual and reproductive rights violations.

Furthermore, the over-use of criminal law is taking place within the context of neoliberal economic structures such as the global care economy, the health- and prison-industrial complexes, militarization and structural violence, trafficking in persons, and states' growing use of the criminal justice system as a response to economic and social problems. Criminalization is promoted under the guise of providing protection and preserving morality. These dominant narratives gain momentum from religious, ethnic, and right-wing fundamentalisms and ideologies. They operate within systems of institutionalized patriarchy, racism, and oppression that maintain and reinforce intersecting structures of inequalities, including those based on race, ethnicity, class, gender identity, sexuality, sexual orientation, geographic location, legal status, ability, health status, age, and religion.

[1] See Annex 1: Biographies for Speakers at the Meeting. A special thanks goes to Sonia Corrêa**,** Associate Researcher of the Brazilian Interdisciplinary AIDS Association (ABIA) and co-chair of Sexuality Policy Watch who was unable to attend the meeting in person but who nonetheless contributed over Skype during one of the sessions.

We are therefore seeking to expand the debate around sexual and reproductive rights violations, in order to analyze, discuss and draw a comprehensive strategy that does not rely solely on criminalization in combatting sexual and reproductive rights violations and protecting gender justice.

Challenges in Addressing Sexual and Reproductive Rights Violations Exclusively through Criminalization[2]

The following are challenges identified by this group when states choose to resort solely in a quick-fix manner to penal policies and criminalization. The basis for discussions included the presentation of case studies from the different countries we work in. The full case studies are included in Annex 2.

- Criminalization is not an appropriate and effective response for addressing public health issues or for upholding the sexual and reproductive rights of individuals. Often times, criminalization in the context of public health issues will lead to violations of the rights of the individuals they are supposedly seeking to protect. A case in point is the law which criminalized HIV transmission in Kenya - the HIV and AIDS Prevention and Control Act, No. 14 of 2006 (the Act), Section 24, which came into effect on 1st of December 2010 pursuant to Legal Notice No. 180 of 2010, and which was found by a Kenyan court to be unconstitutional. The law discriminated against women who can be found liable for vertical transmission of HIV, and fails to protect or empower them to negotiate safe sex. In sum, criminalization in public health issues only exacerbates vulnerabilities and marginalization rather than creating an enabling environment in which people can make informed decisions about their sexual and reproductive health and rights.

- States resort to the use of criminal law as a quick fix for sexual and gender-based violence, with little else done to address structural violence and state-condoned violence. While the government in Egypt passed a law in 2014 penalizing sexual harassment, women detainees who were subjected to compulsory virginity testing at the hands of a military doctor in 2011 remain without redress.

- Criminal justice systems around the world primarily focus on criminalization and have not proved to be a successful deterrent to preventing individual rights' violations. For example, in Egypt, the law criminalizing Female Genital Mutilation (FGM) was passed in 2008, and yet, according to the 2015 national health survey, Egypt still maintains an alarming rate of 87% of girls and women between the ages of 15-49 who have been circumcised, nation-wide. In 2008, before the law was passed, it was as high as 91%

[2] Meeting participants were able to identify these challenges through the discussions but also by presenting case studies that reveal the shortcomings of the approach in question. Full details of the case studies presented are in Annex 2.

indicating a slow decline even after the law was passed.[3] To truly combat FGM, criminalization alone will not work, a more comprehensive approach is necessary.

- The act of criminalization itself within these laws does not inherently change/influence social and cultural norms. Rather it enhances and often reinforces gender norms and stereotypes. This is the case of the gang rape law in Pakistan for example. The penalty for gang rape is the death penalty. With such a high penalty, there is reluctance to pass out convictions which have even a little bit of doubt. The state also does not have proper investigation and forensic capacities to find perpetrators guilty: in the recent Mukhtar Mai case, the judges' own biases and patriarchal mindset was revealed through the excuses and space given to the perpetrators in the judgment. This was further exacerbated with the lack of training and resources to collect and store timely forensic evidence which may have played a crucial role in the final decision.

- Criminalization advances a protectionist approach that sometimes reinforces stereotypes of women as being weak and unable to make decisions on their own, further enhancing their marginalization and vulnerability. This is the case with Norway's immigration laws. As per Norwegian law, any proof of forced marriage provides sufficient basis to refuse family reunification, which, in turn, has weakened rather than strengthened prevention and protection from forced marriage.

- Criminalization imposes a limited, individualistic approach that does not take into account the root causes and multidimensional nature of the problem. State response to sexual and reproductive rights violations focuses on criminalization without taking into account the real and actual needs of the person whose rights have been violated. In 2006, Brazil passed a domestic violence law considered advanced as it is not limited to criminal offenses. The approach includes prosecution but also calls for urgent protective measures (safe houses, immediate financial support from the spouse) to support women whose rights have been violated within an abusive and violent relationship. However, the law is limited by the fact that most of the new courts specialized in domestic violence have not applied any of the provisions that go beyond criminalization. Little advancement was obtained with the implementation of preventive and protective provisions of the law. Given the rise of Christian conservatives at the National Congress, debating needed measures on gender equality and comprehensive sexuality education at schools has become even more difficult. The more complex – and often more needed – urgent protection measures, which go beyond ordering perpetrators to stay away from survivors, are the least granted by judges. Initiatives regarding alternatives to imprisonment, such as psychosocial interventions with perpetrators, have been captured by an approach focused on stabilizing families rather than protecting women. And there is also no evidence of reduction of violence against women and girls.

[3] http://www.dhsprogram.com/pubs/pdf/FR313/FR313.pdf

- This focus on criminalization also results in manipulation of the law, and can lead to the criminalization of sexuality and sexual rights. In this case, criminalization is often used as a tool to impose social and cultural norms and behaviors by threatening punishment if these norms are not respected. In India for example, families will abuse the law on rape and sexual assault when they don't approve consensual acts between adolescents.

- Furthermore, the criminal justice system is fraught with its own set of problems, and criminal laws confine the state response to sexual and reproductive health and rights violations to a structure that usually does not function as it should. The criminal justice system often times disproportionately discriminates and also re-victimizes already disenfranchised groups, in particular women, children, adolescents, sex workers, LGBTIQ groups, migrant communities, people living with HIV, ethnic, racial, religious, and other minority groups. This is the case of Black transgender youth in the United States. Police in New York City will stop and search these youth, and their possession of condoms could be used against them as evidence for their alleged engagement in sex work or sex trafficking. This policy specifically targets Black and Brown people and encourages actual traffickers in withholding condoms. It also prevents those who want to protect themselves from Sexually Transmitted Infections (STIs), further leaving them unprotected and vulnerable. Youth of color are now afraid of carrying condoms around.

  What we can draw from this example is that having the police (and ultimately prisons) as the primary entry point to the judicial system is greatly problematic. Police brutality and violence and the proliferation of prison industries in the neoliberal system reflect the institutionalization of the punitive judicial system. This system of surveillance benefits from the increase in criminalization to the detriment of the most vulnerable communities and reinforces a status quo that glosses over the intersections of inequality and injustice.

- Finally, criminalization laws that purportedly protect the sovereignty of countries and their geopolitical borders limit, control, and police the mobility of bodies across borders. The criminalization of sex work, the deliberate stranding of refugees at borders and their treatment upon arrival, and the war on drugs all contribute to the increase of trafficking. At the intersection of limited mobility, disability, status, ethnic belonging, and labor, sexual and reproductive justice becomes difficult to uphold in a climate of heightened surveillance and increased xenophobia.

Conclusion

As stated above, resorting to criminalization and penal policies has been one of the main ways states, donors, and even civil society activists address violations of sexual and reproductive rights and justice. As a first step towards questioning this inadequate approach, the main objective behind the meeting was to create a space to share and learn about the problematic aspects arising out of it, while also raising provocative questions that will give us all the

opportunity to carefully consider this approach in our daily experiences. It is a challenging task: punishment is deeply embedded in our ideals of justice, and questioning it may feel like losing yet another tool for protecting rights. However, a shared commitment to an intersectional approach to sexual and reproductive justice[4] demands us to not be silent before the contradictions and evident failure of criminalization.

Having gained a deeper understanding of the limitations of criminalization as a solution, we find it very difficult to continue advocating - nationally, regionally, and globally - for states to resort to this approach. We commit to taking this discussion forward in order to, ultimately, design a more comprehensive advocacy strategy that seeks to establish restorative rather than punitive justice. In other words, justice for survivors that does not seek to take revenge at the perpetrators, but instead, ensures that the survivor's rights are respected and protected in the knowledge that these violations will not keep recurring. We aim for a strategy that addresses the root causes and structural problems that lead to sexual and reproductive rights violations in the first place. We will resist attempts of substituting social policies for criminal ones. We will not work in silos. Instead, we would like to advance and establish the interlinkages between sexual, economic, and environmental justice and promote an approach that seeks to uphold all three.

We invite feminists and other interested actors from the different movements to engage with us in this debate, and in particular, in discussing alternatives to the criminalization approach and sharing success stories from their various socio-economical and political contexts.

[4] Our concept of *sexual and reproductive justice* seeks to promote a framework that brings attention to the multiple social, political and economic inequalities among different communities that contribute to infringements of sexual and reproductive rights

Annex 1
Speakers Biographies

Delaine Powerful works with our Youth Initiatives coordinator to plan, implement and coordinate the TORCH Program at the National Institute for Reproductive Health (NIRH), focusing on sexual and reproductive health education, youth advocacy, and youth leadership development. As well as working directly with our teen Peer Leaders, Delaine is also responsible for the TORCH Alumni Program, which keeps TORCH alumni involved in reproductive rights and justice work. Delaine is also the co-chair of the NYC chapter of Black Youth Project 100 (BYP100), an activist membership based organization of Black 18-35 year olds fighting for the social, political, economic, and educational freedom of all Black people through a Black Queer feminist Lens. She is also a Women Deliver Young Leader, an international organization that does sexual and reproductive health and rights advocacy for women and girls. As 1 of 200 global young leaders, Delaine had done work with storytelling and testimonials, bringing together experiences that highlight the ways access to SRH services are limited based upon gender identity, sexual orientation, geographic location, and other social identifiers.

Inga H. Ingulfsen is an M.S. Candidate at NYU's Center for Global Affairs, concentrating on peacebuilding, migration and gender. She is a passionate advocate for immigrant- and intersectional feminist and serves as the President of the Gender Working Group at the Center for Global Affairs. Her research is focused on gendered anti-immigrant and Islamophobic discourse on Twitter. Inga is originally from Iceland and Norway, but moved to New York in 2014 to pursue graduate studies and professional opportunities in the field of international migration policy and gender justice.

Jacinta Nyachae has over seven years of experience working on issues of human rights relating to health. She is an Advocate of the High Court of Kenya and the Executive Director of AIDS Law Project (ALP), a local NGO that focuses on promoting and protecting rights of people living with HIV. She is also a pro bono Advocate and volunteers by working with girls at the informal settlements within Nairobi through mentorship programmes. She holds Bachelors of Laws (LLB), a Post-graduate Diploma in Law and certificate in Intellectual Property Rights and Access to medicine. She has co-authored a number of papers on access to medicines as well as presented abstracts in conferences and meetings on health and human rights. She is a member of the Law Society of Kenya, Federation of Kenya Women Lawyers (FIDA), Young Women's Christian Association (YWCA) and Rotary Club of Karen. Jacinta is a recipient of the Mary Robinson Award for Young Women Leadership in Human Rights.

Magda Boutros is a PhD student in sociology at Northwestern University. She studies social movements and policing in Egypt and France, focusing both on how policing affects movements' strategies, and and how social movements act to transform policing practices. Prior to her PhD, Magda worked in human rights research and advocacy in Egypt and specialized in issues of

policing and human rights, prison conditions, and sexual violence. She has an undergraduate degree in English and French Law a masters degree in Criminology.

Maliha Zia is a High Court Advocate registered with an LLM in International Protection of Human Rights from School of Oriental and African Studies, University of London. She has litigated in Islamabad and Karachi with a practice that focuses on criminal, family, constitutional and human rights law. She has worked extensively with NGOs in Pakistan on research and advocacy on issues related to law, human rights and violence. In recent years she has worked on research on legal gaps relating to religious minorities; drafted manuals on sensitization and implementation of law relating to violence against women and religious minorities; drafted legislation relating to rights of religious minorities, in particularly marriage laws and forced conversion laws; and has conducted sensitization trainings of judges and police officer on discrimination and violence against women and religious minorities in Pakistan.

Sinara Gumieri is a researcher and a legal advisor at Anis - Institute of Bioethics, Human Rights and Gender, an independent nonprofit institute of research, advocacy and strategic litigation dedicated to promoting human rights with a feminist inspiration on social justice. Anis' current projects are focused on domestic violence, abortion, incarcerated women, violence and discrimination based on sexual orientation and gender identity. Sinara became a feminist activist while in college, and helped promote debates and protests on sexual and reproductive rights and other gender related issues. She is currently pursuing a Master's degree in Law at the University of Brasilia.

Annex 2
Case Studies

Criminalization of sexual and gender-based violence in Egypt

Magda Boutros[5]

In Egypt over the past two decades, combatting sexual and gender-based violence (SGBV) has been at the forefront of the agenda of both state institutions and civil society groups. In particular, much attention has been paid to two issues: female genital cutting (FGC) and sexual harassment. For both of these issues, one of the solutions adopted was criminalization. In 2008, the government passed a law criminalizing FGC, and in 2014, sexual harassment was introduced for the first time in the Egyptian penal code. Both of these laws stipulate prison terms and/or fines for offenders.

Criminalizing FGC and sexual harassment are important steps because they open the possibility of holding perpetrators accountable for SGBV, and because they have the potential to send a strong symbolic message that these practices are unacceptable. However, laws are not self-enforcing. For perpetrators to be held accountable, someone must file a complaint, the police must record the complaint and refer it to the prosecution, the prosecution must conduct an impartial investigation and press charges, and the court must convict the offenders. At each of those stages, obstacles arise. For both FGC and sexual harassment, the survivor or her guardians might prefer not to file a complaint, the police might refuse the record it, the prosecution might fail to press charges or conduct an inadequate investigation, or the judge might refuse to convict the offender. Egypt's experience with the FGC law and the law on sexual harassment suggests that these obstacles can be attenuated when there is strong public mobilization around the issue.

Indeed, sexual harassment was criminalized following an important mobilization on the issue by different sectors of civil society – a mobilization that gained momentum following the 2011 revolution. By the time the law was passed, activists had managed to place the issue at the center of media debates and had created a climate in which more and more women were breaking the barrier of silence and encouraging others to speak up and demand their rights. While we do not yet have updated data since the law passed, activists attest that more women are now taking cases of sexual harassment to the police, and that police are now more willing to file such complaints than they had previously been. Moreover, the press has reported several cases in which men have been arrested and convicted under the new law. Thus, although it is not yet possible to know whether the law has resulted in a decrease in the rate of sexual

[5] PhD Candidate, Sociology, Northwestern University

harassment, it has certainly contributed, along with the work of civil society organizations, to empower women to take their harassers to justice. By contrast, the FGC law was enacted as part of a state-sponsored campaign to combat FGC that failed to address the beliefs that sustained this practice, and did not result in any significant mobilization of communities against FGC. Instead of addressing issues at the core of the practice, such as female sexuality and women's autonomy and bodily integrity, the state focused primarily on the religious and medical aspects of FGC. As a result, very few cases were reported (usually, reports only happen when the girl died as a result of the procedure), and only one case has resulted in a conviction since 2008.[6] While the law remains largely unenforced, the rate of FGC remains very high and the rate of decline very slow.[7] Thus, when communities mobilize to create an enabling environment, criminal laws are more likely to be activated. Adversely, passing a criminal law without sufficient work on mobilizing public opinion and empowering survivors to claim their rights is unlikely to result in significant change.

However, even when there is strong mobilization, criminalization does almost nothing to address violations of sexual rights perpetrated by the state. This was illustrated vividly when, in 2011, military officials forced women arrested at a protest to undergo virginity tests. The case reached the media, and the military, under pressure, admitted that they had indeed carried out virginity tests, and claimed that this was routine practice for all unmarried women being arrested by the army. A public uproar ensued, amplified by the ongoing revolutionary wave, and a few women filed complaints. Under pressure, the military physician who carried out the tests was put on trial in a military court. He was charged with "disobeying army orders" and "indecent behavior;" and was acquitted on both counts. This case illustrates that, even in the presence of mobilization and public uproar, criminal laws on SGBV are inadequate when dealing with state crime, because criminal laws are based on the assumption of individual perpetrators. This prevents the criminal justice system from tackling systematic violations, and reduces acts that can be carried out as part of state procedure to individual cases that are dealt with as individual breaches. In the virginity tests case, even if the physician had been convicted, the criminal justice system would not have addressed the systematic nature of the violation or the hierarchical responsibility of the army leaders.

Another limitation of criminalization is that, in police states such as Egypt, one cannot assume that the criminal justice system operates in a fair and humane manner. In Egypt, the criminal justice system does not guarantee the rights to a fair trial for defendants or the right to be heard for complainants, miscarriages of justice are widespread, coerced confessions and confessions obtained under torture are routine, and detention conditions are inhumane. Any new criminal law has the potential effect of throwing more people into this dysfunctional system. Moreover, state officials such as policemen and army soldiers enjoy a *de* facto immunity from prosecution.

---

[6] In January 2015, the Court of Appeal sentenced a doctor to two years imprisonment after he performed FGC on a 13 year old, who died as a result of the procedure. The girl's father was given a suspended sentence.

[7] Between 2008 and 2014, the rate of FGC among ever-married women aged 15-49 in Egypt has gone from 95% to 92% (Egypt Demographic and Health Survey).

This reflection brings to the fore a number of questions:

1. How can we, as activists, create enabling environments that empower survivors and communities at large to mobilize against SGBV?

2. When criminal laws are passed, how do we remain vigilant that the law will not end up being used against the most vulnerable and result in reinforcing the states' securitarian agenda?

3. What actions are required to ensure that the laws are applied fairly and that the rights of defendants and complainants alike are safeguarded? How do we ensure that feminists work hand in hand with criminal justice reform advocates?

4. How do we combat state crimes, and in particular sexual and gender-based violence committed as part of state policy, within the current legal and political system?

5. What alternative conceptions of justice can we foster and support? If we do not believe that putting all fathers whose daughters undergo FGC in prison is the solution, or that prison terms for verbal harassment are appropriate, what other kinds of justice systems can we imagine?

Shortcomings of laws in preventing abuse by law enforcement officers

Delaine Powerful[8]

Reproductive Justice was a term created in 1994 by Black women as a way to connect struggles across social justice movements. It demands an intersectional approach to sexual and reproductive health advocacy, one that acknowledges how access differs for an individual based upon race, gender identity, sexual orientation, ability, and more. Reproductive justice also moves past simply advocating for abortion rights. It uplifts the right to express oneself freely, promotes the freedom to explore one's sexuality, and use one's body in any way they please – as long as it does not cause any interpersonal harm.

Using Condoms as Evidence

Within New York City, the New York Police Department has criminalized bodily and sexual autonomy. By using condoms as evidence of prostitution, police officers have been able to confiscate condoms, harass, abuse, arrest, and put individuals at risk of partaking in unsafe sexual practices. This particular use of stop and frisk disproportionately targets Black transwomen and Black gender non-conforming (GNC) people.

[8] Black Youth Project 100

As a pseudo-interventionist method, Human Intervention Courts (HTICs) were created to provide support for sex workers. However, these structures failed to address the problematic issue of using condoms as evidence, but instead, placed limits on sexual autonomy. Those arrested in possession of condoms were defined as trafficking victims so they would not be imprisoned on criminal charges, regardless of whether or not they were sex trafficked. Yet, individuals who come into contact with HTIC courts are still arrested, handcuffed, put in jail and are given only one option that will allow them to reenter society. District attorneys *offer* defendants the option of attending six sessions of an intervention program. With successful completion, the individual is eligible for Adjournment for Contemplation of Dismissal (ACD) if the defendant is not rearrested for six months after the original charges.

A major problem with HTICs is that it goes against ideologies of reproductive justice, bodily and sexual autonomy. HTICs believe that sex work is only done if it is forced (sex trafficked) or done as a circumstantial labor for money, refusing to take into account a person choosing sex work as a desirable and wanted profession. Using condoms as evidence also disproportionately affects Black trans women and gender non-conforming folks, as police officers will single out GNC and transwomen and automatically assume them to be sex workers. This has created racial disparities in HTICs, where Black women make up 65% of Brooklyn HTIC defendants.

Work Done

There are many organizations in New York City currently organizing around this issue, such as the Sex Workers Project, Red Umbrella Project, The Audre Lorde Project, FIERCE and Streetwise And Safe (SAS). SAS has been working to push legislators to support SB1369 and the Assembly to support A27356
Bill S1369/A2736 would stop police and prosecutors from using the possession of condoms as evidence of prostitution (sex work.)

In 2013, the New York State Assembly passed the "No Condoms as Evidence Bill" (A2736/SB1369) which prohibited the NYPD to use condoms as evidence in some "prostitution"-related arrests, particularly in school zones and while loitering.

Limitations:

The passing of bill A2736/SB1369 is a great success, as the NYPD has continued to oppose and prevent bills that address this issue from being passed. However, because police are still able to use possession of condoms as a *justification of arrests* and take the condoms to use as *investigatory evidence* of promoting sex work or trafficking, this bill is not enough. The limitation of this "success" is that it still leaves sex workers vulnerable and unprotected. Traffickers often withhold condoms from trafficked sex workers and it prevents individuals from protecting themselves from STIs and HIV. In BDSM community spaces where sexual activity occurs, condoms may be hidden or stored in unsafe ways so that police cannot detect them. This new policy stills disproportionately targets Black and People of Color (POC) and allows for the

continued profiling of particularly Black transwomen and Black gender non-conforming (GNC) people, whose gender expression does not match the understanding of police officers conception of gender. It prevents individuals from protecting themselves from STIs and HIV when they are worried about police encounters and being arrested.

This bill cannot be amended to be appropriate to protect these individuals. The only way to prevent the profiling of Black GNC and transwomen and protect sexual health is to ensure no bill criminalizes the possession of condoms by anyone at any place. The NYPD must also not have the ability to stop individuals on the premise that they may be promoting or engaged in sex work or trafficking.

Global Landscape

This is a global issue. In 2012, a study was funded by the Open Society Foundation and conducted by sex workers' organizations across Kenya, Namibia, Russia, South Africa, the U.S. and Zimbabwe. Testimonies collected from sex workers and outreach workers showed that police have been confiscating and destroying condoms and arresting people on sex work charges, using condom possession as justification. Police officers also harass, arrest, and follow outreach worker condom distribution vans to find sex workers.

Because this issue spans over vast geographical regions, a global attack that causes the issue to go viral and specifically targets power holders, will make this international abuse of human rights much more visible.

Questions:

1. How can sex positive, feminist organizations across the world collectively put pressure on policy-makers?
2. How can we strip the police of their abused power?
3. What transformative entity can be put in place of the criminal justice system that does not harm of further subjugate people, especially Black and Brown individuals?

Sources:

http://www.nocondomsasevidence.org/wp-content/uploads/2012/04/Release-on-passage_FINAL.pdf
http://www.thebody.com/content/73520/on-lgbtq-youth-condoms-and-police-stops.html
https://www.opensocietyfoundations.org/sites/default/files/criminalizing-condoms-20120717.pdf

Child marriage among asylum seekers in Norway

Inga Ingulfsen[9]

Government figures estimate that 61 minors seeking asylum in Norway in 2015 were married at the time of arrival. The youngest was an 11-year-old girl and at least ten were under the age of 16, the legal age of consent in Norway.[10] The public debate on child marriage among asylum seekers was sparked when the story of a 14-year-old Syrian girl broke in the media. The girl crossed the border into Northern Norway from Russia, the entry point into Europe for refugees who take the arctic route. She was pregnant at the time of arrival and accompanied by her 23-year-old husband and their 18-month-old child.[11] This story broke in the context of an increasingly polarized asylum and integration debate, and a pending proposal for comprehensive restrictions on asylum laws.[12] The issue raises dilemmas regarding competing rights frameworks and protection claims, particularly between child protective frameworks and asylum and immigration law.

The Norwegian Marriage Act establishes a requirement of consent for both contracting parties to marriage and sets the legal age of marriage at 18. The General Civil Penal Code states that forcing or aiding and abetting in forcing someone to contract a marriage is punishable with up to six years in prison. Entering into a marriage with a person under 16, or aiding in the contracting of such a marriage, is punishable with up to four years in prison regardless of whether force or threats have been used against the child. The sexual consent age is 16 in Norway and sex with an adolescent between 14 and 16 is punishable up to six years, while sex with a child under 14 is punishable up to 10 years[13].

These sections of family and criminal law have considerable bearings on asylum and immigration frameworks. For example, family reunification can be refused if it is "likely that the marriage is being contracted against the will of either party,"[14] a limitation that could impact the prospects for family reunification for many of the refugees who have recently arrived from Syria, Iraq and Afghanistan. Limitations on family reunification introduced in countries across Europe under the guise of protecting women from violence and forced marriage, in fact disproportionately affect female refugees because they make it more difficult for women to qualify for protection under

---

[9] M.S. Candidate, Center for Global Affairs, NYU.President, Gender Working Group

[10] "Elleveåring var gift da hun søkte asyl i Norge," *Aftenposten*, February 2, 2016, Accessed May 3, 2016, http://www.aftenposten.no/nyheter/iriks/Ellevearing-var-gift-da-hun-sokte-asyl-i-Norge-8341379.html

[11] "Gravid jente (14) søkte asyl sammen med mannen," *Aftenposten*, December 2, 2015, Accessed May 3, 2016, http://www.aftenposten.no/nyheter/iriks/Gravid-jente-14-sokte-asyl-sammen-med-mannen-8268142.html

[12] Ingulfsen, Inga, "Why aren't European feminists arguing against the anti-Immigrant Right?" *Open Democracy*, February 18, 2016, Accessed May 3, 2016, https://www.opendemocracy.net/5050/why-are-european-feminists-failing-to-strike-back-against-anti-immigrant-right

[13] Norwegian Directorate for Children, Youth and Family Affairs, *Forced Marriage Brochure –English,* N.d., Accessed May 3, 2016, http://www.bufdir.no/global/Tvangsekteskap_brosjyre_engelsk.pdf

[14] Ibid.

asylum laws.[15] However, because Norwegian courts do not have jurisdiction over marriages contracted legally in other countries between two non-residents of Norway (at least one party must be a Norwegian resident), it is not clear exactly how this limitation will be applied in cases involving recently arrived refugees. Further, as the law currently stands it is unclear whether Norwegian courts would be forced to recognize marriages involving one or more non-resident minors *already in Norway*. In a recent controversial case, the court recognized a marriage contracted in Ethiopia between a man, who has since become a Norwegian resident, and a 15-year-old girl. The marriage was acknowledged and the man granted family reunification because it was legal according to provincial law, even though federal Ethiopian law sets the legal age of marriage at 18. The Norwegian Ministry of Foreign Affairs has openly criticized the decision, which undermines the fight against child marriage in Ethiopia, in which Norway is actively involved.[16]

Importantly, the newly suggested restrictions on Norwegian asylum law could mean that individuals who arrive in Norway as minors will only be granted temporary asylum and risk deportation after they turn 18.[17] These restrictions would severely impact the protection afforded to minor asylum seekers, regardless of the approach taken by Norwegian authorities in responding to the marriages. However, it is also clear that if the spouses are separated or if the husband faces criminal charges in Norway, deportation to Syria, Afghanistan or Iraq could put both parties, perhaps especially women, at risk of honor-related violence.

Child marriage is also a contentious issue within Norwegian integration politics. The Child Welfare Act states that a marriage where one or both of the parties is under 18 and that is contracted under force or coercion is considered a serious deficiency of care and can result in a child being placed in the custody of Child Welfare Services. The Norwegian Child Welfare Services have recently received international criticism for disproportionately targeting immigrant families.[18]

The strong emphasis in Norwegian law on child protection is thereby already coming into conflict with asylum laws and raising a series of legal and political issues, but the push for criminalization only became pronounced after the issue of child marriage among asylum seekers reached public debates. In fact, the current policy in place to respond to the arrival of married minors is the Norwegian Directorate of Immigration's guidance note for asylum centers. This guidance details an extensive process to determine and respond to the individual needs and

---

[15] Amandine Bach, Social Watch, "Immigration, Integration and Asylum Policies from a Gender Perspective", N.d., Accessed May 3, 2016, http://www.socialwatch.org/node/11593

[16] Bjåen, Bjørgulv, "UD fillerisited UDI i barnebrudstrid," *Vårt Land*, March 13, 2016, Accessed May 3, 2016, http://www.vl.no/nyhet/ud-fillerister-udi-i-barnebrudstrid-1.700836

[17] Aspelund, Ingrid, Espen Breivik and Karoline Steen Nylander, "Et liv i frykt og usikkerhet," *Dagbladet*, January 17, 2016, Accessed May 3, 2016, http://www.dagbladet.no/2016/01/17/kultur/meninger/debatt/asyl/barn/42770296/

[18] Lewis, Mark, "Norway accused of unfairly taking away immigrant children," *Business Insider*, August 26, 2015, Accessed May 3, 2016, http://www.businessinsider.com/ap-norway-accused-of-unfairly-taking-away-immigrant-children-2015-8

realities of each family and is implemented in close collaboration with the Directorate for Children Youth and Family Affairs, which administers a comprehensive protective service for victims of family and honor-related violence, local police departments, and Child Welfare Services.[19] Once the issue had reached the public discourse several prominent public figures condemn the marriages and call for criminalization, including actors as diverse as the right-wing minister of Immigration, Sylvi Listhaug, and self-professed feminists on the political left.[20] The development of the case of the 14-year-old Syrian girl is a telling example of how the public discourse can shift policies toward criminalization and undermine refugee protection: the family had originally received a tailored service which involved placing the spouses in separate asylum centers, placing the girl and the children in a special residence for unaccompanied minors, while allowing visitation hours for the husband to spend time with their children. After Sylvi Listhaug's public condemnation of this approach, the police re-opened a criminal investigation directed at the husband.[21]

Questions Raised by the Case:

1. How can feminist supporters of inclusive immigration- and asylum politics respond to narratives that invoke sexual violations to justify restrictive policies and undermine refugee protection?
2. How can we strengthen the alliance between European feminists and advocates for refugee- and immigrant justice?

AIDS Law Project v. Attorney General & 3 others

Jacinta Nyachae[22]

Background

A petition was provoked by the enactment of section 24 of the HIV and AIDS Prevention and Control Act, No. 14 of 2006 (the Act), which came into effect on 1st December 2010 pursuant to Legal Notice No. 180 of 2010.

[19] Norwegian Directorate of Immigration (UDI), "Tiltakskort – Barneekteskap: En veileder til hvordan du skal følge opp mindreårige beboere i mottak som er utsatt for barneekteskap," N.d., Accessed May 3, 2016, https://udiregelverk.no/PageFiles/10981/Vedlegg3.pdf

[20] "Bør vurdere å strafe mennene," *NRK*, February 2, 2016, Accessed May 3, 2016, http://www.nrk.no/norge/listhaug-om-barnebruder_-_-helt-forkastelig-1.12782811

[21] Lieungh, Erik, "Politiet Snur: Etterforsker sak hvor jente (14) kom gravid over grensa med eldre ektemann," *NRK*, March 12, 2016, Accessed May 3, 2016, http://www.nrk.no/finnmark/politiet-snur_-etterforsker-sak-hvor-jente-_14_-kom-gravid-over-grensa-med-eldre-ektemann-1.12685228#

[22] Aids Law Project

Many countries in Sub-Saharan Africa adopted HIV-specific legislation based on the Model Law on HIV. Although its stated aim was the protection of the human rights of all people living with HIV, many of the versions developed by different regional countries have included punitive and coercive provisions that run counter to internationally recognized best practice. Unfortunately, these laws were introduced after it had become clear in other parts of the world that criminalisation did nothing to reduce onward transmission rates, and that despite little evidence of these laws being used in practice, their very existence is impeding prevention efforts.

The scope, generality and vagueness of many of the laws permit the criminalisation of women for exposure or transmission as regards sexual partners, but also as regards their children. There have been very few reports of prosecutions and still fewer convictions across the region. There is infrequent use of the criminal law in the region, despite its existence.

Arguments for criminalization

There is a general assumption that laws criminalising exposure and transmission can have beneficial public health outcomes. However, there is no evidence to support this claim and it is therefore inadequate and insufficient as a justification for the use of criminal law. Proponents of criminalization claim that they are promoting public health and morality; some say they are safeguarding rights and health of women. However, the criminalisation provisions disproportionately impact women because they may be more likely to know their HIV status during antenatal care and it may be more difficult for them to negotiate safer sex.

Problem with application of the law

The purpose and objective of the Act was to eliminate stigma and discrimination that PLHIV face and aid in advancement of rights of women and girls who are disproportionately affected by HIV. Section 24 of the Act was operationalized despite advocacy efforts to amend it. ALP challenged provisions of section 24 on grounds that it was likely to infringe on the constitutional rights of PLHIV if implemented.

Main arguments of the case:

- The term ‘sexual contact’ has no generally accepted legal or social definition; it lacks statutory definition thus leading to arbitrary and capricious interpretations.
- Section 24 worded in a vague and overbroad manner incapable of giving an ordinary citizen notice of criminalized act or omission. It fails to adhere to the principles of legality that the law must be clear and capable of giving sufficient notice to the ordinary citizen of what the forbidden act or omission is.
- Provision instills fear and stigma; it brands PLHIV as criminals thus negating efforts being made to encourage people to live openly with their status.

- The section violates rights to privacy; this undermines public health initiatives; disclosure exposes individuals to stigma, discrimination and rejection. There ought to be a corresponding obligation during disclosure to keep information confidential.
- Argument by Amicus that broad criminalization of HIV exposure and transmission raises questions in the context of vertical mother to child transmission. Most women lack information and services to prevent HIV exposure during pregnancy, delivery or breastfeeding. Further, non- voluntary partner disclosure exposes women to violence and discrimination by partners, family and community.

Limitations of Section 24

- Rights and responsibilities: guarantee of protection and non-discrimination upon disclosure, yet PLHIV are legally responsible to disclose status to their sexual contacts; what about the reciprocal duty of engaging in safe sex? And even worse where there is prosecution even where transmission does not occur.
- Difficulty to prosecute intentional transmission where there is consensual sex. The standard of proof, evidence from healthcare providers, records of HIV tests, did they practice safe sex, was there disclosure?
- Section too vague and overbroad.

Way forward

As proposed by the judgment there is need to amend the law. Criminalization is justified only where individuals are malicious and intentionally transmit or expose others with a purpose of causing harm.

There is no evidence that the infections have reduced as a result of prosecutions. It is clear that what has made a difference in reducing the number of new infections is mainly awareness raising and provision of services as well as creating a conducive legal environment that is free of stigma and discrimination.

Continued advocacy against criminalization of transmission and ongoing work by the Global Commission on HIV and the Law proposes a sustainable response to HIV that is consistent with human rights obligations. Some of the proposals include: enactment of such laws should be withdrawn or amended; Countries to amend or repeal laws that criminalize vertical transmission of HIV; Countries may legitimately prosecute HIV transmission using general criminal law though it requires high standards of evidence and proof.

A holistic approach would be one that involves all stakeholders in dealing with the issue as opposed to a punitive approach which usually would discourage people from testing and therefore taking back the progress already achieved towards dealing with stigma and discrimination and providing care and treatment to PLHIV. To ensure that justice is upheld, its is

important to maintain the already existing criminal law while observing high standards of evidence and proof.

References

http://kenyalaw.org/caselaw/cases/view/107033
http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf

Criminalization of domestic violence and feminicide in Brazil

Sinara Gumieri[23]

Domestic violence has long been a priority issue for women's and feminist movements in Brazil. Since the 1970's, with mottos such as "love doesn't kill", they brought attention to the criminal justice system and its bias against women. Back then, arguments such as "self-defense of honor" were being developed by courts to acquit men charged with killing their partners after they supposedly did something that tarnished male honor. Women who dared to seek help from the police would often be told to go back home because family matters should never leave the house.

Thanks to the decades old feminist fight, a lot has changed since then. In 2006 the National Congress passed the Maria da Penha Law,[24] which brings a comprehensive approach to domestic violence. It goes beyond demanding the criminal justice system to take domestic violence seriously and hold perpetrators accountable. It includes provisions on urgent protection measures for women victims of domestic violence, which are based on the assessment that leaving a violent relationship or domestic setting may require access to material resources, shelters, suspension of the perpetrator's visitation rights, among others. The Maria da Penha Law also provides for the integration of human rights, gender and racial equality perspectives into school curriculum, media outlets, research and data collection, and capacity building for police officers.

However, 10 years after its passing, there is little to be seen about the Maria da Penha Law's comprehensive response to domestic violence. Its implementation may be a tale of caution against prioritizing criminalization as the main or sole response to social problems. Despite some local efforts to create specialized domestic violence criminal courts, which is one of the biggest changes brought by the implementation, it is well known that the threat of punishment or even punishment itself is not effective in changing behavior, especially those reproduced daily by hegemonic masculinity. At the same time, little advancement was obtained with the

[23] Researcher and legal advisor at Anis - Institute of Bioethics, Human Rights and Gender
[24] Brazil. Maria da Penha Law (Law n. 11.340/2006). Available at: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/l11340.htm

implementation of preventive and protective provisions of the Law. Given the rise of Christian conservatives at the National Congress, debating gender and comprehensive sexuality education at schools has become even more difficult. The more complex – and often more needed – urgent protection measures, which go beyond ordering perpetrators to stay away from survivors, are the least granted by judges. Initiatives regarding alternatives to imprisonment, such as psychosocial interventions with perpetrators, have been captured by an approach focused at stabilizing families rather than protecting women.[25]

In early 2015, following the narrative most commonly associated with the Maria da Penha Law, regarding the need for harsher punishment in order to protect women's human rights, a new law on feminicide was passed in Brazil.[26] The legislative debates around it featured an example of how criminal law can be a tool for dehumanization. Members of parliament voted to remove the word gender from the legal definition of feminicide in a sad attempt to keep the law from applying to murders of trans women – they relied on a presumption of sex as nature by defining feminicide as the "murder committed because of the condition of the feminine sex". The new law, often described as much needed to fight perpetrator's impunity, followed a common aspect of criminal legislative activity, which is the lack of reliable evidence to support it. At least at the Federal District, 98% of feminicide perpetrators brought to trial were sentenced to an average of 15 years in jail[27]. However, the same study showed that a big problem was taking place before trial, given that in 21% of the cases of women murdered between 2006 and 2011 the police knew little to nothing about the deaths. It is true that the reality of the criminal justice system at the Federal District is probably not the same as in the rest of the country, but there are no other representative studies available to say much else. Therefore, the feminicide law was passed to respond to a problem that wasn't properly identified.

In this scenario of stronger punitive discourses and larger criminal justice systems, and yet growing violence against women and girls, it may be important to question our feminist attempts to advance sexual and reproductive justice through criminalization. The context of the criminal response to domestic violence in Brazil might help raise a few questions, such as:

1. Is a structurally patriarchal and racist system such as the criminal justice system capable of protecting women's rights? Has it been effective? Has it instead been used to revictimize women?
2. Is the individualized approach of criminalization effective in changing gender norms?

---

[25] Gumieri, Sinara. Maria da Penha Law and normalizing of the Family: a study about judicialized domestic violence at the Federal District between 2006 and 2012. 2015. Available at: http://repositorio.unb.br/handle/10482/19931

[26] Brazil. Feminicide Law (Law n. 13.104/2015). Available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13104.htm

[27] Diniz, Debora; Costa, Bruna, Gumieri, Sinara. Naming feminicide: knowing, representing, and punishing. 2015. Available at: http://bdjur.stj.jus.br/jspui/handle/2011/93323

3. Is the police an appropriate entry point institution for women survivors in need of social protection and health care?
4. Is criminalization being used as an alibi for states not doing anything else when it comes to violence prevention and support for survivors?

The Mukhtar Mai case

Maliha Zia[28]

What is the case trying to deal with?

The identified case study involves a Panchayat ordered case of gang rape of a woman. The gang rape was retribution for the 'dishonour' of a girl from another Tribe/family with whom the victim's brother reportedly had an affair with.

Violations the legislation is trying to respond to?

Gang rape is an offence that is considered to be a 'terrorist' act in Pakistan according to the Anti-Terrorist Act 1997 and provides a punishment of death penalty of life imprisonment under Section 376 of the Pakistan Penal Code 1860.

Overview of Core Issues Impacting this Case

The Legal System in Pakistan

Formal Legal System:

The legal system of Pakistan comprises of a hierarchal structure with Supreme Court as the head of the justice system. Each province has its own High Court with subordinate courts down to the districts. Parallel courts have been set up for specific issues such as banking, terrorism etc. A parallel court and appellate court have been set up to monitor and ensure no violation of Islamic Principles i.e. Federal Shahriat Court and Appellate Shahriat Court. However, Supreme Court is final court of appeal, including from FSC.

Illegal Parallel Legal Systems:

Pakistani society is steeped with cultural traditions. In addition to this, the formal legal system continues to fail the people in providing true access to justice and results with long delays in courts cases, high courts, corruption, un-friendly courtrooms etc.

[28] Lawyer and Aahung Board Member

As a result of these two elements, there exist in many parts of Pakistan illegal systems that mete out justice. These panchayats or jirgas, as they are known, take the forms of male tribal leaders in a community coming together to hear a case and give a verdict. Women cannot be part of the council, nor can they attend the meetings, rarely can they appear as witnesses. In fact their only involvement is when punishments are given – where often, women are the victims of such punishment, whether given to opposing parties to settle disputes, whether as victims of retribution as has been done in this case etc.[29]

Legislative framework in Pakistan

The legal framework with a specific reference to criminal law can be summarily defined as follows:

- Constitution of the Islamic Republic of Pakistan 1973
- Criminal Codes: Pakistan Penal Code (PPC) 1860; Qanun e Shahadat (Law of Evidence 1984); Code of Criminal Procedure (Cr.PC) 1898
- Laws for specific issues e.g. Zina Ordinance 1979; Anti-Terrorist Act 1997
- Laws specially made for women and children etc.

Sources of Law:

- Legislative text
- Binding judgment of superior courts

Courts may also use other sources as guiding principles, including:

- Natural justice
- Settled legal principles
- Islamic principles etc
- International law

Required Evidence in Rape Cases

While naturally the nature and requirement of evidence in each individual case varies, there are some accepted forms of evidence which have been laid out by the superior courts in Pakistan. These include:[30]

· Sole testimony of victim which inspires confidence;
· While corroborative evidence is good, it is not mandatory
· Previous conduct of victim is not relevant
· Marks of violence are not essential

[29] Jirgas and Panchayats were criminalized in Criminal Law (Third) Amendment Act 2011. However, they still continue to function in many parts of Pakistan. There is little data to be able to assess whether the 2011 law was successful or unsuccessful.

[30] "How Much Rape is Rape - Understanding Normative Assumptions within Rape Victimology in Pakistan", Sarah Zaman & Maliha Zia, 2014

· Delay in reporting is acceptable within social context of Pakistan
· Age of Consent is 16 years

The Facts

Mukhtar Mai was subjected to gang rape by four persons belonging to the Mastoi Tribe[31] by the sanction of the Panchayat of the Tribe. This rape was supposedly ordered as a form of retaliation against her brother Abdul Shakoor, who was alleged to have an affair with Salma, who belonged to the Mastoi Tribe. As Salma had been 'dishonoured' by the actions of Abdul Shakoor as he had 'violated' her 'chastity', the only way to vindicate them and restore the Tribe's honour was to retaliate against them was to retaliate by raping the sister of the accused.[32]

Alternatively, it was proved in a simultaneous court case that Abdul Shakoor has in fact been the victim of involuntary rape by men from the Mastoi tribe and upon his refusal to maintain his silence about his rape, reportedly this situation was created to cover up the culpability of Abdul Shakoor's rapists.

The case took many years, with appeals being filed back and forth. The Anti-Terrorist Court gave a guilty verdict to the perpetrators and the final appeal was presented to the Supreme Court.[33] The Supreme Court in 2011 gave a divided judgment with two of the judges giving the majority decision and the third judge providing a dissenting judgment. As a result of the majority decision, all persons were acquitted except one person.[34] The sole person found guilty was only found guilty because he claimed to have married Mukhtar Mai and admitted to sexual intercourse – a fact challenged by Mukhtar Mai. The lack of evidence of a marriage, whilst admitting sexual intercourse resulted in his being convicted of rape.[35]

The biggest injustice that emerged from this judgment was not just the fact that the majority of the perpetrators were acquitted but that the highest court of the land gave a clearly imbalanced judgment, which looks to have strived to find reasons to acquit.

Objections to the Majority Decision include the following:[36]

---

[31] Pakistani society is divided often according to lines of caste, tribes, class, religion. Power structures result in certain tribes being more powerful than others – usually due to being economically or politically stronger.

[32] "Mukhtaran Mai: A story of extraordinary courage", Farooq Tirmizi, The Express Tribune, 22-04-2011

[33] "Going back to Mukhtar Mai", Sana Saleem, Dawn Newspaper, 22-04-2011

[34] Ibid

[35] The State vs. Abdul Khaliq [PLD 2011 Supreme Court 554]; "Preliminary Critical Analysis of the Judgment of the Hon'ble Supreme Court datedApril 1, 2011 in Criminal Appeals No. 163 to 171 and S.M. Case No. 5/2005 Re: Mukthara Mai Case",Senator (R) Iqbal Haider and Barrister Hamaad Haider

[36] These objections are taken from two articles: "Preliminary Critical Analysis of the Judgment of the Hon'ble Supreme Court datedApril 1, 2011 in Criminal Appeals No. 163 to 171 and S.M. Case No. 5/2005

- Supposed 'foundational facts' identified by the Court as providing base for disproving of the prosecution's case were completely irrelevant to the actual crime.
- Lack of recognition of 'aiding' and 'abetting' – certain persons who were nominated as aiding and abetting in the FIR were released due to their 'un-involvement' despite clear proof in their assisting in the rape e.g. dragging the victim into the house where she was raped.
- Moral presumptions in favor of the alleged rapist and his brother (a man would not rape the same woman as his brother; the house where she was raped, the family of the accused resided there – would he rape a woman in the presence of his family – no question of whether perhaps the family was not home etc)
- Lack of acceptance of 8 day delay
- Making a difference the reaction and shame of an 'unmarried virgin victim of a young age' vs. 'grownup lady, who is a divorcee for the last many years'.
- Unwarranted considerations of Judges – actually making up presumptions, possibilities in favor of the accused e.g. establishing a backdrop of 'riff and tiff'; stating the prosecution was affronted when a compromise marriage for her was not arranged therefore she concocted this story etc.
- Missing the corroborative evidence of marks of violence
- Dismissing the time held sole testimony of the victim as the prime evidence for prosecution
- DNA and Semen testing not conducted to prove gang rape
- Using trivial inconsistencies in witnesses statement to disbelieve them

Justice Jillani gave a dissenting opinion whereupon he also felt that only 1 person could be charged with rape, but the other accused would therefore be charged with aiding and abetting. His judgment differed in many other aspects from the majority decision – particularly with regards to reasoning and language.

- Judge believed the rape victim because the 'crucial testimony in any rape case is always that of the victim';
- Analyzed the so-called contradictions and so-called 'unbelievable' parts of the prosecution evidence as seen by the majority decision, within the context of the imbalance of power between the rape victim and the accused persons, who are more powerful because of their stronger Mastoi tribe and their maleness.
- The judge listened to the rape victim and tries to understand the evidence within the unequal power context of the victim and the aggressor but without accepting everything she is saying.
- Received at a different conclusion than the majority decision which included punishments of aiding and abetting for others etc.

Re: Mukthara Mai Case",Senator (R) Iqbal Haider and Barrister Hamaad Haider; " To Whom will they turn?", Faisal Siddiqui, Advocate, 2011

Limitations Identified in Attaining Justice for the Victim[37]

This case demonstrates that despite decent criminal law, a high punishment, good case precedents, the power of the judges is immense in moving away from these positive aspects,
The language and presumptions given in the judgment evidence the bias of the judges – with no monitoring, check and balance. It reflects the mind-set of a large segment of society that not only condones tribal judgments such as of this Panchayat, but carry it through. The majority decisions demonstrates a patriarchal mindset wherein facts and non-facts are stretched to give as much levy to the accused and to taint the image and statements of the victim and her witnesses.

The backlash that to this day follows Mukhtar Mai for not only fighting her case to the finish in court and 'dishonoring' herself by making public what happened to her, thereby 'tainting the name of Pakistan' is yet another demonstration that the problem continues to be with the attitudes and biases of the people. Higher criminal penalties or a changed focus on the type of penalties – which are welcome to ensure no impunity – should not be the sole focus of legislative aim. The real problem lies with the mindset of the society and initiates to engage and challenge that must be focused upon rather than purely on the law and its implementation.

With high penalties of gang rape (death), there is reluctance to provide convictions which have even a little bit of doubt. There is also reluctance to accept that 'rape' or even 'gang rape' should provide such a high penalty.

This case law provides clear evidence that high penalties with a focus on criminalization are not useful in this context. The challenges remain within the mindset, language and 'discretion' of the judges and therefore the society.

Questions raised by the case

1. If criminalization is not working – then what should we be focusing on?
2. How to effectively change mind-sets of society?
3. How do we measure change?
4. What else has worked around the world?
5. Is criminalization a strategy to keep women's activists diverted, thereby not really solving the problem and thereby giving immunity?

[37] Ibid