



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 USE AND HIV

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For the past six years, Amnesty International has developed a comprehensive body of work dedicated to documenting, analysing and critiquing the human rights impact of criminalizing sexuality and reproduction. This work has deepened the organization's commitment to sexual and reproductive rights issues; enabling it to become a stronger and more progressive partner in the women's rights, sexual and reproductive rights and LGBTI rights movements.

Amnesty International has undertaken provocative, cutting-edge research on criminalization of abortion, same-sex relations, sex work and drug use during pregnancy, and adopted a bold institutional position on the human rights of [sex workers](#) (which calls for full decriminalization of sex work, among other things).¹ The organization is in the process of updating its institutional position on abortion and developing a policy on drug control and human rights. Over the years, Amnesty International has also developed a theoretical framework - firmly grounded in international and regional human rights standards - for critiquing states' resort to criminalized responses to control and punish sexual and reproductive actions and decisions, and gender expression, which has been shared with UN agencies, human rights experts and allied organizations to develop normative guidance on these issues at the international level. This framework is set forth within the organization's [Body Politics: Criminalization of Sexuality and Reproduction Series](#) (containing a [primer](#), [campaigning toolkit](#) and [training manual](#)), which represents the culmination of Amnesty International's research, analysis and dedication to these issues.²

The Body Politics series covers seven issue areas where overreaching laws and policies criminalize sexual and reproductive actions, decisions and gender expression. Amnesty International uses the overarching concepts of consent and bodily autonomy to guide its assessment of the human rights impacts of criminalizing same-sex sexual conduct, HIV non-disclosure, exposure and transmission, sex outside marriage, adolescent sexual activity, conduct during pregnancy such as drug use, and abortion. For the purposes of this submission we will focus on a smaller sub-set of issues which sometimes receive less attention.

¹ Amnesty International, *Policy on state obligations to respect, protect and fulfil the human rights of sex workers* (Index: POL 30/4062/2016); Amnesty International, *Explanatory note on Amnesty International's policy on state obligations to respect, protect and fulfil the human rights of sex workers* (Index: POL 30/4063/2016)

² Amnesty International, *Body Politics: A Primer on Criminalization of Sexuality and Reproduction* (Index: POL 40/7763/2018); Amnesty International, *Body Politics: The Criminalization of Sexuality and Reproduction Campaigning Toolkit* (Index: POL 40/7771/2018); Amnesty International, *Body Politics: The Criminalization of Sexuality and Reproduction Training Manual* (Index: POL 40/7771/2018).

Amnesty International recommends that States ensure their use of criminal law is human rights compliant. The law must:

- Have a **legitimate aim or purpose**
- Clearly **outline in writing what behaviour is criminalized** in a manner accessible to the population
- Be **necessary** on the basis that there are no other less restrictive responses which would achieve the legitimate aim or purpose
- Be **proportionate** and **suitable to pursue their legitimate aim**
- Be **non-discriminatory** and apply equally to all people and not have an unequal impact on particular groups of people
- Not be applied **retroactively**

In enforcing the law, states must ensure that:

- Anyone accused has access to the **full range of fair trial guarantees**
- Any associated **punishment is proportionate**
- The law itself is not **arbitrary** and is **not applied in a discriminatory or arbitrary manner**

CRIMINALIZATION OF CONDUCT DURING PREGNANCY

Amnesty International's research has documented the negative impact of criminal law on pregnant women's health and rights.³ Laws criminalizing pregnant women are widespread in the US, where a specific set of laws targets those who are marginalized and those who use drugs, based on a belief that they have caused or risked harm to their fetus. Often known as "fetal assault", "chemical endangerment" or "personhood" laws, these measures have been used to arrest and prosecute women who experience pregnancy complications and conditions such as drug dependence.

Rather than promoting healthy pregnancies, Amnesty International found that a criminal justice approach pushes pregnant women who are dependent on drugs to avoid healthcare. In addition to negatively impacting women's access to healthcare, fear of punishment erodes their trust in healthcare providers.

Laws criminalizing pregnant women violate their right to health, including the right to informed consent to medical care. Drug tests conducted on pregnant women in healthcare settings, often without informed consent, are used as evidence of a crime. The most marginalized women, such as those living in poverty, who already have poorer health outcomes, are also more likely to be subject to greater policing and surveillance. This punitive approach drives women further away from the antenatal care and treatment, which is essential to maternal and fetal health and to which pregnant women are entitled.

Promoting women's health during pregnancy is a legitimate aim but using criminal law is the wrong approach as it promotes fear and does not encourage healthy pregnancies or expand access to healthcare and other social services. Instead, punitive approaches deter women from seeking healthcare services, have a discriminatory impact on marginalized individuals and effectively criminalize pregnancy for certain women, violating their human rights.

Recommendations:

- Repeal or amend laws criminalizing pregnant women for their use of drugs and other acts in relation to their own pregnancies.

³ Amnesty International, *Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA*, (Index: AMR 51/6203/2017).

- Assess all laws that have been used to punish women for conduct in relation to their own pregnancies and amend the laws to ensure that they cannot be used in this manner.
- Ensure access to affordable, gender-responsive drug dependence treatment and support without discrimination.
- Drug treatment and rehabilitation programs for people who use drugs must be evidence-based, voluntary and safeguarded by informed consent and mandatory drug testing should not be permitted.

For more information see:

Amnesty International, [USA](#): *Criminalizing pregnancy: Policing pregnant women who use drugs in the USA* (Index: AMR 51/6203/2017)

CRIMINALIZATION OF DRUG USE AND OTHER DRUG-RELATED CONDUCT

More than 50 years of drug control policies based on prohibition and criminalization have left a legacy of violence, disease, mass incarceration, suffering and abuse around the world. Over the years, Amnesty International has documented numerous human rights violations that have taken place across the world as a direct consequence of the implementation of repressive drug control policies and drug enforcement operations. Such violations include the use of the death penalty for drug-related offences, police abuses, discrimination, extrajudicial executions, torture and other ill-treatment, arbitrary detentions, inhumane conditions of detention and violations of economic, social and cultural rights, including of the right to health.

Halting human rights violations related to drug control requires a reform of drug control policies at the national and international level. Amnesty International calls for an end of the blanket prohibition of drugs under which governments have deliberately punished, violently attacked, stigmatized and demonized millions of people with the aim of stopping them and deterring others from using drugs. Instead, States should take a compassionate approach based on international human rights law and standards to ensure that drug control policies protect people, not harm them.

The “war on drugs” has effectively been a war on people, in particular the poorest and most marginalised sectors of society and has undermined the rights of millions. Amnesty International recognizes the risks that drugs can pose to individuals and societies, and the obligation that States have to adopt adequate measures to protect people from the harmful effects of drugs. However, it is precisely because drugs are risky that governments need to take control and regulate how these substances are produced, sold and used. Hence, States should aim to bring currently illicit drugs under government control through effective enforcement of regulations and adequate prevention campaigns, rather than pursuing policies that have facilitated human rights abuses and contributed to the existence of unregulated criminal markets that are inherently prone to violence and are detrimental to public health.

States should adopt new models of drug control that put the protection of people’s health and other human rights at the centre, including the decriminalization of the use, possession and cultivation of drugs for personal use and other minor, non-violent drug-related offences, as well as the effective regulation of drugs to provide legal and safe channels for those permitted to access them. Such policies must be accompanied by an expansion of health and other social services to address drug-related problems as well as other measures to address the underlying socio-economic causes that lead people to engage in the drug trade such as poverty, discrimination, unemployment, ill-health, denial of education or lack of housing.

New regulatory models for drug control should be flexible enough to respond to different types of drugs, groups of people and their needs in distinct contexts and regions, depending on the risks and harms associated with each drug and the different environments in which regulation will apply. Effective mechanisms must be put in place to monitor compliance with the regulations and impose adequate sanctions for activities that take place beyond the established parameters. When developing new regulatory frameworks, States should also include and prioritise communities that have been affected by punitive drug laws and policies, including rural farmers and those who have been imprisoned for non-violent drug offences.

Recommendations:

- Redirect drug control policies towards the realization of human rights, including to ensure the right to health of people who use drugs and the rights of other groups that have been affected by punitive drug control policies.
- Decriminalize the use, possession and cultivation of drugs for personal use and implement alternatives to the criminalization of other minor, non-violent drug-related offences that do not cause harm to others, such as subsistence cultivation of drug crops, transportation of small quantities of drugs (drug couriers), social-sharing of drugs with no financial gain or sale of small amounts of drugs that a person previously owned for the purpose of supporting their personal use of drugs (also known as “user-dealer”).
- Regain control of illicit drug markets by moving towards the state regulation of drugs based on the risks and harms of each drug, to effectively control the production, distribution and sale of drugs and provide legal channels for those permitted to access them.

For more information see:

Amnesty International, [Philippines](#): “I You are Poor, You are Killed”: Extrajudicial Killings in the Philippines’ “War on Drugs” (ASA 35/5517/2017)

Amnesty International, [Brazil](#): *You Killed My Son: Homicides by Military Police in the City of Rio De Janeiro* (Index: AMR19/2068/2015)

Amnesty International, [Mexico](#): *Surviving Death: Police and Military Torture of Women in Mexico* (AMR 41/4237/2016)

Amnesty International, [Singapore](#): *Cooperate or Die: Singapore’s Flawed Reforms to the Mandatory Death Penalty* (ACT 50/7158/2017)

Amnesty International, [Indonesia](#): *Flawed Justice: Unfair Trials and the Death Penalty in Indonesia* (ASA 21/2434/2015)

CONSENSUAL SEX OUTSIDE MARRIAGE

Consensual sex between people who are not married, often referred to in law as “adultery” or “fornication,” can carry punishments ranging from lengthy prison sentences to flogging, or, in a small number of states, death by stoning. There can also be implications in civil settings. For example, in states where “fault” is a factor in divorce proceedings, “adultery” may impact the division of assets after divorce.⁴ Criminal laws may remain in place without being regularly enforced, for example in some states in the USA.

“Adultery” laws are primarily used to punish women and compound the discrimination and violence they face. In many countries, the laws themselves are directly discriminatory, imposing criminal liability on women and girls in situations in which men would not face criminal sanctions.⁵ Under many laws, penalties are harsher for women than for men. In other cases, the laws themselves are gender-neutral, but they are applied in a discriminatory manner against women. Discriminatory laws or customs that allow men to have multiple wives, the use of pregnancy as evidence of sex outside marriage,⁶ discrimination against women within the court system⁷ and the frequent use of “adultery” laws against individuals who have been raped⁸ result in the oppression and punishment of women.

Amnesty International is currently conducting research in Jordan, where many provisions of Jordanian criminal law continue to punish sexual and reproductive behavior. The Crime Prevention Law of 1954 is being used to allow for administrative detention of women to “protect” victims of gender-based violence, or punish those who have transgressed social norms.⁹ The law can be used to detain women who have had sex outside marriage, committed “adultery”, had same-sex relations, or who have tried to leave home without permission

⁴ Amnesty International, *Gulf Cooperation Council (GCC) Countries: Women Deserve Dignity and Respect* (Index: MDE 04/004/2005)

⁵ OHCHR, Statement by the UN Working Group on the issue of discrimination against women in law and in practice, *Adultery as a criminal offence violates women’s human rights*, 2012.

⁶ Amnesty International, *Nigeria: The death penalty and women under the Nigeria penal systems* (AFR: 44/001/2004)

⁷ Human Rights Watch, *‘I had to run away’: The imprisonment of women and girls for “moral crimes” in Afghanistan*, 2012, www.hrw.org/reports/2012/03/28/i-had-run-away

R. Terman and M. Fijabi, *Stoning is Not Our Culture: A Comparative Analysis of Human Rights and Religious Discourses in Iran and Nigeria*, WLUMI, 2010, http://www.wluml.org/sites/wluml.org/files/SKSW%20Policy%20Briefing%20Series%201_Stoning%20is%20not%20our%20Culture_Terman%20&%20Fijabi.pdf

⁸ UNAMA and OHCHR, *Silence is violence: End the abuse of women in Afghanistan, Kabul*, 2009, http://www.ohchr.org/Documents/Press/VAW_Report_7July09.pdf

⁹ Human Rights Watch, *Guests of the Governor: Administrative Detention Undermines the Rule of Law in Jordan*, 2009, <https://www.hrw.org/report/2009/05/26/guests-governor/administrative-detention-undermines-rule-law-jordan>.

or marry someone considered inappropriate by their guardian. In 2018, more than 1,700 women were being held in administrative detention, including some in these circumstances.¹⁰

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

Recommendations:

- Repeal laws and release individuals detained under laws that criminalize consensual sexual relations between adults, including “adultery” and consensual sexual activity between same-sex adults.
- Enact legislation that bans stoning as a legal punishment and ensure the penal codes do not permit the use of any form of the death penalty or flogging for those convicted of “adultery” or other crimes.

For more information see:

Amnesty International, *Out of control: Policing and punishing women's decisions around sex, marriage and reproduction in Jordan* (working title), forthcoming

Amnesty International, [Iran](#): *You Shall Procreate: Attacks on Women's Sexual and Reproductive Rights in Iran* (MDE 13/1111/2015)

ADOLESCENT SEXUAL ACTIVITY

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

Many countries set a lower “age of consent” for women than for men which can discriminate against women. Among countries that do not criminalize same-sex sexual activity, at least 16 enforce a higher “age of consent” for same-sex sexual activity than for heterosexual activity.¹¹ This discriminates against LGBTI adolescents and can subject them to increased penalties irrespective of consent.¹²

While “age of consent” provisions may be intended to provide protection from child sexual abuse or early marriage, they can also be used to unfairly suppress, regulate or prosecute consensual sex between adolescents. Being free to explore and develop one’s own sexuality without coercion or discrimination is fundamental to the enjoyment of bodily autonomy, and the rights to freedom of expression, privacy and health. Young women can be disproportionately punished under these provisions because of social expectations that they curtail their sexual expression and remain “chaste.” The consequences on women and girls are compounded by the fact that they often bear the burden of preventing unwanted pregnancies. Thus, “age of consent” provisions can present particular barriers to girls and young women seeking sexual and reproductive health information and services, contraception and safe abortion services. Information-related restrictions can also make it harder for adolescents to protect themselves from STIs and early and unwanted pregnancies, and to exercise informed and autonomous sexual and reproductive health decision-making, in accordance with their “evolving capacities.”

The criminalization of adolescent sexuality is also harmful in the perpetuation of negative stereotypes, which undermine efforts to improve health outcomes for women and girls, such as barriers for pregnant girls to continue with their education. At an extreme example, visibly pregnant girls in Sierra Leone were banned in 2015 from attending mainstream school and taking exams and in some

¹⁰ Amnesty International Annual Report 2017/2018, p. 217-220, 2018, <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>

¹¹ A. Carroll, ILGA, *State-sponsored homophobia. A world survey of laws: Criminalization, protection and recognition of same-sex love*, 2016, ilga.org/downloads/02_ILGA_State_Sponsored_Homophobia_2016_ENG_WEB_150516.pdf; Equaldex: The Collaborative LGBT Knowledge Base, www.equaldex.com/

¹² UNFPA, *Harmonizing the Legal Environment for Adolescent Sexual and Reproductive Health and Rights: A review of 23 Countries in East and Southern Africa*, 2017.

school girls were subjected to forced pregnancy testing.¹³ However, informal barriers are widespread across states. In the context of challenging stereotypes and improving access to sexual and reproductive health services for adolescents, Amnesty International has highlighted the obligation on States to ensure access to comprehensive sexuality education.

Finally, overbroad application of anti-pornography or “obscenity” laws or other administrative and public health laws or policies can impede individuals’ exercise of their sexual and reproductive rights, stifle discourse around sexual and reproductive health, and fuel stigma and discrimination; often with a disproportionate impact on women, young people and those with non-normative sexual orientations and gender identities.

Recommendations:

- Recognize adolescents as rights holders, and in accordance with the principle of “evolving capacities”, allow for assessing the best interest of the child when assessing sexual consent in particular situations, as opposed to imposing strict “age of consent” requirements on them (particularly when the sexual partners are close in age).
- Provide training for health care providers to support a human rights-based approach to the provision of sexual and reproductive health information and services.
- Repeal discriminatory ‘age of consent’ provisions that disproportionately impact girls and LGBTI individuals.
- Avoid conflating age of sexual consent with age of consent for marriage.

For more info see:

Amnesty International, [Zimbabwe](#): *Lost Without Knowledge: Barriers to sexual and reproductive health information in Zimbabwe*, (Index: AFR 46/7700/2018)

Amnesty International, [Burkina Faso](#): *Coerced and Denied, Forced Marriages and Barriers to Contraception in Burkina Faso* (Index: AFR 60/3851/2016)

Amnesty International, [Sierra Leone](#): *Shamed and Blamed, Pregnant Girls’ Rights at Risk in Sierra Leone*, (Index: AFR 51/2695/2015)

CRIMINALIZATION OF ABORTION

Amnesty International’s research on abortion has highlighted the impact of laws criminalizing, punishing and/or otherwise limiting access to safe abortion services. For example, criminalization of abortion, such as total abortion bans and highly restrictive laws, is discriminatory and obstructs access to life-saving health services, and puts women’s, girls’ and all persons’ who can become pregnant health and lives at risk by compelling them to seek and undergo illegal abortions, which often result in maternal deaths and injuries.¹⁴

Criminalization of abortion also disproportionately affects the most marginalised women and girls who do not have the means to pay for expensive illegal abortions in private clinics or seek safe and legal abortion in another country. Pregnant persons can also be denied access to healthcare treatment for serious medical conditions such as cancer or lupus, for example on the grounds that treatment may damage the fetus.¹⁵

Women and girls who have undergone unsafe clandestine abortions and seek post-abortion care risk being reported to law enforcement officials by health professionals, also threatened by criminal sanctions, and can face criminal charges. For example, Amnesty International has found out that in El Salvador, many women serving long-term prison sentences on pregnancy-related charges have been reported by medical providers when seeking medical care for complications of illegal abortion or miscarriages.

¹³ Amnesty International, *Shamed and Blamed, Pregnant Girls’ Rights at Risk in Sierra Leone* (Index: AFR 51/2695/2015)

¹⁴ World Health Organization, *Safe abortion: technical and policy guidance for health systems*, 2012, http://www.who.int/reproductivehealth/publications/unsafe_abortion/9789241548434/en/

¹⁵ Amnesty International, *El Salvador: On the brink of death: Violence against women and the abortion ban in El Salvador*, (Index: AMR 29/003/2014)

Threats of punishment deter medical providers from providing post-abortion care, abortion-related information and referrals, and even legal abortions due to fear of prosecution or because they are unclear on how to interpret the law. This can result in dangerous delays in accessing safe and legal abortion services.

Recommendations:

- Decriminalise abortion and the provision of abortion-related information, eliminate all punitive measures for pregnant people seeking abortion, and for health care providers and others performing abortions or assisting in obtaining such services.
- Ensure effective access to safe and legal abortion, remove existing barriers and refrain from introducing new barriers that deny access to abortion for all pregnant people, including by tackling abortion-related stigma and harmful gender stereotypes.
- Immediately and unconditionally release all women and girls who have been detained or imprisoned in relation to undergoing abortions or for having miscarriages and drop charges against women and girls whose cases are pending trial.

For more information see:

Amnesty International, [South Africa](#): *Barriers to safe and legal abortion in South Africa*, (Index: AFR 53/5423/2017)

Amnesty International, [Americas](#): *The state as a catalyst for violence against women*, (Index: AMR 01/3388/2016)

Amnesty International, [Ireland](#): *She is not a criminal: the impact of Ireland's abortion law*, (Index: EUR 29/1597/2015)

Amnesty International, [El Salvador](#): *On the brink of death: Violence against women and the abortion ban in El Salvador*, (Index: AMR 29/003/2014)

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

HOW A SET OF PRINCIPLES WILL HELP SUPPORT AMNESTY INTERNATIONAL

Assessing and critiquing the human rights impact of the misuse of criminal law in these select areas continues to be a priority of Amnesty International. Contributing to the development of the principles and engaging with others in the process will support our ongoing work in this field. Once completed, we can foresee the principles being used to bolster our report recommendations and reinforcing our policy positions and campaign strategies. They can also be useful advocacy tool for us when engaging with governments and international organisations.