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Global Dialogue on Decriminalisation, Choice and Consent

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Why a Global Dialogue on Decriminalisation, Choice and Consent?

Around the world, various aspects of reproductive and sexual conduct, identities, and expression remains criminalised. In some instances where some of this has been decriminalised we see renewed efforts towards criminalisation. Family (personal) laws continue to exclude individuals based on sexual orientation and gender identity. Health policies prioritise and accord legitimacy to heterosexual sex taking place within marriage and for reproduction. Sex taking place outside marriage and/or between same sex partners and transactional sex remains criminalised and stigmatised.

During the past decade within the sexual and reproductive health and rights (SRHR) advocacy landscape there has been a neglect of the complicated and messy questions around the nature of choice and consent, which lies at the heart of the situation described above. The Millennium Development Goals (MDGs) have provided the overarching framework within which countries as well as multi-lateral and regional mechanisms have defined their development agenda. The MDGs to a large extent have served to reduce the broader SRHR agenda to a more limited focus on maternal health. An essential corollary of this has been the de-politicisation of sexual and reproductive health and rights and the broader ambit of issues it seeks to address. On-going civil society efforts to promote a more inclusive, rights-based framing have remained fragmented partly as a result of funding streams and the way these have narrowed the vision on SRHR and partly because often the complicated and complex nature of issues of choice and consent are not amenable to easy consensus building.

To address this gap and need for critical debate and discussion, CREA, along with Amnesty International, the Human Rights Program at Harvard Law School, and the Global Health Justice Partnership at Yale Law School organised a Global Dialogue on Decriminalisation, Choice and Consent at the Rockefeller Foundation Bellagio Center, Italy, from October 22-24, 2014. The focus of the Dialogue was to discuss threadbare consent (and choice) including the way it is defined and addressed within criminal law and covered a range of issues around sexual agency, orientation, identity and SRHR.

Geetanjali Misra, Executive Director, CREA

#2 Interrogating Consent

The second of the ten part essay series has been adapted from Carole Vance's presentation at the Global Dialogue on Decriminalisation, Choice and Consent.

Many people are familiar with and accept the idea that consent is an important part of sexual interactions and relationships even though there are some circumstances where it may be difficult for outside observers to determine if a person consented or the people involved disagree about whether their own sexual interaction was consensual. Despite conflicting accounts and difficult cases, the standard of consent has become widespread, even obvious, in contemporary culture in many countries.

This has not always been the case. In fact, the idea that consent is necessary for sexual behaviour is a radically new idea.

Several centuries ago, the standard of sexual legitimacy in Europe and Great Britain was derived from Christian theology that understood sexual behaviour for reproductive purposes as 'natural' and all other non-reproductive sexual behaviour as 'unnatural'. Unnatural behaviours were serious sins, whether done by married couples or the unmarried. That people wanted to engage in sexual sin did not erase the sin or excuse it. Christian doctrine about sexuality entered into the law of early nations of many European countries and Britain. At the time that nations formed and broke away from Church governance, many religious ideas of natural and unnatural sex migrated into the legal codes of these nations, particularly into criminal law.

The standard of unnatural sex made it impossible to consent to behaviours deemed unnatural, in the sense that the wishes or desires of people to do so were irrelevant and did not provide a defence to the criminal charge. In this way, the idea of consent was absent, since committing an unnatural sexual act was an offense against the state (as well as society and family), and the desires (consent) of the people involved did not excuse this offense. Similar to church law, the idea that people might want to engage in this behaviour was irrelevant. Thus, in the criminal law codes of these newly formed nations, the reproductive standard was codified and perpetuated.

Sexual history in the past several hundred years has been marked by a series of battles about trying to legitimise people's ability to engage in sexual behaviour they desired, even though it had been defined as criminal. Gradually and unevenly, the reproductive standard of sexual legitimacy was replaced by a standard of consent, which often involved non-reproductive sex and pleasure. Consider, for example, the movement of married people to be able to use birth control (that is, have heterosexual penetrative sex for non-reproductive purposes) and the efforts to overturn sodomy law (which in many countries, has prohibited both same-sex and different sex sexual behaviour for nonreproductive purposes). We don't often link these movements together, but both have rejected the reproductive standard as the standard of legitimacy for sex and argue for the decriminalisation of non-reproductive sex and statutory laws that forbid such behaviour.

These battles have proposed a different standard of legitimacy: people engaged in this behaviour willingly, that is, they consented to it. And most importantly, their consent should demand repeal of criminal law. As this newer standard of sexual legitimacy became more publicly acceptable, certain laws came to look very archaic. By 1940, married heterosexuals

felt respectable when they engaged in non-procreative sex, although they may have continued to feel disdain towards homosexual practices as ‘unnatural. Nevertheless, such changes in the standard of consent for some kind of sexual practices had implications for the others. The growing acceptability of non-reproductive sex for heterosexuals eventually undermined the charge of ‘unnatural’ hurled at homosexual sexuality.

The shifts in social attitudes and practices regarding sexuality have had uneven effects on criminal law, which has an obdurate nature. In some cases, legal reform in some countries has resulted in the repeal of statutory laws that forbid certain sexual practices, regardless of the willingness (consent) of participants (laws against masturbation, premarital sex, and non-reproductive sex). Legal reform efforts in many countries have also attempted to change criminal laws that include a marital exemption in the definition of rape; drawing on elements of Church law that accepted a one-time consent in marriage, certain criminal laws have historically not recognised marital rape with the understanding that the wife gave consent to all subsequent sexual acts with her husband when she agreed to marry. Other statutory laws remain, notably laws that criminalise prostitution (regardless of the consent of the participants) and age of consent laws, also called statutory rape laws, that make it a crime for the older person to engage in sex with the younger person.

These developments in Europe and Great Britain, derived from a particular religious tradition, would remain only of local interest to historians and sociologists of the region, except that notions of natural and unnatural sex, as well as their centrality in sex law and criminal codes, spread throughout the world through the vehicle of modern colonialism. Sodomy law, for example, moved from the British penal code into the penal codes of India (Section 377) and a number of other countries. Definitions of unnatural sex permit prosecution and punishment, regardless of willingness and consent. In this regard, we might say the development of consent as an important principle of sexual legitimacy is an unfinished project.

Indeed, thinking about the past, present, and future of ‘consent’ draws out a number of critical questions that we must attend to. What kind of person can give consent? What are they giving consent to? With whom? Where? How do different regimes of racial, ethnic, and religious subordination shape understandings of consent? How is consent demonstrated? If consent is deemed to be lacking, who is harmed? And how do advocates engage in conversations about these questions?

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3: Consent and International Human Rights Law

The third of the ten part essay series has been adapted from presentations by Mindy Jane Roseman, Jaime Todd-Gher and Sara Hossain at the Global Dialogue on Decriminalisation, Choice and Consent.

'Out of our memory we must forge an unshakable oath...that never again will the world stand silent, never again will the world...fail to act in time to prevent this terrible crime of genocide...We must harness the outrage of our own memories to stamp out oppression wherever it exists. We must understand that human rights and human dignity are indivisible.'
– President Jimmy Carter, September 27, 1979

After the failure of the Treaty of Versailles and the atrocities enacted and experienced during World War II, there was a general consensus that the rule of law had to be firmly re-established. Reconstructing a war-torn world in the minds of people and the collective consciousness of nation states led to a situation where international human rights law was seen as an essential meta framework within which to examine national laws and the contracts those lay out between the individual and the state. The law was - and is – how we keep both the known and unknown devils at bay.

This is no less true for issues of consent. Consent is primarily a legal construct that has its origins in three different doctrines of law. The first is informed consent. After World War II, the idea of informed consent primarily emerged in response to coerced or involuntary medical experimentation, which was brutally imposed in Nazi concentration camps. More broadly, informed consent comprises the idea that one should know and provide affirmative agreement to a procedure: be it a science experiment or a medical procedure.

The second notion of consent is the legal capacity to consent, which is something that emerges from contract law. This is based on the idea that you have the capacity, knowledge and ability to understand what you are promising in a contract and what is being promised to you. However, this is a complicated arena where varying – and often prejudiced – definitions of 'capacity' come into play.

And finally, the third aspect of consent in the law arises from criminal law, and covers amongst other things 'victimless crimes'. In such crimes, the consent of the parties is irrelevant, because the state, crown or 'the people' are deemed to be injured, and it is their interest that is protected by the law. Such laws cover forms of exploitation like slavery, torture and human trafficking. That's because under these laws it's emphasised that individuals cannot agree to be enslaved or tortured, since these acts damage some fundamental value that the state – or the people – wish to protect as a collective entity.

However, in practice some of this begins to fray around the edges. One such area is around sexual consent. International legal standards around sexual consent have often been grounded within contexts of violence. The latter has contributed to the creation of laws around sexual consent that have been framed in protective terms rather than enabling ones. Which means that primarily they see to prevent harm and exploitation, as opposed to directly empowering people to have sex.

This becomes especially significant in the context of 'victimless' crimes, which often end up prioritising an externally developed idea of exploitation over and above people's agency. One

of the primary examples of this is the way in which international anti-sex trafficking movements tend to conflate all commercial sex as a singular form of exploitation. So regardless of whether or not an individual consented to selling (or buying) sex, the focus here is on whether or not they have the capacity to consent to selling sex at all. Given that national and international anti-trafficking movements generally hold that it is not possible to consent to your own exploitation, what happens then is that an externally determined definition of what exploitation constitutes denies agency to sex workers.

But it is not just sex work. People with severe (or even moderate) intellectual disabilities are often treated under the law as being unable to consent to sexual relationships. They're seen as 'lacking the capacity'. But who gets to define what capacity is? Are the scales by which we determine who is mentally fit and unfit to enjoy sex immutable, or rather are they products of the law's ableism?

As we move forward in this series we will also be examining in detail issues around children and consent. Denying *all* children – i.e.: anyone under the age of 18 – the capacity to consent to sex is far removed from the realities of young people's sexualities and their right to information, agency and even sexual pleasure.

When we start talking about 'capacities', we reach the murky territories of age, gender, (dis)ability, socioeconomic strata, and so on. Not to say that these don't matter, but who's going to decide a single age of consent (18? 16? 14?), which types of sex can and cannot be consented to (paid sex is, after all, a type of sex), and what tests must a person's intellectual capability pass before they're allowed to have sex? When policy makers attempt to address these issues through the law, they end up relying on statistics, public health research, and even national, cultural or religious constructions of morality. But what they seem to often miss are the diverse realities of the individuals concerned and the need to ground harm prevention within those realities. Ultimately, this type of analysis belies one of the overarching tenets of human rights: to ground analysis in the realities of rights' holders lives and to empower individuals to realise their own rights.

Much of the problem here comes back to the idea of 'protective' versus 'enabling' rights. When we consider consent outside the law we can focus on individual autonomy. But as soon as we look at consent under the law, it becomes framed in protective terms; in other words as a question of who cannot consent and who must be protected. The very idea that as human beings we have the right to have sex because we want to exists nowhere in human rights law. For example the right to sexual health information is not about empowering teens to have sex but to make 'healthy' decisions to protect against disease and pregnancy.

This framing is not simply a result of the fact that sex continues to be a very difficult and layered arena to legislate around. It also has to do with the fundamental way in which the law works: it helps us address the things we cannot name. When it comes to the 'protective rights' developed around sex, the unnameable is, of course, exploitation. What is the legal definition of exploitation? It doesn't exist. In its place we have an age of consent, anti-trafficking laws, anti-violence against women legislation and so on. Social movements too relied overtly on legal strategies and law reform as a proxy tool that can help clarify complex often undefinable issues around sex and sexual consent.

But what if we approached it the other way? What if another way to prevent exploitation was to emphasise agency, autonomy and sexual empowerment? What if we began to talk about

the right to have sex rather than the right to not be raped? What if we advocated children's rights to agency rather than constantly toying with a fairly arbitrary number that defines what age is *too young* to have sex?

This may sound a little far-fetched, and the truth is that we *do* need a legal framework for consent, because it is an incredibly important way of conceptualising both agency as well as legislating against harm and exploitation. But if we do not keep critically examining and reflecting on what consent means in the law, too often will the concept be used by conservatives or abolitionists to prevent people – and especially vulnerable people, including children – from exercising their human rights.

So perhaps then what we must do is to keep expanding the definition of consent, conceptualising it in a manner that promotes 'enabling rights', emphasising agency, and finding ways within national and international laws to define the right to sex as more than simply the right to be free from harm. Because just as important – if not more important – as the right to be free from sexual exploitation, is our human right to have sex. If 'no means no', then conversely, we must recognise and celebrate the 'yes'.

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4: Women, Medicine and Informed Consent

The fourth of the ten part essay series has been adapted from a presentation by Allan Achesa Maleche at the Global Dialogue on Decriminalisation, Choice and Consent.

In 2012, 22-year-old Ruth Achieng suffered a miscarriage and was rushed to Nairobi's Kenyatta National Hospital. She was barely conscious when she was admitted. A week later, a doctor touring the ward informed her that she had been sterilised. Why? Because they realised that she was HIV positive. Today, Achieng is one of 40 women planning to sue the Kenyan government for forced or coerced sterilisation. But what's being argued in return is that many of the women who claim to have been forcibly sterilised *did* sign consent forms; however, these forms were presented to them *while they were in labour*. Can a woman undergoing huge amounts of pain at the mercy of her doctors do anything *but* sign a form? And it gets more complicated. What if she can't read or write? Or if the form is in a language different to the one she knows? Can this really be called 'informed consent'?

The development of informed consent was triggered by human rights violations faced by research subjects in several mass experiments. Some of these includes the Nuremberg Trials under Hitler, the Tuskegee syphilis experiment in Alabama, and the Thalidomide scandal in the United Kingdom. As a response to these violations, institutions and scientists developed agreements that explained the conditions and risks of their experiments to their subjects – the first 'consent forms' so to speak. More recently, this practice has been adopted by the healthcare sector and is known as informed consent. Though this process began in America, it has now extended itself to various parts of the world. At the heart of informed consent is the idea that medical practitioners should provide patients with information about the benefits and risks of a procedure. The patient is then asked to sign a consent form to indicate that they are aware of the consequences of accepting a particular treatment. This means that the procedure can now be performed. But as Achieng's story shows, it doesn't always play out the way in was originally intended - especially when it comes to sexual or reproductive health.

Take the situation in Kenya - which isn't all that dissimilar to scenarios in several parts of the Global South. Most people who access sexual and reproductive health services (SRHR) in Kenya are women and young girls, and one of the greatest barriers to informed consent is poor literacy. Since not all women are at the same literacy level, explaining the implications of a consent form greatly differ and can take varying amounts of time. With overworked doctors in understaffed hospitals, the time needed to actually explain the purpose of the forms is a rare luxury.

Then comes language. Or rather, the several languages spoken within any single excolonised country whose contours were drawn by mapmakers who spoke none of them. When informed consent documents - usually developed in the Global North – are translated, they come up against the reality of several local languages being spoken in one place. Which one do you pick? What happens in areas where the concept of signing a document is in itself alien? Does the consent form then help or hinder access to healthcare? The language problem is not just one of translation though. All across the world, consent forms for healthcare are about risk; however, the language they use is so obtuse, most of us are unable to identify what exactly the risk is. And moreover, most healthcare providers are unable to tell us. These forms present a fictional narrative of 'choice' - one where we as patients can make our 'own' decisions about what happens to our bodies. But in reality, we're presented with language we cannot understand talking about risks that cannot be explained: is this still consent?

Many would argue not. An important parallel can be found in a 2013 Canadian report that explored the ways in which social media contracts and agreements tend to be constructed in obtuse, unreadable language. The report states, 'It is imperative that...when consent is given, such consent be meaningful and appropriate in the circumstance...to achieve this, the language put before individuals should be clear and accessible.' A set of guidelines issued on the basis of this report then goes on to define what counts as 'readable' language. It states that language 'readable to the average person...can be accomplished through clear explanations, a level of language suitable to a diverse audience, and easily readable font size.' Significantly, the report goes on to say that a user's consent is valid *only if* the form they signed actually made sense to them. If we apply this logic to informed consent forms, it's a fairly good starting point, especially insofar as it helps do away with the idea that simply a signature constitutes consent.

Aside from language, one of the biggest barriers to informed consent is the power relation that exists between healthcare workers and patients. The doctor's white coat has been instilled with superiority, which means that we often tend to be in situations where 'the doctor is always right' or that where the doctor knows what is best for our bodies. And because most of us aren't in medical or healing professions ourselves, there isn't much by way of information that could present us with a counter discourse. But if we're meant to be giving *informed* consent, isn't part of that the right to knowledge about the real risks of what a doctor might present as the 'only' option? Isn't it the right to a second opinion? Or even the right to say no to medical treatment?

In most places these options are either unavailable or only available to those who can afford them. Be it in rural Kenya, where doctors see countless patients every day with no time to explain alternatives, or in the heart of America, where getting *any* medical treatment may likely be the result of a long and tedious battle with insurance companies, information is *not* at the heart of informed consent. Which of course leaves us with the question, how informed is 'informed consent' anyway?

Here's something else to chew on. Because sexual and reproductive services are mainly accessed by women, gender inequality has a big role to play. Doctors often consult with husbands before making decisions on behalf of women, and the more socially stigmatised the woman, the less decision making power she has. Women with mental disabilities, HIV positive women, and women from low socio-economic backgrounds are only a few examples of the countless women who enter healthcare systems only to have decisions about their bodies made by male relatives, doctors and hospital staff. All too often a patriarchal morality and perception of women's bodies also comes into play, and this can often have devastating consequences. Take the example of the 2 finger rape test in India. This now officially outlawed practice (that continues to take place in alarming numbers) involves a doctor 'testing' the elasticity of a rape survivor's vaginal walls to see whether she is 'accustomed to sexual activity'. Why? Because if she's a 'loose woman' who has had sex before, the assumption made is that *all* sex she has is consensual. Seriously, this is a real thing that happens all the time. And because a post-rape examination may often involve checking inside the vagina, most women – if asked – will consent to the process. But what they're *not* consenting to is the use of that examination to determine the credibility of their allegations; however, doctors can well argue that because they *did* give their consent to the examination itself, they're free to use the information as they wish.

So where do we go from here? Well, there are no easy answers, but definitely some immediate areas that need work. Firstly, ensure that informed consent guidelines (medical ethical guidelines as well as legal ones) take into account language and culture and power issues and emphasize meaningful consent. Secondly, boost training for medical providers on obtaining meaningful consent. Thirdly, take all steps to address gender discriminatory practices that interfere with informed consent.

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5: Abortion and Consent

The fifth of the ten part essay series has been adapted from presentations by Elisa Slattery, Sonia Correa and Rupsa Mallik at the Global Dialogue on Decriminalisation, Choice and Consent.

When she was 17 weeks pregnant, 31-year-old dentist Savita Halappanavar began to have a miscarriage and was rushed to the Universal Hospital Galway in the Republic of Ireland. Here the doctors deemed the foetus unviable - in other words, it would not survive. But it still had a heartbeat, which according to Ireland's laws means that unless the life of the pregnant woman is under threat, an abortion is illegal. Despite her pleas to undergo the procedure, the hospital refused. But three days later, when Savita was in the restroom she collapsed. At this point the remains of the foetus was removed from her womb - but it was too late. Her condition worsened, and just seven days after her initial hospital visit, Savita Halappanavar died from organ failure and cardiac arrest.

How did this happen? It's been interpreted differently by various parties, especially the medical fraternity, Ireland's legal system and the Catholic Church - none of whom wanted to be directly implicated in her death. But Ireland has some of the strongest antiabortion legislation in the Global North (including a 14 year penalty for both women and healthcare providers if an 'unnecessary' abortion is carried out) and an arduous process around who can determine what constitutes a 'real and substantial' threat to the life of a pregnant woman. In fact, it's so difficult to attain an abortion legally that most women living in the Republic of Ireland travel to the United Kingdom or other countries for one.

But there's something deeper at play here - something that is rearing its head in debates, legislations and hospitals around the world: the idea that abortion constitutes *harm*, and by extension, that the pregnant body must be regulated. But who is harmed when a woman chooses to have an abortion? Is it the unborn foetus, the woman's body, or in fact, something more insidious - a procreative pact that keeps patriarchal societies afloat?

Anti-abortion movements in Catholic countries are generally attributed to the Church's values and doctrines. Historically speaking, however, this isn't entirely accurate. In

Brazil, for example, colonial criminal law that overlapped with medieval canonical law criminalised a wide range of sexual acts; but abortion was never one of them. However, the Brazilian Penal Code in 1830, adopted soon after Brazil's independence in 1822, criminalised the practice of abortion - punishing agents of abortion, but not women who aborted. This law was in place for 39 years *before* the Catholic Church finally adopted a dogmatic position against abortion, after debating the matter for many centuries. Then in the revision of the Brazilian Penal Code of 1890, this criminalisation was extended to women - both those who 'self-aborted' and those who resorted to the help of others.

Why does this history matter? Well, we generally think about anti-abortion campaigns as being linked to the influence of religion. But in reality, a closer look at history shows us that criminal laws around abortion directly came from the politics and policies of 'managing' populations and legislating a certain code of morality onto women's bodies.

A more recent development within this history is the introduction of ultrasound technologies, which allowed the foetus to be crystallised from an abstraction into a visible entity separate from the woman. With the introduction of these technologies, the foetus took on a life of its

own and influenced public imagination in a way that was not possible before. In this way, what started off as a means of population control (and still continues to be used for this very purpose in many countries) became a discourse about the right to life of the foetus as a living entity. And this profoundly impacted the right of a woman to choose and consent and to make her own reproductive decisions.

Skip across oceans to India, where abortion has been legal since the Medical Termination of Pregnancy Act was passed in 1971. In a situation similar to Brazil, the Act was not passed due to feminist concerns over a woman's right to choose, but amongst other things, as a means of curbing a growing population. By the early 90s, the use of screening technologies to assess the foetus started becoming widely available, but also allowed for the practice of sex determination of the foetus. The introduction of these technologies took place at a time when the sex ratio was rapidly declining (females per thousand males), and over the past two decades, the abortion narrative in India has been fused together with the discourse of 'female foeticide'.

In 2011 Lightship Production aired the following short film, 'Life Before Birth', in which the voice of an unborn girl speaks to a pregnant woman, pleading for her life.

The visuals presented by the above advert are hardly an anomaly and resemble countless publicity devices that began in the mid-1980s and have populated public space and imagination for close to two decades. At the heart of this imagery are two central figures: first, the unborn girl child, speaking and pleading for her survival; and second, the contrasting image of the cruel (and almost always voiceless) woman who is seeking an abortion. Here the female foetus has been humanised into a living and speaking girl child, where an abortion would equal her murder (hence the use of the violent word 'foeticide').

Apart from breathing life into the foetus, visuals like these also influenced the way in which pregnant women were perceived. Adverts like the one above show us a lot of female faces: the pregnant woman, the mother-in-law, the woman's friends, and so on. This then forms a highly fictive story of women's decision making that positions women as collectively unwanting of their daughters. But the reality is that Indian patriarchal society does not want its girls or its women. There are generally very strong male voices and values at play when it comes to women undergoing screenings of foetuses and the abortion decisions that follow this. However, these male voices have been wilfully erased to allow for the creation of the cruel, abortion-seeking mother. In fact, it was only in 2011 that Indian courts ruled a woman did not need her husband's consent to undergo an abortion (irrespective of the sex of the foetus). But visuals like these feed into popular perceptions of the woman who 'chooses' to eliminate her unborn daughter, thus perversely placing a chunk of the burden of India's declining sex ratio on women themselves.

And now, it is against this highly fraught and complex backdrop that Indian feminists must advocate for the rights of women to have an abortion; the right of a woman to choose. As feminist author Nivedita Menon writes, 'it seems to me we cannot hold simultaneously that abortion involves the right of women to control their bodies, but that women must be restricted by law from choosing specifically to abort female foetuses. We seem to be counter posing the rights of (future) women to be born against the rights of (present) women to control over their bodies.' The language of consent and women's rights has crept into movements around 'saving' the girl child, whereby the unborn girl child's imagined consent is given preference over a pregnant women's choice - all in the name of women's rights. And

the fact that the girl child will eventually become a grown woman whose consent will in turn be disregarded is, of course, entirely missing from the conversation.

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6: Choice and consent in the trans* community: voices from Africa

The sixth of the ten part essay series has been adapted from presentations by Leigh Ann van der Merwe and Adrian Jjuuko at the Global Dialogue on Decriminalisation, Choice and Consent.

After a long and tedious legal battle, in early October 2014 the Nairobi High Court ordered that the National Examinations Council conduct a name change on transgender activist Audrey Mbugua's academic certificates. Where once her academic qualifications read 'Andrew Mbugua' today they read 'Audrey Mbugua': an accurate reflection of her name and gender identity. In a country where trans* people face barriers finding employment because of the discrepancy between the names on their qualifications and the genders they present today, Mbugua's case was no less than a landmark win for the trans* rights movement in Kenya.

However, the battles for legal, social and cultural recognition of the rights of trans* people continue in Kenya and world over. To simply be accepted as the gender you are and be accorded with rights as a full human being appear to be pretty obvious demands; however, trans* people across the world are denied access to these basic rights. What's more, transphobia is rife everywhere, creating a global culture in which trans* people are routinely discriminated against, bullied and demeaned on the basis of their gender.

In her blog '[Living Lindsay: My Life as a Transgender Girl in Kenya](#)', 26 year old Lindsay exposes how the world that she - and countless others - navigates each day is full of intolerance and hate. In a great section entitled 'Living Lindsay: My Life as a Transgender Girl in Kenya', Lindsay lists out the big no-no's which include 'When did you decide to become a girl?' ('We don't *decide* to become girls. We just are), 'So are you a real woman?' ('This implies I'm a fake woman... What's a real woman anyway?') and the ubiquitous 'Do you still have your dick?' (to which some of Lindsay's many responses include, 'How would you feel if I suddenly started asking you about your genitals? How big is your dick? How small is your clitoris?').

While Lindsay maintains an impressive sense of humour through her anger, these issues are neither funny nor unique to her experience, and questions like these consistently work to undermine any choice and autonomy trans* people have over their bodies and their lives. Living as a trans* person in societies that are deeply invested in the gender binary and all the privileges that come with it is a tiring struggle. And depending on where you live, how wealthy you are, or what ethnic group you come from, your ability to choose and consent to decisions being made about your body greatly differ too.

Over the last few months, Kenya's neighbour country Uganda has enacted several discriminatory laws that punish and criminalise sexuality. While there is no specific legislation directed against trans* individuals, this amounts to lack of legal protection rather than a loophole from discrimination for the trans* community. A major source of trans* abuse and harassment by law enforcement is on the basis of Uganda's Anti-Homosexuality Bill that was passed in 2013. Given that trans* identities are often misunderstood and unrecognised, trans* people are seen as 'engaging in homosexuality' and then persecuted by the police. Since the bill was signed, at least one trans* person has been killed in a hate crime, and countless others have faced homelessness, loss of employment, or fled the country.

It is within this fraught context that the trans* community must negotiate their basic human rights. One area in which the fight back has been at least partially possible has been in the case of name changes. In contrast to Mbugua's hard-won name change battle, the Ugandan Registration of Births and Deaths Act allows adults to change their names, which has meant that up to this point, over ten trans* people have managed to change their legal names.

And interestingly, despite there being no recognition of the rights of transgender people in Ugandan law, the same Act allows for sex changes to take place - but only for minors with their parents' consent. While this provision provides a certain amount of leeway for some individuals, it rests heavily on parental consent, which is often very difficult for young trans* people as many trans youth are ostracised by their families. And moreover, it rests on the hugely unjust idea that beyond the age of 18, a sex change is legally out of the question.

Jump across and down the continent to South Africa, which has some of the most extensive anti-discrimination legislation in the world. Following apartheid the importance of enshrining identity-based equality in the constitution was incredibly important for lawmakers, and the South African Constitution clearly states that no one should be discriminated against on the basis of either their sexual orientation or gender identity. Moreover, the Alteration of Sex Description Act of 2003 allows those who have undergone a medical and/or surgical sex change to apply for an official name change (however, this doesn't account for those who have changed their gender without changing their sex). For the most part, though, the country's laws have been designed to include trans* people as a legitimate gender identity. However, as activist Leigh Ann van der Merwe aptly puts it, 'South Africa is a country of beautiful laws whose only function is to gather dust somewhere on the shelves of Parliament.'

Take the law that 'ensures' sexual and reproductive health services - including gender reassignment surgery and hormone therapy - for trans* people: the only one in the world of its kind. While this looks great on paper, in reality the waiting list is 26 years long. Yes, 26. And moreover, access to hormone therapy is limited, as is the time allocated to surgeries, which fall under the category of 'cosmetic' rather than 'medical'. This also means that most insurance companies will not pay for this treatment, leaving it as inaccessible as if the law had not existed at all.

Moreover, given that name change laws are only relevant if someone has undergone sex change surgery (after navigating their way through that 26 year long waiting list), the majority of trans* people in South Africa still don't have proper identification or documentation. Living without any form of ID essentially criminalises the identity of trans* people, and also prevents them from fully accessing health services: something that becomes particularly significant in the context of HIV services. When trans* people do access such services, the attitude of 'the doctor is always right' pervades most of their experiences, which limits people's choices and relegates 'consent' to a situation forced by circumstance. The medical fraternity is given a large amount of power over the bodies of trans* people, and there are very few meaningful choices when it comes to making health and medicine related decisions.

No matter how you look at it, the gender binary is everywhere we turn. Toilets. Children's clothing. Hollywood. Company policies. Constitutions. Rent agreements. Laws. The list is endless. In several African countries trans* communities have used legal challenges to

counter some of this and have made some progress. But there is still a long way to go.

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7: Negotiating Choice and Rights in Hierarchies of Power

The seventh of the ten part essay series has been adapted from presentations by Leigh Ann van der Merwe and Sylvia Tamale at the Global Dialogue on Decriminalisation, Choice and Consent.

On 21 October 1986, the African Charter on Human and People's Rights – or the Banjul Charter as it's commonly known – was officially passed, marking what came to be known as African Human Rights Day. To many people, and particularly people living outside Africa, the Banjul Charter seemed pointless. With an existing framework for international human rights, what was the point of developing another one?

One of the most important ideas embedded in the Banjul Charter – and one that was notably missing from existing human rights frameworks – was the emphasis on the idea of *community*. It espoused the idea that rights are not simply for individuals, but that rights should also apply to communities of people. These are known as 'third generational rights' or 'rights of solidarity'. So while 'first generational rights' placed the individual at the centre of the conversation, this alternative way of looking at human rights focuses on the importance of community living.

Why were community rights forgotten in the first place? Like with the tales of many nations, it all began with colonisation, which brought its own code of morality and justice wherever its colonising missions spread. So for example, British rulers introduced the Ugandan Penal Code that criminalises abortion, same-sex relationships and sex work in the early 20th Century. The same goes for nearly all of the British Empire's colonies, including those in South Asia. This externally imposed system of justice failed to take into account the lived realities of diverse peoples and cultures. So in several African countries, for example, pre-colonial policies that emphasised reconciliation and restoration were replaced by colonial laws based on retribution and deterrence.

The international human rights framework developed over the past 66 years has emphasised the notion of individual rights. This body of rights drafted mostly by Western governments drew on experiences of the Holocaust and the imperative to protect individuals against abuses by the state. Much of these rights are rooted in the notion of personal autonomy, dignity and privacy. But like with alien colonial morality and ideology, how does this notion of individual choice play out in areas where the emphasis has always been on the collective?

In the 20th Century, several African scholars emphasized the fact that many African societies live under the *Ubuntu* philosophy: 'I am because you are, and you are because we are.' While that may seem a little simplistic, part of what the Banjul Charter sought to do was to reintroduce the notion of rights as more than belonging to the individual alone, and instead, located rights and choice within the context of a community.

This isn't to say that we need to glorify an 'original' community identity over a 'Western imposed' individualism. In fact, that's what many right wing fundamentalist groups in ex-colonised countries often resort to. But what the African experience shows us is that the 'right to choose' is a negotiated, complicated territory in which geographic, cultural, economic and racial differences all play an important role.

As Chi-Chi Undie of the Population Council writes, 'If we talk about "choice" without

considering how this concept is embedded in (and thus informed by) perceptions of “culture”, prescriptions by religion, economic realities [and so on], how much “choice” are we really offering to prospective rights-holders? Are we merely holding forth an ephemeral concept?

Take cultural circumcision in South Africa and its role in the lives of trans women. Circumcision within some South African ethnic groups is not only a rite of passage into manhood, but also a signifier of belonging to the wider community. To reject this process is therefore not simply a rejection of manhood, but it amounts to losing community rights, including one’s right to property, inheritance and other socio-economic benefits. For South African men, this is therefore always a negotiated choice, but for trans women, it becomes even further complicated. For trans women, belonging to a community and having access to community rights must be weighed against having to undergo a ritual that incorrectly forges their gender identities. In this context, and under pressure from their communities, most trans women end up undergoing cultural circumcision. Is this a choice that they make, or is it coercion? In other words, can a community pressure to agree be called a choice, and can an acceptance of a certain situation really be called consent?

These are not easy questions and there is no single answer. In many ways, consent is often used as a proxy for acceptance, because if you think about it – how many entirely free choices as individuals do we ever really have? The choices that we make every day are linked to a community or societal social contract, and moreover, to a capitalist system of exploitation that renders almost all our choices, to some extent, forces of circumstance.

But when it comes to the idea of individual choice pitted against community pressure – or one set of rights (property) pitted against another (sexual) – the Banjul Charter has made a significant contribution to the debate. What it’s done is that it has taken previously compartmentalised rights and brought them together. So civil and political rights are brought together with economic, social and cultural rights. And individual rights are viewed in tandem with collective rights, acknowledging both our individuality *and* our membership to various communities as essential components of who we are.

And as far as the question of what constitutes ‘free choice’ goes; well, it’s more likely than not that no choices are ever really free. And what’s more, based on the amount of privilege we have, some people’s choices are freer than others’. For example, while even cis gender men in South Africa may be coerced into cultural circumcision, because of their gender privilege, their ‘choice’ in the matter may be greater than those of a trans woman. But in another situation, a trans woman with greater social and economic privilege than a cis gender man may have more ‘choice’ than him.

So perhaps instead of advocating for ‘choice’ we can advocate for ‘justice’. For example, to talk about reproductive choice implies that all women should simply have the right to decide what happens to and around their bodies. But in situations of social, racial and economic inequality, access to information and assistance around making those choices greatly differs, which has led feminists of colour to instead demand reproductive *justice*.

In this way, if the lens of justice pervades our struggles more than the question of choice, we can take into account a range of differently lived and experienced realities, ranging from those enmeshed within cultural communities to those embroiled in conditions of racial or ethnic inequality. And in fact, that’s a lot like what the Banjul Charter set out to do in the first place.

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8: Children, Representation and Consent

The eighth of the ten part essay series has been adapted from a presentation by Shohini Ghosh at the Global Dialogue on Decriminalisation, Choice and Consent.

There are two words most commonly associated with childhood: happy and innocent. Childhood is supposed to be happy, and it is supposed to be innocent.

Especially in the Global South, we are confronted with moments that expose the structural underpinnings of such a conceptualisation; class privilege, for instance, is a general prerequisite for a “happy” and “innocent” childhood. Despite this, and despite knowing that childhood can be buffeted by loss and grief, we still cling to an idealisation of childhood.

Where did this idealisation come from?

A number of scholars have demonstrated how contemporary understandings of childhood have emerged from specific historical developments. Indeed, historical inquiry, beginning with Philippe Ariès’ groundbreaking and contested work, has shown how in earlier centuries, ‘childhood’ was not conceptualised as so temporally discrete from ‘adulthood.’ In *Pictures of Innocence: The History and Crisis of Ideal Childhood*, Anne Higonnet tracks how this changed over the eighteenth century with the invention of the ‘romantic’ or ‘innocent’ child in Western societies. Importantly, this was an exceptionally classed development. For instance, the idea of differential clothing came in with the upper classes. Whereas children in the working class generally wore small-size versions of their parents’ clothes, amongst the elite there was the introduction of child-specific clothing, like sailor suits for young boys over this period.

What is interesting about the invention of ideal childhood is its treatment in mediums like painting not as a shift in representation but rather, as a discovery of a natural, essential truth. As Higonnet contends, it was precisely because it was an invented idea that childhood needed consolidation through visual fictions in this way. Over the eighteenth century, one thus sees the first great movement in the visual history of childhood innocence, led by British portrait painters like Joshua Reynolds and Thomas Gainsborough. Through their representations, these painters collectively created the idea of the innocent child.

What, exactly, is the child innocent of? The child is innocent of sexual knowledge.

By the beginning of the twentieth century, the golden age of painting and illustration begin to give way to the photograph. For many years, the idea of the innocent childhood is inherited by photographers. The wide circulation of photography means for instance that every home can be adorned with images of mother and child. Nonetheless, over a period of time, photography began to unsettle the certainties of childhood sexual innocence. At the same time, the idea of the family as a safe haven (?) for children begins to be questioned.

With the intensification of debate around child sexual abuse in the late 80s and early 90s, the idea of the ideal childhood and the idea of home as a safe haven for children entered into a crisis. As the panic about harms to children, some of it real, some of it imagined, began to spread, artists and photographers came under attack.

In 1988, for example, artist Alice Sims was working on a series entitled “Water Babies” that

involved the superimposition of photographs of her nude daughter onto photographs of water lilies; upon seeing the nude photographs, a worker at the photographic developing lab notified the police, who in turn charged Sims with interstate pornography and placed the child in a temporary foster home. Though the charges were ultimately dropped, the incident draws out how anxieties around representation were central to protecting the crisis-ridden idealisation of childhood.

Similarly, in 1989, Robert Mapplethorpe's photographs were not allowed to be exhibited because they show explicit sadomasochistic/homosexual content and exposed genitalia of children. In the public imagination, such photographs revealed the perversions of their creator. Over the 1990s, the publication of novels like Catherine Harrison's *Exposure*, which centers on the discovery of family abuse through the examination of photographs, and the passage of child pornography prevention legislation consolidated a climate wherein the interpretation of photographs was critical to claims of abuse. This climate of moral anxiety led to the targeting of famous photographers like Sally Mann, whose images – like the noted *Popsicle Drips* – lend to a range of interpretations.

This is a brief overview, but following the evolution and controversies surrounding the representation of the child in this way begins to denaturalise contemporary assumptions surrounding childhood. Understanding that the conceptualisation of the child as innocent (particularly of sexual knowledge) is a historically mediated representation necessarily complicates conversations around childhood and consent.

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9: Consent in the Digital Era

The ninth of the ten part essay series has been adapted from a presentation by Bishakha Datta at the Global Dialogue on Decriminalisation, Choice and Consent.

In 2012, American data scientist Adam Kramer ran an experiment involving 689,003 Facebook users: he wanted to see whether emotions on social media were contagious. Lasting for a week, half the unsuspecting users chosen for the experiment saw only ‘happy’ content on their home feeds, whereas the other half saw negative or ‘sad’ content. The investigating scientists then analysed whether this influenced the moods of users and had an impact on the type of content they posted themselves. But the idea of manipulating Facebook for a science experiment hit a nerve with people across the world. They wanted to know where - as with all science experiments – where was their consent to their information being used for research? In reply, Facebook referred users to their Terms of Service, where, after all, didn’t we ‘consent’ for Facebook to use our information for a range of things?

The question of consent haunts many of the complexities raised by the digital world, most notably with reference to rapidly shifting notions of privacy. In reality, the digital world is simultaneously a public *and* a private space. For example, the internet may be private when a physically disabled woman uses a chat room for a sexual encounter. But it becomes public when she advocates for the rights of women with disabilities across social media.

But where’s the line and who gets to draw it? Can Facebook use our semi-public (or semi-private, depending on how full or empty you see the glass) home feeds to then manipulate our moods on the grounds that the information was public to start with? What about our location data, email addresses and all the information about us it collects but is not on our home feed? Or can we, as users, argue that our data is private and should be restricted to our chosen Facebook friends?

In India, several instances involving sex, sexuality and information technology have populated newspaper headlines over the past decade. This now exceedingly long list of privacy violations began most notably in 2004 with the ‘DPS-MMS Scandal’, in which a young man and woman studying at the Delhi Public School filmed themselves having sex on a mobile phone. Soon after, the video went viral via Multi Media Messaging (which predated the worlds of Whatsapp, BBM and Snapchat as the most popular medium for sharing images and videos) and became the first notable instance of sex being made public via digital technology. For many of us, the consent issue is clear from the get-go: the sex was consensually filmed but non-consensually distributed. However, against the backdrop of a national discourse steeped in notions of honour, chastity and shame, what policymakers and the public discussed was not that a boy had distributed a private video without a girl’s consent, but that a boy and a girl *were having sex in the first place*.

Fast-forward to the present moment. Today one of the most popular forms of pornography in India is amateur porn. In its particularly Indian avatar, some amateur porn depicts situations where either one or all of the individuals being filmed are unaware of a hidden camera’s existence (for example, in hotel rooms or cyber cafes - the latter being a popular place for young people in India to find privacy) or that the woman who is the subject of the video is drugged or hurt, and unable to consent to anything at all. Other amateur porn is, of course, consensually filmed, distributed and enjoyed, but when consent is off the table, it’s less porn and more abuse.

Ten years after the DPS-MMS scandal the conversation around sex and shame has barely changed. With women's virtue and chastity being seen as necessarily compromised by sex, this moral discourse not only dismisses and overrides consent violations, but makes it difficult for any woman who feels her consent has been violated to report it and access justice. Therefore, despite the fact that most amateur porn websites have lengthy disclaimers about consent, in reality the enforced shame around having 'illicit' sex takes precedence over non-consensual sex, filming, or distribution of videos. When morality is the highest stake, the question of consent remains both unasked and unanswered.

Issues of consent and the digital world aren't just about how offline situations get represented online – it's also about how we, as users of digital technology, are able to represent ourselves. In America there's recently been a lot of talk about teenagers sexting each other. In case the phenomenon has bypassed you, a sext is just what it sounds like: sex via text, often including some nude selfies. But at least 20 states in America have passed laws criminalising the possession or distribution of nude photographs of minors – even if the minor is you. So teenagers sexting each other can be booked under child pornography laws. In her forthcoming book *Sexting Panic: Rethinking Criminalisation, Privacy and Consent*, author Amy Hasinoff explains that 'sexting is a form of sexual activity, not a gateway to it.' Which means that if you're 17 years old it's perfectly legal for you to have physical sex offline, but if you send a sext, it becomes a matter for the police. Consent? It often gets buried below moral panics or legalities that both operate under the logic of 'a sext is a sext'.

Whether we legally fall into the category of 'adult', 'child' or somewhere in between, as users of the internet we are constantly negotiating digital space and the various boundaries it draws or opens up. And because most of this space is owned by a mixture of corporations, states and individuals, it's never clear who's making the decisions about what we do online. Recently, Apple rejected HappyPlayTime, a sex education app designed to remove stigma around female masturbation. The rejection was made on the grounds of obscenity. However, apps such as iLust and iStare (which challenge you to stare at a woman's breasts for as long as possible) and Kawaii Assistant (offering 'your own personal Japanese secretary right in the palm of your hands') are welcomed by Apple and are downloaded by large numbers of people. Similarly on Facebook, women's own representations of their bodies have been deemed as 'inappropriate' or 'obscene', whereas countless pro-rape pages remain unchecked.

This is no accident. In a 2012 book entitled *Consent of the Networked*, author Rebecca MacKinnon tells readers that governments and corporations are actively working to fit the internet to their own needs. In this way, the tedious, difficult-to-read Terms of Service that precede every portal we join are designed not to protect us - the users, but instead to protect the providers - the internet platforms. It also means that companies and governments are allowed to decide what is 'obscene' as per their own prejudices around representations of sex, rather than whether the representations were made and distributed consensually. In fact, most laws and intermediary regulations pertaining to content online rarely talk about consent, and when they do, it's still clear from some of the examples here that some people's consent is seen as being more worthy than others'.

MacKinnon argues that our freedom in the internet age depends on whether we defend our rights on digital platforms and networks in the same way that people fight for their rights and for accountable governments in offline spaces. It is time to stop thinking of ourselves as passive 'users' of technology and instead act like citizens of the internet – or as netizens - and

take ownership and responsibility for our digital future. And in doing so, we must place questions of consent and agency at the heart of our conversations.

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10: Marriage and Consent

The tenth of the ten part essay series has been adapted from a session led by Alice Miller and Sonia Correa and includes contributions of all the participants at the Global Dialogue on Decriminalisation, Choice and Consent.

In the name of promoting consent, there is a contemporary move to utilise criminal law to prevent child and forced marriage.

Historicising how international human rights law has addressed issues of marriage and consent enables us to begin to problematise this move. The first essay based on Carole Vance's talk draws out how the modern state in the West inherited the power to regulate forms of sex through criminal law. Concomitant to the criminalisation of "unnatural" sex was the state's instantiation of marriage as a legal status, in part because marriage was linked to all kinds of other legal implications, like inheritance.

Within human rights law, from the League of Nations era onwards, the structure of marriage was implicated in intergovernmental conversations thinking about the development of nations. In particular, in the context of decolonisation, women's status in marriage was framed as an indicator revealing the modernity of states. Reflecting this, women's status became a means to assess a country's developmental status. Attempting to define what marriage ought to look like everywhere in the world, the 1948 Universal Declaration of Human Rights was a part of this project. Over the late 1940s and early 1950s, various conventions exemplified the centrality of marriage to conversations around rights and modernity. In other words, there was a focus on developing legal protections in order to separate individual women from what were understood to be "non-modern" cultures.

Fundamentally shaped by this history, contemporary human rights law addressing marriage primarily stresses two things. First, as stated in the Universal Declaration, "free and full consent" is elaborated as the terms upon which men and women enter into marriage. Second, there is an emphasis on equality between men and women in the terms of entry, the conditions of practice, and the terms of dissolution of marriage.

International law aims to work against the local practices and laws that limit these rights across caste, religion, and race. Within the frame of international rights law, differences in caste, religion, and race are seen as irrelevant to the right to marry. Thus, even though kinship systems have historically determined how marital structures look, under international law, marriage is treated as an institution related to, but separate from, the institution of the family. At the same time, the documents that frame the right to marriage are largely heteronormative. Marriage involves a man and a woman, and there is furthermore no interrogation of what these gender categories might mean.

In its focus on a man and a woman entering into marriage with "full and free consent," the human rights approach to marriage is highly individuated. The only attributes of the imagined rights-bearer that are relevant to the right to marry are age and sex-gender. Paradoxically, "full and free consent" is protected through the threat of criminal law. Forced and child marriage, understood to violate this right, thus face criminal charges. Especially given that these protections of marriage are decontextualised from structures of kinship – which differ over space and time – and the history of the social construction of childhood, what does it mean to use criminal law around forced and child marriage?

There seems to be a great deal of human rights campaigning around regulating who “gets in” to marriage; on the one hand, there are efforts to legalise same-sex marriage and on the other, there are campaigns to ban child marriage. But there doesn’t seem to be much emphasis on how to “get out” of marriage. Are current efforts to protect the right to marry, in other words, normatively consolidating marriage as a requirement of adulthood?

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