

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.

Leigh Ann van der Merwe is the Coordinator and Founder Social, Health and Empowerment Feminist Collective of Transgender and Intersex Women of Africa (S.H.E.)

Sylvia Tamale is a leading African feminist lawyer and scholar based in Kampala, Uganda.