#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 non-reproductive 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?

Carole S Vance, PhD, MPH, teaches anthropology, human rights, health and sexuality at Columbia University, where she founded and directed the Program for the Study of Sexuality, Gender, Health and Human Rights.