

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 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 than 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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