

Consent

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Abstract

This chapter provides an overview of the notion of consent in Swiss substantive criminal law. While there is no general statutory provision on consent, case law and doctrine have formulated four cumulative conditions for valid consent: it must be declared (1.) by a person capable of giving consent (2.) who is entitled to give up a legal interest (3.) and does so voluntarily (4.). After elaborating on these four conditions, the effects of valid consent are analysed. Three questions are answered regarding the Swiss and German doctrine: Does consent only lead to justification or does it already exclude the objective elements of the crime? What happens if the offender assumes consent? And what are the consequences if the offender acts without knowing that consent has been given?

Keywords

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Consent is a controversial topic in every system of substantive criminal law. Three questions arise: What is the rationale of consent (I.)? What are the conditions of valid consent (II.)? What are the effects of consent (III.)?

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I. Rationale

The Digest (D.47.10.1.5) already contains a passage by ULPIAN that deals with consent: “If anyone sells a son with his own consent, his father will be entitled to an action for injury in his own name, but the son will not, *because no injury is committed against one who consents*” (Scott [1932] 307; Lewis [1985] 285); “... *quia nulla iniuria est, quae in volentem fiat*”. From this, a legal axiom (‘paroemia’) developed in the Middle Ages, which can now be regarded as customary law: “*volenti non fit iniuria*” (Liebs [2007] 245). This maxim only states that no (non) injustice (iniuria) is done (fit) to the willing (volenti). It fails, however, to explain *why* it should have an influence on the criminal liability of a perpetrator if the victim has consented to its injury. This is a question of the rationale underlying consent.

The first approach to explain the rationale is that consenting persons waive their right to legal protection. This is not plausible under Swiss law: numerous offences must be prosecuted regardless of a waiver of legal protection. According to the principle of compulsory prosecution (Article 7 of the Code of Criminal Procedure), a thief must be prosecuted and convicted even if the victim waives the right to report the theft. A second explanation sees the rationale of consent in a balancing of interests. According to this argument, consent outweighs the wrong of the infringement. This explanation is not convincing either: why should a consented violation be a wrong at all? The third and most convincing approach bases the rationale of consent on the principle of human autonomy. Legal rights are not protected for their own sake, but because they are the precondition for the free exercise of human will (Hurtado Pozo and Godel [2019] 288 ff.). All persons, literally, have the right to establish their own (αὐτόζ, autós) laws (νόμος, nómos) on how to make their goods available. The autonomous decision to give up a good does not lead to an infringement of liberty (with consent) but is the very exercise of liberty. A violation, which has been consented to, is no violation. Put simply, not the protection of the legal good is waived but the good itself (Stratenwerth [2011] 223 ff.).

II. Conditions

There is no general statutory provision on consent in the Swiss Criminal Code (Swiss Criminal Code of 21 December 1997, SR 311.0; for an English version of the Swiss Criminal Code see [www.admin.ch \[https://perma.cc/XAY8-2DPN\]](https://perma.cc/XAY8-2DPN)). The requirements for valid consent have, therefore, been developed by

case law and doctrine. Essentially, four cumulative conditions must be met: Consent must be declared (1.). The person concerned must be capable of giving consent (2.) and must be entitled to give up a legal interest (3.). Finally, consent must be voluntary (4.).

1. Declaration of Consent

Consent must be declared to the offender. It is a unilateral expression of will. With it, the person concerned expresses that he or she wants to give up or, at least, accepts the giving up of his or her legal rights: A short-sighted person agrees (wants) to have eye tissue removed by laser. The owner does not care (accepts) if her bicycle is stolen. Consent is not considered a legal declaration of intent that binds the declarant and grants the offender the power to intervene. Rather, the declarant “*may freely withdraw consent at any time*” (Article 5 III Convention on Human Rights and Biomedicine), even if, for example, preparations to undergo surgery are already under way.

In principle, consent must not be given in any particular form. Certain interventions require written consent (Article 16 I Human Research Act), otherwise oral consent is sufficient. Consent can also be implied, for example, when a regular customer sits down in front of his hairdresser without saying a word and gets the usual haircut. It is disputed whether consent must be expressed outwardly in some recognisable form (explicitly or impliedly), or whether it is sufficient that a consenting person inwardly approves of the intervention. According to one convincing view, internal approval at the time of the offence is sufficient (Frister [2018] 203). If this is the case, there is no violation of a legal interest. The opposite view confuses the lack of a violation with the lack of provability. If the owner hopes that someone will take her old bicycle so she does not have to pay disposal fees, she will not be a victim of theft if someone takes the bicycle. Whether the tacit consent was perceptible to the person who took the bicycle – for example, because it was unlocked and unguarded for some time – is merely a question of proof. If the owner has given up her bike, the objective elements of theft can no longer be fulfilled. However, if the offender did not recognize this internal consent, he can still be held liable for attempted (→ Attempt) theft (III. 3.).

Irrespective of whether consent was explicitly expressed or tacitly given, there must be consent at the *time of the act* at the latest. Subsequent approval of the interference has no justifying effect. If the owner wanted to continue using her bicycle, but then approves of the removal because she realizes that she can buy a new bicycle with the compensation from the insurance, this does not

change the fact that there was no consent at the time of the removal. The offender did not merely attempt, but completed a theft.

2. Capacity to Consent

Valid consent requires capacity to consent. A person is capable of giving consent if he or she has the capacity to judge. According to Article 16 of the Swiss Civil Code, a person is capable of judgement if he or she does not lack the capacity to act rationally because of his or her age, mental disability, psychological disorder, intoxication or similar condition. Therefore, valid consent can be given by any person who is capable of understanding the scope and consequences of an interference and of forming his or her own will accordingly. It is important to emphasize that the capacity to judge only depends on the capacity to act rationally, not reasonably. Thus, the decision must be taken in a rational manner, but not appear reasonable from an objective point of view. If it is clear to a young man in love that a tattoo will remain permanently visible, he may have the name of his girlfriend engraved on his forehead.

As consent is not a binding legal declaration (II.1.), it is not dependent on the capacity to act. According to Article 13 of the Swiss Civil Code, "*anyone who has reached the age of majority and is capable of judgement has capacity to act*". Thus, the capacity to consent is not tied to a fixed age limit. A 16-year-old who understands the dimensions of her decision can, therefore, validly consent to an abortion (→ Abortion) (Articles 118 and 119 Swiss Criminal Code).

If a person is incapable of giving consent, their legal representatives decide. In the case of children who lack the capacity to judge, these are usually their parents. The parents' decision must be based on the best interests of their child (Articles 296 I and 304 I of the Swiss Civil Code). If the parents are Jehovah's Witnesses, they can refuse life-saving blood transfusions for themselves, but not for their child. In the case of incapacitated adults (e.g. persons in advanced stages of dementia), a cascade order applies (Article 378 of the Swiss Civil Code): the representative designated by the patient in a living will ('patient decree') is primarily responsible, followed by the legal guardians ('deputy'), spouses and other close persons. All these representatives must base their decisions primarily on the wishes, which the person has formulated in his or her living will or expressed informally to third parties, while still in a state of capacity (Article 9 Convention on Human Rights and Biomedicine). Only if these wishes are not known or the person has never been able to express treatment wishes, e.g. due to a severe mental disability since birth, can decisions be made according to their objective interests (Thommen [2004]).

3. Limits to Consent

The basic principle is that every person capable of judgement can freely make his or her legally protected goods available. However, this principle is restricted in three respects. Firstly, one can only make one's own *individual* goods available. No one may consent to the violation of goods belonging to the general *public*. For example, a farmer can freely make her land available, but she cannot validly consent to toxic waste being dumped there, because this would affect public interests in a safe environment and unpolluted water.

Secondly, not even all individual goods are at one's free disposal. There are limits to consent in relation to one's own body. According to the prevailing view, unrestricted consent can only be given for simple bodily injuries. In the case of serious bodily harm, consent is only valid if it appears reasonable in view of the objective interest of the consenting person (Stratenwerth [2011] 230 f.). The removal of a kidney for the purpose of inter vivos donation, for example, is considered reasonable. Valid consent can be given here (Article 12 Transplantation Act). Female genital mutilation (Article 124 Swiss Criminal Code), on the other hand, is considered a senseless intervention to which consent cannot validly be given (RK-N [2010] 5669). At first glance, such a soft paternalism – oriented towards the long-term interests of the person concerned – seems reasonable. However, a closer look raises doubts (Niggli and Göhlich [2019] 223 ff.): For example, kidney donation is considered reasonable only if the donor gets no compensation (Article 6 Transplantation Act). Also, in a liberal criminal law system, it cannot matter whether a surgical intervention on the genitals is carried out for aesthetic or atavistic reasons. The only decisive factor is whether it corresponds to the free will of the person concerned. Is the complete tattooing of the face ("blackout tattoo"), including the removal of the outer ear, a sensible or senseless intervention if the person concerned thereby fulfils a lifelong dream?

That consent is restricted in cases of bodily harm can be explained by the fact that the German doctrine and practice on consent have been uncritically adopted in Switzerland. § 228 of the German Criminal Code states: "*A person who commits bodily harm with the consent of the injured person only acts unlawfully if the act is contrary to morality despite the consent.*" The Swiss Criminal Code does not have such a restriction on consent (Weissenberger [1996] 140 ff.).

Thirdly, according to Article 114 of the Swiss Criminal Code, the killing of a person is punishable even if it was carried out at the serious and insistent request of the person killed. If an insistent request is not enough, then mere consent is even less sufficient. From this, it is sometimes hastily concluded that one's

own life cannot be relinquished by consent. This is incorrect in three respects. First, one can of course take one's life by one's own hand. Attempted *suicide* is not punishable. Second, consent is only invalid in the case of *active* killing. Killing by omission (passive euthanasia) can effectively be consented to. A terminal cancer patient who does not want to receive antibiotics to treat pneumonia can consent to his or her own death. The doctor cannot be punished for homicide by omission (Geth [2010]). This can either be explained by the cancer patient releasing the doctor from her duty of care and thus from her guarantor's responsibility or on the grounds that administering antibiotics against the patient's will would itself be a criminal offence that the doctor cannot reasonably be expected to commit. Third, only consent to *intentional* homicide (→ Homicide) is invalid. Negligent homicide may be consented to with exempting effect. In the event of an accident, the drunk driver is not liable for negligent homicide if his passenger has joined him in the car knowing that he was drunk. The fact that the passenger merely consented to endangering his life and not to losing his life does not change the driver's exemption from punishment. The passenger and the driver both knew that death could occur, but they also both trusted that it would not ensue. Consent to the danger thus fully covers the wrong of the negligent behaviour (Jetzer [2015]).

4. Voluntary Consent

The idea behind the exclusion of a criminal wrong in the case of consent is autonomy. If a person gives up her bodily integrity, there is no violation of a legal interest; rather, the person makes use of her freedom to make her body available. However, one can only speak of an autonomous decision if the person giving consent makes a voluntary decision. Consent must be given in an informed manner, undisturbed by misleading information and without coercion.

Informed consent is given when “*the purpose and nature of the intervention and its consequences and risks*” (Article 5 II Convention on Human Rights and Biomedicine) have been properly explained to the consenting person. This allows him to make his decision “*en connaissance de cause*” (knowingly). Those who do not understand the consequences of their decision cannot give valid consent.

An *erroneous* assessment renders consent invalid. If a patient is persuaded to consent to surgery under false promises of a cure, the intervention constitutes criminal bodily harm (Frister [2018] 207 ff.). It is fiercely disputed whether this also applies to cases that are attributed to “*assent*” (III.1.). Is it also rape (Article 190 Swiss Criminal Code) if a woman is tricked into giving consent to sex under false promises of marriage? The traditional view is that the false promises do not change the woman's ‘factual’ agreement. More convincingly, there is no rape in

these cases because there is no coercion to sexual intercourse. If such behaviour is deemed worthy of punishment, a new criminal offence of tricking someone into consenting to sexual acts would have to be introduced into the Swiss Criminal Code (Scheidegger [2018] 312 ff.). The same does not apply to unlawful entry (Article 186 Swiss Criminal Code). Entry must not be forced to be unlawful. It must only be against the will of the occupant. Thus, if the police gain access to a home by pretending to have a search warrant, they commit an unlawful entry. As the homeowner makes an erroneous assessment due to false pretences, she has not validly given permission for entry to her property.

If erroneous assumptions nullify consent, a fortiori, *coercion* (→ Coercion) makes consent invalid. If a woman only “allows” sexual intercourse to take place because she is forced to do so at gunpoint, there is obviously no valid consent. It is less clear if mere coercive circumstances can render consent invalid. What about a woman who prostitutes herself to feed her children? Is she validly consenting to sexual intercourse? Here, the mere fact that there is a choice between two evils does not invalidate consent. For example, a sex offender may validly choose chemical castration to avoid indefinite internment (Federal Supreme Court, BGer 6B_645/2008).

III. Effects

Regarding the effects of consent, three questions arise: Does consent only lead to justification or does it already exclude the objective elements of the crime (1.)? What happens if the offender assumes consent (2.)? And what are the consequences if the offender acts without knowing that consent has been given (3.)?

1. Justificatory consent

In German and Swiss doctrine, criminal liability follows a three-level structure: the (objective and subjective) *elements* of the crime, *unlawfulness* and *culpability*. At the level of the elements of the crime, the question is whether a criminal wrong has occurred. Was someone killed intentionally? At the level of unlawfulness, the question is whether the wrongfulness of the offence is exceptionally justified. Did the killer act in self-defence (→ Self-Defence)? At the level of culpability, the question is whether the perpetrator can be blamed. Did she suffer from a serious mental disorder (→ Mental Illness and Criminal Responsibility)?

For over half a century, a dispute has been raging in German legal doctrine about where to allocate consent within this three-level structure. What effect does the victim's consent have? Traditionally, a distinction was made between assent and consent (Geerds [1960]). Whereas assent (*Einverständnis*) already excludes the objective elements of the crime, consent (*Einwilligung*) is only effective at the level of justification. Whether assent or consent is required depends on the case. For certain offences, such as theft, trespass or coercion, acting against the will of the victim is already included in the objective elements of the crime. Therefore, if there is assent the offence cannot be committed. A person who has permission from his neighbour to pick an apple does not commit theft. The objective element of theft (Art. 139 Swiss Criminal Code) "taking away" is lacking if the neighbour agreed to the apple being taken. On the other hand, there are offences in which acting against the will is not already immanent to the offence. This applies, for example, to bodily harm or damage to property. A surgical intervention fulfils the offence of bodily harm. However, if the patient explicitly and informedly consented, the surgery is justified.

This distinction is said to be relevant, for example, in the cases of fraudulently obtained consent. Because *assent* is deemed to depend on the victim's *factual* will only, an erroneous assumption would not render assent invalid. On the other hand, false assumptions are viewed to nullify consent. Furthermore, it is said that – unlike merely natural assent – *consent* hinges on increased normative preconditions. It is only valid if the victim has the capacity to consent and has consented freely.

The *distinction* between assent and consent has been adopted in Swiss legal doctrine (Monnier [2020] 277 ff.; Wohlers [2020] 52 ff.). The Federal Supreme Court has not accepted the distinction explicitly, but in substance. In a case concerning bodily injury, it held that consent has a justifying effect (Decision of the Federal Supreme Court, DFC 124 IV 258), while in a theft case it ruled that the assent of the proprietor excludes the offence of theft altogether (DFC 103 IV 83). The question was left open in the case of deprivation of liberty (Federal Supreme Court, BGer 6P.106/2006). Regarding the *effects* of consent (justification or exclusion of the offence), the Swiss doctrine remains divided (Geth [2018], 94 ff.).

This *distinction* between assent and consent has come under increasing pressure. The main objection is that there is no legal basis for the differentiation between assent and consent and the consequences attached to it (form, errors, etc.). Therefore, it does not make a difference whether a surgeon obtains permission ("*consent*") to perform a surgery by false promises of healing or whether police obtain the permission ("*assent*") to enter by producing a forged search warrant. In both cases the permission is invalid (II.4).

If – following modern doctrine – the same conditions of validity are attached to both forms of agreement, the only question remaining is what *effect* consent has. Does consent merely justify an infringement or is there no wrong in the first place? One convincing view is that the merely justificatory effect of consent is based on a misguided understanding of legal interests. In the same way that an invitation to a party cannot result in a merely agreed trespass, a haircut cannot be regarded as assault with consent. Neither bodily integrity nor privacy is protected for its own sake. Objects like a human body or a home are not protected per se and independently of the legal interests vested in them (bodily integrity, privacy). Rather, the person who consents to the interference makes use of her freedom to decide about her body or property. Therefore, there is no wrong in the first place. Consent excludes the objective elements of the offence (Roxin and Greco [2020] 655 ff.).

However, this conclusion should not be overrated. The question whether one wants to describe consensual violations as wrongs that require justification or whether there is objectively no wrong at all, is purely dogmatic. In practice, this labelling controversy has no discernible consequences. If there is valid consent, a defendant must be acquitted. In the absence of a wrong and/or an unlawful act, all accessory consequences such as instigation, aiding and abetting or confiscation cease to apply.

2. Assumed Consent

What are the consequences if consent is merely assumed? Take a situation in which the perpetrator thinks that consent has been given, but the victim has revoked it. The gardener who has been given the task of cutting down a large tree forgets to check her emails the morning before she carries out her (supposed) task. As a result, she does not learn that the owner of the house has cancelled the mandate. Subsequently, she cuts down the tree under the mistaken belief that she is acting with the owner's consent. The erroneous assumption of consent is assessed according to the rules on the error on lawfulness (putative justification). The offender is to be judged according to what she imagined to be true (Article 13 I Swiss Criminal Code). The gardener imagined that the owner was consenting. Hence, in her view, she did not commit an offence. However, if she could have avoided the error by exercising due caution, she is liable to prosecution for negligence if the negligent commission of the act is punishable (Article 13 II Swiss Criminal Code). Although the gardener should have checked her emails before setting off to work (negligence), according to Article 144 of the Swiss

Criminal Code causing damage to property (cutting down a tree) can only be committed intentionally. Thus, she must be acquitted.

3. Unknown Consent

What happens in the opposite case, in which the perpetrator thinks he is acting without consent, but in fact, consent has been given? For example, the perpetrator gains access to a supposed VIP party at a film festival. In reality, it is a public event, to which everyone has access. Objectively, there is no criminal wrong. The host's property rights were not violated. Subjectively, however, the perpetrator acted with intent to infringe property. Thus, according to the prevailing view, the 'party crasher' is guilty of attempted trespass.

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