



Consent, Autonomy, and Criminal Liability

Marie Kagrell, Master of Law (LL.M.), Degree of Master of Arts in Philosophy, PhD
Candidate in Criminal Law, Department of Law, Stockholm University

Introduction

Consent plays an important role in our everyday life, for example when it comes to sexual relations, transfer of property, and issues of integrity, among other things. Consent also plays an important role in the context of criminal law when it comes to statutes that prohibit acts such as rape, theft, and unlawful violation of integrity. At a basic level, consent is – in part – decisive for what can permissibly be done towards us. The reason that consent is granted this relevance in the evaluation of individuals' behaviour towards one another comes, most likely, from ideas of personal integrity or autonomy and is expressed in the maxim *volenti non fit iniuria* – a person is not wronged by that to which the person has consented.

In my research project, *Consent – ideology, dogmatics, critique*, I mean to analyse consent in the context of criminal law. There are three major rationales or aims for this project. The first aim is to explore which ethical reasons that might justify awarding consent relevance in the evaluation of interpersonal behaviour. The second aim is to account for what the content of the law is in questions relating to consent, primarily in the context of Swedish criminal law. The third aim is to critically review the law, from both internally legal and external perspectives. The end to the project is to contribute with understanding as to why consent matters; clarity in the assessment of legal issues where consent is relevant; and attention to potentially problematic aspects of consent. In regards to the content of the law there are several interesting issues in need of review. A few of these issues are presented in the following sections.

1. The different faces of consent in Swedish criminal law

Technically speaking, consent has two similar, but separate, functions in Swedish criminal law, as well as in other jurisdictions and in some moral theories (Asp, Ulväng & Jareborg, 2013, p. 231; Bergelson, 2010, p. 163-192, 171). One function is inculcating: the absence of consent is a necessary precondition for an act to fall under a specific legal statute, but the act (for example having sex, transferring money, or visiting someone's home) is not bad in itself (Ber-



gelson, 2010, p. 171). Rather, it becomes morally wrong or legally prohibited if it is not consensual; the act is prohibited *because* it is done against someone's will. In these cases, consent must be absent in order for a specific statute to be applicable. Take the example of theft: if I consent to your taking a note from my wallet we simply cannot say that you have stolen it; there has been no theft – per definition.

The other function of consent is exculpating: the presence of consent can make an otherwise prohibited act permitted. In these situations, the act is in some sense bad in itself, or *prima facie* wrong (for example, punching someone in the face is bad in itself since it imposes physical harm). A legal statute, for example assault, is technically applicable in these cases, but consent functions as a general ground for freedom from criminal liability. This form of consent enables activities such as rough tackles in hockey as well as the cutting of human flesh in medical procedures and the practice of violence in the context of BDSM-sex. Consent in this form is regulated in a general provision in chapter 24 article 7 in the Swedish Criminal Code.¹ These two functions of consent are in one way similar; if there is consent, then criminal liability might be ruled out. One interesting issue is how these two functions of consent relate to one another, for example whether they use the same concept for valid consent.

2. Valid consent and the limits of the unlawful

On a rather general note, it is crucial to understand the conditions for, the scope of, and the limits of consent since these questions have implications for the question of the range of the criminalised area for several criminal law statutes. If consent is to function in the way described above, it must be valid, and so deciding whether there is valid consent in an individual case is crucial for the question of deciding whether a crime has been committed in this case. This is relevant both for the judiciary in order to, after the fact, establish criminal liability and pass sentence on the defendant, as well as for the members of society who might face prosecution for acts they commit. Higher clarity in regards to what the scope and limits of consent are will give members of society a better chance of knowing what kinds of behaviour to avoid (in order to stay within the scope of what is lawful).

On a more specific note, it is necessary to inquire into the different conditions for valid consent. These conditions are in the international literature of philosophy, jurisprudence, and criminal law theory typically taken to be competence, information and opportunity – including freedom (Hurd, 1996, p. 122-123, 140; Westen, 2016, p. 179-193). Roughly speaking, a person must be

1. This provision states that an act committed by a person with the consent of the person at whom it is directed only constitutes an offence if, in view of the damage, violation or danger that it results in, its purpose, and other circumstances, the act is unjustifiable.



mature enough, informed enough and consent freely in order for the consent to count. Swedish criminal law holds, as further conditions, that there must be consent at the time of the deed (it is not possible to give consent after the fact), that the consenter must be serious in consenting, and that the interest that the consenter is waiving by his or her consent is an interest that he or she exclusively can dispose of (Swedish Government Bill 1993/94:130 p. 39, 42, 72; NJA 2018 p. 591; NJA 2013 p. 397; NJA 2004 p. 176 on p. 202; NJA 1997 p. 636, on p. 642).

Given that there are formal conditions for valid consent; do these conditions impose the same demands – in relation to maturity, information and so on – in all contexts? This might not be the case, instead the demands might vary from context to context (Wertheimer, 2003, p. 123), and there might be good reasons for such a position. Consent from the person an act is directed to is best understood as providing an exemption from, or a defence against, the criminal law statute which would otherwise be applied with regards to the act. The specific statutes exist to protect a specific interest; for example ownership of property when it comes to crimes such as theft, and sexual integrity or autonomy when it comes to crimes such as rape (see e.g. Swedish Government Official Reports 1992:61 p. 101-107; Swedish Government Official Reports 2013:38 p. 481-483).² One rationale for consent is that it should, to some extent, be up to the consenter if he or she wishes to waive the interest that the specific statute is protecting (see and compare Swedish Government Bill 1993/94:130 p. 39). These interests are, in turn, quite different from one another. For example, we might regard the interests of bodily integrity or ownership of property as more or less important, and in need of more or less protection. In analysing how demanding the conditions for valid consent are in a given context, it is important to assess these conditions in relation to the specific criminal law statute that consent might work as an exception from or a defence against.

A related, but independent, reason for adopting a differentiated view on the conditions for valid consent that is context sensitive is, that the person that the consent is given to may or may not have a personal interest in the deed. For example, a physician who is about to perform a surgical procedure on a patient has no personal interest in the patient consenting to the procedure – but the same cannot reasonably be said for a person who wishes to have sex with someone else. The latter is »as it were, a judge in his own case« (Fletcher, 1996, p. 117). A thorough investigation of the sources of law is therefore needed, to see if there are, *lege lata*, different conceptions of the conditions of valid consent depending on the context, and to see if there, *lege ferenda*, should be.

Another interesting issue relates to which types of harm and how much harm one can consent to, since this will delimit the scope of the unlawful.

2. The identification of a particular interest in need of protection by the criminal law has, in the Swedish context, often been taken as a necessary condition for criminalisation.



In Swedish criminal law, in the preparatory works as well as in case law, there is an explicit limit on how much *physical* harm a person is allowed to inflict upon another consenting person: only minor bodily harm, but never grievous bodily harm, is permitted on the ground that the person harmed has consented (Swedish Government Bill 1993/94:130 p. 38-39; NJA 2018 p. 591, section 8; NJA 1997 p. 636). This explicit limit gives rise to several interesting queries. One query is how we are to account for the practice in some sports and some medical procedures that go beyond minor physical harms. The solution in Swedish criminal law is to appeal to the doctrine of social adequacy as an alternative ground for freedom from criminal liability, with the motivation that some rule violations are generally accepted in society (Swedish Government Bill 1993/94:130 p. 40-41; NJA 2018 p. 591; NJA 2018 p. 1051). Another query is how to account for the apparent asymmetry between suffering a consensual physical harm and suffering a consensual economic harm; I cannot consent to your breaking my finger but I can consent to your taking my entire fortune (Swedish Government Official Reports 1953:14 p. 104).

3. Individual rights, consent, and criminal policy

As previously noted, consent provides freedom from criminal liability for acts that would absent the consent be impermissible, and the rationale for providing such freedom is rooted in some idea of personal integrity or autonomy. One way to understand this idea is through an analysis of what rights we have towards each other. Generally speaking, individuals have the right not to be harmed by other people. However, individuals can also choose to give up or waive some of these rights. If I consent to your hitting me in the face (say, when we agree to a boxing match), then you have not violated my right that you do not harm me since I have waived this right by consenting (Bergelson, 2010, p. 177). By a similar token, the recent legislative reforms, proposals, and discussions in some of the Nordic countries regarding sexual offences with emphasis on consent as decisive for the criminalised area are motivated by the view that individuals have a right to sexual autonomy (see and compare e.g. Swedish Government bill 2017/18:177, p. 1, 22; Danish committee report from the Ministry of Justice, no. 1574, p. 119-121, 174; Sveinsdóttir, 2020, p. 225-227; Jacobsen, 2019, p. 94-119).

The internationalisation and Europeanisation has had an impact on national criminal policy in the Nordic countries, especially as a result of the emphasis on individual human rights in the European Convention on Human Rights and in the Charter of Fundamental Rights of the European Union (see e.g. Lahti,



2015, p. 270-271).³ One interesting question is what can be said regarding the scope of consent in the application of criminal law in these countries: does European law entail a more generous scope for consent than what has previously been the case? Could an increased emphasis on individual rights lead to a change in attitude where individuals are regarded to be free to (by consenting) waive rights against criminalised conduct in an increased number of situations? Could such a change in attitude lead to a diminished scope of applicability for certain criminal law statutes? These are open questions with uncertain answers. It should, however, not be ruled out that increased emphasis on individual rights and consent might pose a challenge for the current, arguably, repressive criminal policy (Gunnlaugsson, 2021, p. 40; Anderberg & Martinsson, 2018, p. 921-922, footnote 7 and therein made references; Antilla, 1967, p. 237-251).

An area that might be of particular interest, given the possibly enhanced emphasis on individual rights, is the question of killing another with their consent, and especially the question of euthanasia, or physician-assisted suicide. Cases of euthanasia by the active administration of a lethal injection are regularly classified as manslaughter (instead of murder) in Swedish criminal law, but aiding and abetting someone to commit suicide does not fall under these provisions (NJA 1979 p. 802; RH 1996:69).⁴ Thus, there is a clear asymmetry between situations where a person ends his or her life by their own hand and situations where a person consents to another person's killing them – even if the result is an exercise of the person's autonomy in both instances. The issue of euthanasia is from time to time discussed in the political as well as the general debate of criminal policy (see question in Parliament for written answer 2020/21:2381 and answer from the Government, answer to question S 2021/03079). A recurring argument in the debate is that individuals should have the right to decide whether they wish to end their life, independently of whether they have the physical capacity to do so themselves or not (see motion 2020/21:1698). Swedish law has hitherto been very clear in stating that situations of killing a person with his or her consent cannot be permissible (Swedish Government Bill 1993/94:130 p. 38). Although a paradigm shift in this matter might not be very likely, the debate will surely continue.

3. An interesting question is if the general development and enhanced focus on individual rights in European law has led, or will lead, to a change in policy for such general provisions as mens rea, self-defence, and consent, that are regulated in national criminal law (compare to article 83 of the Treaty on the Functioning of the European Union).

4. Aiding and abetting another's suicide is permissible because suicide is permissible and complicity in permissible deeds is also permissible in Swedish criminal law.



4. Concluding remarks

Consent does play an important role in quite a large number of legal provisions in criminal law. Understanding the conditions for, the scope of, and the limits of consent is therefore important; clarity in these matters will help deciding what conduct is unlawful and what conduct is permissible. One challenge for the academic investigation into consent in the context of criminal law is that consent might be volatile with regards to both developments in society and the more specific context in which consent is given. It might be the case that only very little can be said about consent in general, and that the analysis must be sensitive to whether consent is given to an act that have implications for bodily integrity, the safety of one's home, sexual autonomy, or some other interest.

Kontaktoplysninger

marie.kagrell@juridicum.su.se

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Swedish Government Official Reports 1953:14 Förslag till brottsbalk

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Denmark

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