

EDS Submission: Report of the UN Special Rapporteur on violence against women and girls (Consent)

Abbreviations:

EDS:	End Demand Switzerland
CC:	Swiss Civil Code
CO:	Swiss Code of Obligation
CP:	Swiss Penal Code
HTfSE:	Human trafficking for sexual exploitation
s-bvawg:	sex-based violence against women and girls

A. Definitions

Consent in Swiss law

Civil law: According to Art. 28 para 2 CC, an infringement is unlawful unless it is justified by the consent of the victim, by an overriding private or public interest, or by law. Here, consent has a justificatory ground that has the effect of ruling out the unlawfulness of an infringement of personality. Consent in this circumstance does not mean that the victim waives the personal rights in question, but only renounces the right to invoke them. It is a unilateral act that can be revoked at any time and is not subject to any particular form. It must be given by a person who has the capacity for discernment,¹ is free and informed (the person must be given all the information likely to influence his or her wishes and thus enable him or her to make a fully informed decision).

Medical law: The Court ruled that a patient must knowingly and voluntarily consent to a medical procedure after being informed of the risks involved.² If the patient was not adequately informed or if their consent was obtained through deception or manipulation, the consent is invalid.³

Criminal law: Sexual consent can be defined as the act of communicating to another person, through verbal or non-verbal behaviour, one's willingness to perform a specific sexual activity. Conversely, refusal in sexual matters can be defined as communicating to another person, tacitly or expressly, one's unwillingness to engage in a specific sexual activity.⁴

Contract law: A contract exists when there is a mutual and concordant agreement between the parties.⁵ There are three situations in which consent may be flawed: error, fraud or duress.⁶ This may lead to the contract being invalidated.⁷

As we can see above, the concept of consent and its related legal definitions is understood in the context of the specific area of law or type of act to which consent is given.

For example: consent to the sale of an object is fundamentally different to consent given to perform sexual acts. The difference lies in the fact that the first is a straightforward business transaction, whereas the latter differs in nature as it involves the highest degree of physical intimacy (sexual integrity). The concept of consent and the criteria attached to the quality of consent may differ accordingly.

The existence of laws protecting privacy demonstrates that, as a society, we acknowledge and respect privacy as a uniquely valued and important good.⁸ These laws address a wide range of issues, including the right to control personal information, freedom from unwarranted surveillance, and protection from intrusion into personal spaces. However, because sexual acts represent the highest degree of physical intimacy, they require an even greater level of protection than matters typically covered under the general scope of privacy laws. We therefore believe that consent to sexual acts does not belong in the realm of business transactions and commodification.

However, in Switzerland prostitution is currently deemed to fall under Art. 27 of the Swiss Constitution:

1. Economic freedom is guaranteed.

2. Economic freedom includes in particular the freedom to choose an occupation as well as the freedom to pursue a private economic activity.

¹ Art. 19 para 1 CC

² ATF 105 II 284

³ Dumoulin Jean-François, Introduction - I Les soins prodigués à un patient incapable de discernement en situation d'urgence *in* Actes médicaux et contrainte, Schulthess, 2023

⁴ Perrier Depezusinge Camille, Arnal Justice, Révision du viol en droit suisse, RPS 142/2024, p. 21

⁵ Art. 1 CO

⁶ Chappuis Christine/Marchand Sylvain, Du jargon et de la raison en droit des obligations, 2021, p. 20: Consent is defined as "l'accord résultant de l'échange de manifestations de volonté concordantes en vue de la conclusion d'un contrat"

⁷ Art. 23–31 CO

⁸ Art. 13 of the Swiss Constitution

Sex and gender specific crimes disproportionately affecting women

- Sexual assault and coercion (Art. 189 CP)
- Rape (Art. 190 CP):

Recently, several points concerning the concept of rape in Art. 190 CP were amended, including the concept of consent in a case of rape. Since July 2024, acts are considered rape or sexual assault and coercion in all cases where the victim has made it clear to the perpetrator, by words or gestures, that she does not want to have sexual relations with him and where the perpetrator has intentionally disregarded the victim's expressed wishes. This is known as the "no means no" solution. The victim's state of shock will also be considered as an expression of refusal. If the victim is petrified with fear and is unable to express her refusal or defend herself, the perpetrator will have to answer for rape or sexual assault and coercion if he takes advantage of this state of shock.

Moreover, the offence of rape will now include intercourse-like acts involving penetration, and thus more sexual acts than before. The new legislation on sexual offences will also penalise what is known as "stealthing". This is when a sexual act is deemed consensual but the perpetrator secretly either removes the condom or does not use one in the first place. The rape offence has also been broadened so that it is no longer reserved exclusively for female victims.^{9 10}

- Encouragement of prostitution (Art. 195 CP):

The purpose of this provision is to protect people who are pushed into prostitution and people who - already in prostitution - are being kept in prostitution against their will.¹¹

According to Art. 195 (d) CP, "keeping a person in prostitution" is a punishable act. According to doctrine, "being kept in prostitution" occurs when the person is prevented from abandoning this activity. The perpetrator must influence the victim's decision in a way that attains the intensity of coercion under Art. 181 CP. Coercion includes violence, psychological pressure, threats, confiscation of identity papers or exploitation of financial dependencies. The formal consent of the person concerned is not valid if her or his freedom of decision has been considerably limited by economic distress. Art. 195 CP is specifically intended to protect individuals who, due to their economic and social situation in their country of origin, are willing to engage in prostitution.¹²

Thus, according to doctrine, the consent of the person who is kept in prostitution is invalid if her or his freedom of decision has been considerably limited by economic distress.

In 2002, the Federal Court ruled: "The victim's consent to her own exploitation is invalid. Without this protection, perpetrators could evade criminal liability by targeting the most desperate victims, who would endure even the most extreme exploitation and restrictions of freedom in an attempt to escape their situation, even temporarily, and earn money."¹³

According to the above Federal Court ruling, a person's economic distress is a relevant factor that can considerably limit a person's freedom of decision in prostitution. Consequently, the consent of the person concerned is deemed invalid.

It may be asked why the "economic distress" is only deemed a relevant factor –in limiting a person's freedom of choice– when persons are "kept in prostitution", i.e. are prevented from abandoning this activity. It appears inconsistent that this factor is not generally deemed relevant, including when a person *enters* prostitution.

In addition, it is reasonable to question whether factors other than economic distress could also limit a person's freedom of decision in the context of prostitution and consequently render the consent of a person in such a situation –in principle– invalid. In practice, we observe that a person's vulnerability prior to entering prostitution is not necessarily

⁹ FF 2018 2889, Feuille Fédérale (FF): The Confederation publishes a FF that mainly contains bills and decrees (including the message) that have been submitted to Parliament, as well as texts that Parliament has passed and that are subject to referendum: <https://www.fedlex.admin.ch/eli/fga/2018/1154/fr>

¹⁰ <https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-99508.html#links>

¹¹ Trechsel Stefan, Bertossa Carlo, Art. 195 Förderung der Prostitution, in Schweizerische Strafgesetzbuch Praxiskommentar, 2021

¹² Trechsel Stefan, Bertossa Carlo, Art. 195 Förderung der Prostitution, in Schweizerische Strafgesetzbuch Praxiskommentar, 2021. Original text: "Festhalten in der Prostitution liegt vor, wenn der oder die Prostituierte daran gehindert wird, diese Tätigkeit aufzugeben, u.ö. Der Täter muss auf diesen Entschluss des Opfers in einer Art und Weise einwirken, welche die Intensität der Nötigung nach Art. 181 erreicht. Beispiele sind Gewalt, psychischer Druck, Drohung, Wegnahme der Ausweispapiere oder das Verstricken in Abhängigkeiten finanzieller Art. Das formale Einverständnis der betroffenen Person ist unwirksam, wenn ihre Entscheidungsfreiheit durch wirtschaftliche Not wesentlich eingeschränkt war. Abs. 3 soll gerade auch Personen schützen, die aufgrund ihrer wirtschaftlichen und sozialen Lage im Herkunftsland bereit sind, sich zu prostituieren".

¹³ ATF (Arrêt du Tribunal Fédéral) 129 IV 81 recital 1.4, http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F129-IV-81%3Afr&lang=fr&type=show_document original text: "Die Förderung der Prostitution gewährt auch Personen strafrechtlichen Schutz, die aufgrund ihrer ausweglosen oder gar verzweifelten wirtschaftlichen und sozialen Lage in ihrem Herkunftsland bereit sind, auf ihre Handlungsfreiheit zeitweise zu verzichten, um als Prostituierte arbeiten zu können. Wäre dem nicht so, könnten sich Täter der Strafbarkeit entziehen, indem sie möglichst verzweifelte Opfer aussuchten, die auch extremste Ausbeutungen und Freiheitsbeschränkungen auf sich nehmen würden, um ihrer Lage wenigstens vorübergehend zu entfliehen und Geld zu verdienen".

limited to economic distress. While the latter plays an important role, it is often compounded by multiple other types of vulnerabilities. Therefore, it would be sensible to include these vulnerabilities in the whole context of prostitution.

Also, it is relevant to question the decision to consider economic distress as a determining factor for the validity of consent in the context of Art. 195 (d) CP, *but not in relation to consent regarding the activity of prostitution as such*.

In other words, why is it that the economic distress of a person who is kept in prostitution limits that person's freedom of decision, but not when that same person starts this activity? Assuming that there is no coercion initially, economic distress remains the central element that limits autonomy and invalidates consent.

In view of the above, a person's economic distress should be taken into account as a factor limiting freedom of decision, at all stages and not only when the person is prevented from leaving prostitution.

Switzerland has not repeated the irrelevance of consent mentioned in Palermo Protocol's Art. 3 Trafficking in human beings in its national legislation (Art. 182 CP). An omission which has been criticized by GRETA.¹⁴

B. Legislation and jurisprudence

Legislation, monitoring and evaluation mechanisms

As mentioned above, the concept of consent may be used as a factor reducing liability in sexual violence offences and absence of consent is an element required to qualify the act as rape.¹⁵

In a recent Federal Criminal Court ruling examining a case that took place after the amendment of Art. 190 CP, the victim's state of shock was taken into account. The Court admitted that the victim was in a state of shock and sent the case back to the cantonal court for a new judgement.¹⁶

As it stands, there are no evaluation mechanisms in place. Currently, dark numbers of rape cases are very high as only a small fraction of women that consult rape advisory centres report to the police. It still needs to be seen if the amendment of the CP will lead to more prosecutions.

C. Consent in international human rights and international criminal law

In a decision of the International Criminal Tribunal for Rwanda (ICTR) in the context of a crime against humanity, rape was defined as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".¹⁷

Instead of seeing rape through the lens of lack of consent, the ICTR applied the *perspective of coercion*.

In reference to the above decision, the legal scholar, Catharine MacKinnon argues that consent is an intrinsically unequal concept and should be eliminated as a valid criterion to define sexual assault. To redefine rape as the crime of inequality that it is, the prohibited act should instead focus on a concept of force that, beyond physical force, incorporates multiple inequalities of power - such as sex, age, race, disability, and sexual orientation - when used to coerce a sexual interaction.¹⁸

The approach used in the above decision, supports the suggestion that rape laws often fail to achieve justice because they do not recognize the context of inequality in which they operate.

In the context of HTfSE: Art. 3 of the Palermo Protocol¹⁹ defines "Trafficking in Persons" and stipulates in litra (b) that the consent of a victim of trafficking to the intended exploitation shall be *irrelevant* where any of the means set forth in subparagraph (a) have been used²⁰ including the abuse of a position of vulnerability.

¹⁴ <https://rm.coe.int/report-on-the-implementation-of-the-council-of-europe-convention-on-ac/1680981889> p. 45 (point 213)

¹⁵ Perrier Depeursinge Camille, Pittet Marie, Le consentement du lésé en droit pénal suisse, PJA 2021, p. 801

¹⁶ Federal Supreme Court Decision 6b_1192/2023 of 7 August 2024

¹⁷ https://www.bger.ch/ext/eurospider/live/it/php/aza/http/index.php?lang=de&type=show_document&highlight_doid=aza://16-08-2023-6B_800-2022&print=yes

¹⁸ The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, <https://www.refworld.org/jurisprudence/caselaw/ict/1998/en/19275>

¹⁹ "Rape Redefined." Harvard Law & Policy Review 10 (2): 431-477

²⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, was adopted by the United Nations General Assembly on 15 Nov. 2000

²¹ means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person

Importantly, in the context of HTfSE, Europol confirmed in 2021 that “exploiters increasingly seek to exploit their victims in the context of supposedly voluntary business”. In other words, business that they have supposedly consented to.²¹

Recommendations

Regarding consent to sexual acts in the context of prostitution, it is important to note that a division of prostitution into “voluntary” and “involuntary” categories²² is misleading and contributes to an increase of sexual s-bvawg. The application of these two categories leads to the presumption that valid consent is present in cases labelled as “voluntary prostitution”.

However, this presumption is largely erroneous as it does not adequately reflect the reality of prostitution.

When women in prostitution are asked if they are in prostitution voluntarily by someone with whom they do not share a deep, trusting relationship, the vast majority are likely to confirm that their participation is voluntary.

Research, however, has sufficiently documented that such assurances are mostly not based on reality.²³ Survivor movements around the world confirm this.²⁴

Women in prostitution know that men are unlikely to buy them if they express their true feelings about their participation in prostitution to these men (including the display of enjoyment of the sexual act itself). In other words, the false display or the pretence of voluntariness is a *characteristic* of the reality of prostitution.

Prostitution mostly involves coercive factors such as financial desperation, social marginalization, or human trafficking, which compromise the autonomy of individuals.²⁵ Adopting the categories “voluntary” and “involuntary” in the context of prostitution, serves to justify certain prostitution policies - such as the regulatory models and full decriminalisation models - that systematically ignore factors like poverty, addiction, previous experience of sexual abuse, dysfunctional family background and lack of opportunities etc. that significantly influence decisions to enter and remain in prostitution.

As mentioned above, the constitutional right to economic freedom (Art. 27) is often cited in discussions relating to the legality of prostitution. Given the ample evidence of the harms done to women in prostitution including s-bvawg, the power imbalances between the buyer of sexual acts and the prostituted person (overwhelmingly women), the coercive factors that drive women into prostitution, the ratio between Swiss and migrant women in prostitution, *it appears obvious that prostitution should not be considered a profession but first and foremost a phenomenon that constitutes violence against women.*

In the past, the Federal Supreme Court issued decisions²⁶ where evolving public mores have played a significant role. The Court's responsiveness to shifting societal values and its role in interpreting the law in the context of these contemporary societal values could therefore also validate that prostitution constitutes s-bvawg and - based on this insight - deny prostitution the current (implicit) status of profession/work. This would lift prostitution out of the realm of Art. 27.

To effectively combat violence against women, Swiss law must reverse the presumption of voluntariness in prostitution to one of involuntariness, analogous to shifting the presumption of sexual consent to a lack of consent on the part of women in prostitution. This change would more accurately reflect the reality of prostitution, where meaningful sexual consent is circumvented by payment and the sexual acts performed are unwanted by the women.

The most suitable way to implement the presumption of involuntariness in prostitution - and lack of meaningful sexual consent - is the introduction of the Equality Model which has its origins in a comprehensive legislation to combat s-bvawg and promotes equality between men and women. The Equality Model effectively addresses demand for prostitution by criminalizing the buyers of sexual acts and educates the public about the harmful system of prostitution.

²¹ Europol (2021), European Union serious and organized crime threat assessment, A corrupting influence: the infiltration and undermining of Europe's economy and society by organized crime, Publications Office of the European Union, Luxembourg

²² such as forced prostitution including HTfSE

²³ Julia Wege: Biographische Biografische Verläufe von Frauen in der Prostitution, Eine biografische und ethnografische Studie (2021), Springer Fachmedien Wiesbaden GmbH (Verlag) 978-3-658-34836-6 (ISBN)

²⁴ Ella <https://netzwerk-ella.de/>, SPACE International <https://www.spaceintl.org/>, https://www.facebook.com/people/Ge-STAC/100078166197635/?locale=ms_MY&_rd=1

²⁵ Huschke Mau: Entmenslicht – Warum wir Prostitution abschaffen müssen 9783841907943 (ISBN10: 3841907946, Rachel Moran: Paid For – My Journey Through Prostitution, Gill & Macmillan ISBN-13978-0717160327

²⁶ Example: same-sex Partnership Pension Rights (2008): Federal Supreme Court Decision 9C_874/2007, rendered on 20 August 2008
Example: Climate Change and Human Rights: Federal Supreme Court, Public Law Division I – Judgment 1C_37/2019 of 5 May 2020 Verein KlimaSeniorinnen Schweiz et al. v. DETEC – Ruling on real acts relating to climate protection Unofficial translation prepared on behalf of KlimaSeniorinnen