Regulating Expression of Consent in Sexual Relations

Karolina Kremens

A. Introduction

In May 2020 Amnesty International reported that only nine European countries have a definition of rape based on the absence of consent while the remaining twenty-two define it based on force, threat of force or coercion[1]. This may seem a small number (9 out of 31), but the change in thinking about personal autonomy by adopting consent as an important factor shaping law reforms concerning sexual relations is certainly trending. A good example is Sweden, which just recently replaced the original definition of rape focusing on violence with a new approach[2]. The new Spanish rape law is also moving in that direction, at this very moment being processed by the Parliament[3] as a reaction to the current regulations criticized in a heated debate following the controversial "Manda case" judgment[4]. This trend may also be seen as resulting from the powerful #MeToo movement, which has led to societal change in the perception of sexuality from a concept of morality and decency towards individual sexual autonomy.

As criminal justice systems continue to shift away from a traditional approach towards the requirement of receiving consent before engaging in a sexual act, the discussion on how this consent should be expressed becomes more vital than ever. This is because the determination of the absence of consent is becoming decisive to the attribution of guilt throughout criminal processes. It is true in at least some jurisdictions researched

1 Amnesty International, *Criminalization and Prosecution of Rape in Europe* (2020).

2 Ministry of Justice, *Consent – the basic requirement of new sexual offences legislation* (2018).

3 See Josephine Joly, 'Spanish Parliament begins debate on 'Only Yes is Yes' sexual consent law Access to the comments' <https://www.euronews.com/2021/10/15/spanish-parliament-begins-debate-on-only-yes-is-yes-sexual-consent-law> accessed 14 January 2022.

4 See P. Faraldo-Cabana, 'The Wolf-Pack Case and the Reform of Sex Crimes in Spain' (2021) 22 *German Law Journal*, 847.

within this study, and the number of countries that apply this rule is increasing. However, it is the way in which consent should be *expressed* that becomes central in shaping consequences for its existence or the lack of it. Scholars constantly attempt to establish what stands behind this vague concept[5]. What makes the matter even more complex is that consent and the forms in which it is expressed is not limited in law only to sexual relations but has a much broader and established application both in civil and criminal contexts.

For NGOs and those providing help to victims seeking advice on issues concerning sexual violence, the form in which consent is expressed seems not to be that complicated. For example, the RAINN[6] website states that consent "should be *clearly* and *freely* communicated" and that "a *verbal* and *affirmative expression* of consent can help both you and your partner to understand and respect each other's boundaries"[7]. Another American website called Healthline says that "consent is a *voluntary*, *enthusiastic*, *and clear agreement* between the participants to engage in specific sexual activity", adding that "there is no room for different views on what consent is"[8]. The National Sexual Violence Resource Center[9] similarly states that consent must be "*freely given and informed*" but also adds that it is "*more than a yes or no*", being "a *dialogue* about desires, needs, and level of comfort with different sexual interactions"[10]. This unfortunately adds only little to the discussion on *how exactly* consent should be expressed, also leaving some room for out-of-place jokes and discussions concerning the need to sign a written contract before engaging in sexual relationships with anyone[11].

---

5 See, e.g., V. Munro, 'Constructing consent: Legislating freedom and legitimating constraint in the expression of sexual autonomy' (2008) 41 (4) *Akron Law Review*, 923; M. Beres, 'Rethinking the concept of consent for anti-sexual violence activism and education' (2014) 24 (3) *Feminism & Psychology*, 373.

6 RAINN (Rape, Abuse & Incest National Network) is an anti-sexual violence organization based in the USA (www.rainn.org).

7 RAINN, 'What Consent Looks Like' <https://www.rainn.org/articles/what-is-consent> accessed 14 November 2021.

8 Adrienne Santos-Longhurst, "Your Guide to Sexual Consent" <https://www.healthline.com/health/guide-to-consent#sexual-assault-resources> accessed 14 November 2021.

9 NSVRC (National Sexual Violence Resource Center) is a US nonprofit organization providing information and tools to prevent and respond to sexual violence (https://www.nsvrc.org/).

10 NSVRC, 'About Sexual Assault' <https://www.nsvrc.org/about-sexual-assault> accessed 14 November 2021.

11 D.-E. Dubé, 'Will you have to sign a contract the next time you have a one-night stand?' <https://globalnews.ca/news/3962289/contracts-consenting-sexual-encou

One of the reasons why it is necessary to establish the ways in which consent should be expressed is that the simple answer focusing on verbal confirmation may be too limiting. Non-verbal signs of approval may be misleading, since the reactions of the human body during sexual intercourse may be involuntary. Touching or kissing may cause arousal whether the person wants that or not. Therefore, voluntary consent is a priority, although its form is uncertain. As T. Hörnle aptly argues, "[t]he difference between a pleasant flirt, an appreciated compliment, a funny joke with erotic undertones and the turning point where it becomes unpleasant and annoying is not evident. In borderline cases, labels such as 'amusing' or 'harassment' depend on nuances, personal tastes, situations and moods"[12]. Indeed, sexual communication is very complex, and it can hardly be reduced to unambiguous legal norms.

Therefore, it is one thing to declare that sexual intercourse shall be engaged in only upon consent, as has already been done in some jurisdictions, and another thing to prescribe *how* this consent must be expressed – especially if it must be done in legal language, transferred into articles and provisions of a binding legal act. Adding to consent such adjectives as 'clear', 'voluntary', 'free' or 'informed' is only another layer of confirmation that the consent is somehow to be communicated by a person wishing to consent, but how it should be communicated still appears to be unclear.

Therefore, this chapter aims at analysing how various jurisdictions researched in this study approach the issue of the formal requirements of consent prescribed within a legal framework. For this purpose, this chapter provides a comparative analysis of contemporary approaches to how selected countries regulate the form in which consent shall be given. It must, however, be acknowledged that the countries discussed here do not approach the issue of consent in sexual relations from the same perspective, which also seems to affect the requirements of consent. As a result, the analysis will be undertaken in the light of the preliminary assumption that the countries that have chosen a requirement of consent for sexual relations, which are frequently called "yes means yes countries", provide more straightforward answers to how exactly the consent shall be given. In other words, the hypothesis is that countries that condition the voluntariness of a sexual act on receiving confirmation from the partner before

---

nters-app/> accessed 20 January 2022; ABC News, 'Should Lovers Sign a Pre-Sex Contract?' <https://abcnews.go.com/GMA/story?id=128101&page=1> accessed 20 January 2022.

12 T. Hörnle, '#MeToo: Implications for criminal law?' (2018) 6 (2) *Bergen Journal of Criminal Law and Criminal Justice*, 118.

engaging in the sexual act provide clearer definitions of the expression of consent than countries that only consider consent in other contexts.

The chapter proceeds as follows: the first part explores the key international standards with regard to the normative regulation of the form of consent, including international instruments such as the Istanbul Convention as well as the case law of ECtHR on the issue. This will be done despite the fact that not all analysed jurisdictions are part of the Council of Europe's framework. Recognition of the achievements of the ECtHR in the field of interpreting consent to a sexual act should however not be overlooked. The second section briefly discusses approaches towards the form in which consent is expressed in various jurisdictions. The discussion will be based on national reports of ten countries that were delivered within this project, namely: Australia, Austria, England and Wales, Germany, Italy, Poland, Spain, Sweden, Switzerland, and the United States of America. The chapter ends with conclusions that look beyond the form in which consent should be given.

B. Expression of Consent in the International Context

In the international context, some guidance on the expression of consent can be obtained from the Istanbul Convention[13], a landmark treaty of the Council of Europe that created a legal framework at a pan-European level to protect women against all forms of violence, and to prevent, prosecute and eliminate violence against women and domestic violence. The Convention addresses the issue of the form of consent in Article 36 (2), stating that "consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances". Two elements seem to be underlined, that is the freedom (voluntariness) in making the decision and the context in which consent has been given. The latter takes into account the specific nature of the situation occurring among two people engaging in sexual intercourse. As provided in the Explanatory Report to the Istanbul Convention,[14] it is each state's responsibility to "decide on the specific wording of the legislation and the factors that they consider to preclude freely given consent".

13 Council of Europe Convention on preventing and combating violence against women and domestic violence 2011, CETS No. 210.

14 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011.

Other international instruments seem to be even less focused on the form of consent. For example, the Recommendation Rec (2002)5 of the Committee of Ministers of the Council of Europe on the Protection of Women Against Violence[15] obliges the state parties to "penalize any sexual act committed against non-consenting persons, even if they do not show signs of resistance" as well as to "penalize sexual penetration of any nature whatsoever or by any means whatsoever of a non-consenting person" (§ 35). Yet no further explanation on what form of consent is desirable is given, again leaving this for each state to decide.

Even though the European Court of Human Rights (ECtHR) has addressed the issue of consensual sexual activities on several occasions[16], the case law also lacks a deeper discussion on the form of consent. Interpreting Articles 3 and 8 of the European Convention of Human Rights, the ECtHR emphasizes the duty of the state to protect the individual from violations of his or her sexual freedom and to combat and prevent sexual crime. Therefore, during criminal proceedings the state authorities are bound to protect the person who has experienced sexual violence from secondary victimization and must ensure that the law is applied in practice.

The first case in which the ECtHR explicitly addressed sexual autonomy as the test for assessing whether rape has occurred was *M.C. vs. Bulgaria*[17]. The Court focused on the concept of "affirmative consent" (although not using this term), explaining that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim[18]. Interestingly, in the ruling the Court referred to the case law of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor vs. Kunarac, Kovači and Vuković*, in which the ICTY Trial Chamber made it clear that consent must be given voluntarily, as a result of the victim's will, assessed in the context of surrounding circumstances[19]. But even though the judgment was generally received as an important improvement leading to a breakthrough of established cultural patterns which are not adapted

15 Recommendation Rec (2002) 5 of the Committee of Ministers on the Protection of Women Against Violence, 2002.

16 See among others *A. v. the United Kingdom* App no 25599/94 (ECHR 18 September 1998); *Z. and others v. the United Kingdom* App no 29392/95 (ECHR 10 May 2001); *E. and others v. the United Kingdom* App no 33218/96 (ECHR 26 November 2002); *August v. the United Kingdom* App no 36505/02 (ECHR 21 January 2003) and *X. and Y. v. the Netherlands* App no 8978/80 (ECHR 26 March 1985).

17 *M.C. vs Bulgaria* App no 39272/98 (ECHR 4 December 2003).

18 Ibid., § 104.

19 Case no. IT-96–23, 2001.

to the conditions of modern society and which are no longer valid in other countries, it has also been subjected to justified criticism[20]. What is important, however, from the perspective of this study, neither in this case nor in other judgments did the ECtHR specifically address the form in which the informed and voluntary consent needs to be expressed.

C. *Expression of Consent in Researched Jurisdictions*

Since international instruments appear not to give any specific guidance regarding the way in which consent must be expressed, we shall now analyse selected states with regard to the normative regulation of sexual offences. As previously stated, the preliminary assumption is that countries that decided to explicitly provide for consent in the legal definition of rape will be more eager to lay down the requirements for consent, while those states that still follow the traditional legislative approach might be less clear on that. The approach undertaken by each of the researched jurisdictions will be presented accordingly from the most progressive states in that regard (Australia, US, England and Wales, and Sweden), through those standing somewhere in the middle (Spain and Germany), to those representing a more traditional perspective (Poland, Austria, Italy, and Switzerland).

Among the researched jurisdictions, the most explicit with regard to establishing how consent should be expressed seem to be the **Australian** states of Tasmania and Victoria. Their Criminal Codes not only provide that consent means "free agreement"[21] but further clarify that a person does not freely agree to an act if she or he does not say or do anything to communicate consent[22]. Therefore, consent is considered a "communicated state of mind". This has been criticized by Australian scholars claiming that sometimes what is not communicated can still be considered consensual[23]. And such a strict approach has not been adopted by all Australian states. On the contrary, other criminal law systems in that country provide for more nuanced resolutions. For example, in Queensland even

20 See, e.g., C. Pitea, "Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in M.C. v. Bulgaria" (2005) 3 *Journal of International Criminal Justice*, 447.
21 Criminal Code Act 1924 (Tas), s. 2 A (1).
22 Ibid., s. 2A (2) (a).
23 Andrew Dyer, 'Australia', in this volume.

though consent must be given "freely and voluntarily"[24] there is no additional requirement, like the one in Tasmania and Victoria, that it shall be communicated externally. It is understood that under some circumstances a person can communicate consent even though she or he remains silent[25].

U.S. law also does not provide for a coherent approach towards regulating the expression of consent for the whole country. Although each state of the U.S. has its own criminal code, the social perception of what is rape seems to be shared among these jurisdictions[26]. This is reflected on the doctrinal level in the Model Penal Code, which criminalizes sex without consent[27]. According to it, consent means "willingness to engage in a specific act" and "may be expressed or it may be inferred from behavior – both action and inaction – in the context of all the circumstances"[28]. However, some states have decided to expressly provide for some form of affirmative consent[29]. The meaning of "affirmative consent" remains ambiguous though, and, as A. Gruber reports in this volume, "ranges from the very restrictive – a thoughtful, enthusiastic, and ongoing <<yes>> – to the more permissive – any words or conduct that indicate the person's sexual willingness"[30].

The ways in which consent may be given in **England and Wales** are not clearly determined, as the statute is not prescriptive[31]. The Sexual Offences Act 2003 provides that "a person consents if he agrees by choice, and has the freedom and capacity to make the choice"[32]. This underlines the free will of the person that consents. This approach is also confirmed by the jury instructions, which read that "when a person gives in to something against his or her free will, that is not consent but submission"[33]. Submission may be a result of threat, fear, or persistent psychological coercion.

However, what seems to be determinant for the expression of consent in the English and Welsh system is that the defendant must reasonably

---

24 Criminal Code Act 1899 (Qld), s. 348.
25 Andrew Dyer, 'Australia', in this volume.
26 Aya Gruber, 'U.S.A.', in this volume.
27 MPC TD 5 § 213.6(1).
28 MPC TD 5 § 213.0(2)(e).
29 American Law Institute, *Model Penal Code: Sexual Assault and Related Offenses Tentative Draft No. 3*, (2017) 41 no. 93 quoted in Aya Gruber, 'U.S.A.', in this volume.
30 Aya Gruber, 'U.S.A.', in this volume.
31 See Lyndon Harris and Hannah Quirk, 'England and Wales', in this volume.
32 Sexual Offences Act 2003, s. 74.
33 See Lyndon Harris and Hannah Quirk, 'England and Wales', in this volume.

believe that consent was given[34]. And, as explained further in the Sexual Offences Act of 2003, "whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents"[35]. This suggests that for the establishment of consent the context and the circumstances in which the consent has been given (and believed to be given by the alleged offender) are important factors, appearing as more important than the form in which consent is given.

The case of **Sweden**, frequently perceived as a champion in introducing the reformulation of rape, is particularly interesting since the Swedish government decided relatively recently, in 2005, when reforming the criminal law not to replace coercion by lack of consent as the criminal element of rape[36]. It was not until 2018 that the revolution took place. But particularly this reform teaches us how difficult it is to clearly demarcate the area of criminalized behaviour when determining what is and what is not consensual.

Originally, an official Swedish proposal of sex offence regulations of 2016 provided that in order for participation in sexual intercourse to be considered voluntary it had to be expressed either by verbal confirmation ("yes") or through active participation[37]. But the criticism of this concept urged the Swedish Council on Legislation to depart from such a strict approach and to leave the determination of the voluntariness of participation to the judges' discretion in light of the circumstances of each individual case[38]. As a result, the law now provides that having sexual intercourse with a person who is not participating in it voluntarily constitutes rape, while the second part of the definition explains that "when assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way"[39]. As interpreted, the assessment of non-voluntariness shall also be

34 This concerns some sexual offences such as rape – see SOA 2003, s. 1(1)(c).

35 SOA 2003, s. 1 (2).

36 See an older perspective on the Swedish system: M. Burman, Rethinking rape law in Sweden. Coercion, consent or non-voluntariness?, in: C. McGlynn, V.E. Munro (eds), *Rethinking Rape Law. International and Comparative Perspectives* (Routledge 2010), 196–208.

37 L. Wegerstad, 'Sex Must be Voluntary: Sexual Communication and the New Definition of Rape in Sweden' (2021) 22 *German Law Journal* 734, 740.

38 Ibid.

39 Chapter 6 Section 1 of the Swedish Criminal Code in English is available at: <https://www.government.se/4b0103/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf> accessed: 14 January 2022.

based on the situation and its context. This leaves lots of room for ways in which the voluntary participation (consent) may be manifested, at the same time shifting the focus to the context in which consent was given[40].

The **German** case seems to be ambiguous. This country should be considered as standing on a middle ground between countries that accept the "yes means yes" and the "no means no" approaches[41]. On the surface, the law requires for the criminal act of sexual abuse the objection of the victim, not the lack of an affirmative consent. § 177 sec. 1 of the German Criminal Code provides that sexual abuse is a sexual act performed "against the recognizable will of another person"[42]. Therefore, the passivity of a person during a sexual act is understood as excluding criminal liability since there is no recognizable will expressed by the victim[43]. The "recognizability" is determined from the viewpoint of an objective observer who is familiar with the relevant facts. If, however, a person does not have a normal power of judgment, e.g., because she or he is drunk or incapacitated in another way, the law requires the person's explicit approval[44]. The idea behind the German law is not to punish persons in unclear and ambivalent situations but to expect adults to communicate their wishes and needs[45]. However, despite its noticeable shift of approach towards sexual offences, German law remains silent on the forms in which consent can be expressed.

Spain seems to be more specific. Although the new bill on sexual offences (which positions that country somewhere in the middle between countries with a modern approach and those with a traditional approach), has not yet been enacted, some interesting conclusions can be drawn from the draft legislation, which states that "consent will only be understood to exist when it has been freely manifested through acts clearly expressing the individual's will, considering the circumstances of the case"[46]. However,

---

40 Linda Wegerstad, 'Sweden', in this volume.

41 See generally on changes in German law in that regard T. Hörnle, 'The New German Law on Sexual Assault and Sexual Harassment' (2017) 18 *German Law Journal*, 1309.

42 German Criminal Code 1998, § 177 sec. 1.

43 Thomas Weigend, 'Germany', in this volume.

44 German Criminal Code 1998, § 177 sec. 2 no. 2.

45 Hörnle (note 12), 131.

46 Susana Urra, 'Spain approves sweeping sexual violence protection bill: 'We don't want any woman to feel alone' <https://english.elpais.com/spain/2021-07-07/spain-approves-sweeping-sexual-violence-protection-bill-we-dont-want-any-woman-to-feel-alone.html> accessed 14 January 2022.

this will not bring any change, since non-verbal conduct is understood as an "external act", as is shown in practice and case law.

In contrast to the presented attempts to include some relation to consent in the definition of rape, still there is a group of countries that follow the traditional approach centered around the expression of opposition by the victim as a requirement for rape. In these countries, where consent is just a supplementary element, for obvious reasons the discussion on the form of such consent is less pronounced. It is rather the form in which the victim opposes a sexual act that remains relevant and attracts the attention of scholars.

In **Poland**, even though consent is not mentioned in the definition of rape, in the view of the courts and scholars giving valid consent generally negates the existence of the crime of rape[47]. Therefore, the form of giving valid consent should play a role in the analysis of liability for rape. However, since the emphasis remains on force, threat of force, deceit, and how opposition is expressed[48], there is little in the case law and literature on how consent in sexual relations should be articulated. It seems to be certain that the lack of expressing an affirmative decision to engage in sexual intercourse or indifference should not be equated with lack of consent[49]. This suggests that silence, as a form of implied consent, may be considered as a valid way of expressing agreement under Polish law[50].

In **Switzerland**, where the definition of rape is also based on force used by the perpetrator,[51] consent is barely considered on a normative level. This is also due to a still strong attachment to traditional rules of decency which concentrate on resistance rather than on consent, and, as reported, the lack of protest on the victim's part can even be used to question the responsibility of the accused[52]. Therefore, similarly as in Poland, the discussion on the ways in which consent may be given is not that relevant in Swiss law, although it has been confirmed that it can be given verbally or non-verbally and, in some cases, even implied.

Another country that does not normatively consider consent as an element of sexual offences and therefore does not engage in a discussion on

47 Judgment of Supreme Court of 8 September 2005, OSNwSK 2005, Nr. 1, poz. 1617.
48 Polish Criminal Code 1997, Article 197–198.
49 K. Szczucki, Rola zgody w strukturze przestępstwa na przykładzie przestępstwa zgwałcenia (2011) 1 Czasopismo Prawa Karnego i Nauk Penalnych, 31, 47.
50 Wojciech Jasiński and Karolina Kremens, 'Poland', in this volume.
51 Swiss Criminal Code 1937, Article 190.
52 Nora Scheidegger, 'Switzerland', in this volume.

its form in that context is **Italy**. Even after the most recent reform, Italian law still refers to violence and threats,[53] focusing attention in case law on resistance to the perpetrator's actions[54].

This group of countries is concluded with **Austria**. Despite the social changes, sexual liberalization, and the acceptance of the view that the criminal law on sexual offences primarily protects the right to self-determination and sexual autonomy (rather than public morals), there have not been any changes in the definition of rape. Similar to other traditional countries, the focus remains on coercion and resistance rather than on consent[55]. Scholarly opinion on the form of consent, made with reference to consent in more general terms and not specifically in the context of sexual offences, suggests that consent shall be expressed externally. This can be verbal but may also be implied[56].

D. Conclusions

This chapter was seeking an answer to the questions in what form should consent in sexual relations be expressed and whether countries that adopted the modern "yes means yes" approach that focuses on consent provide some guidance regarding the form of consent. Unfortunately, the answer is somewhat disappointing. The comparative analysis of the ten researched countries shows that states are reluctant to give a straightforward answer to *how* consent should be expressed. Moreover, there is no consistency in how this issue has been resolved in the "modern" group of states. And even if some similarities are visible, it is uncertain whether there is any common reasoning behind choices in that regard. The expectation that countries that have chosen to include consent as an element of sexual offences will specify the form in which consent should be given has therefore not been confirmed. It seems that it was rather a random and individual choice of each jurisdiction to adopt a particular wording rather than a well-thought-out common decision. There is not even agreement visible on a normative level among states on whether the only choice is a verbal statement or whether non-verbal communication can also be considered as a sufficient form of expressing consent.

---

53 Italian Criminal Code 1930, Article 609-bis.
54 Gian Marco Caletti, 'Italy', in this volume.
55 Austrian Criminal Code 1974, § 201–202.
56 Sebastian Mayr and Kurt Schmoller, 'Austria', in this volume.

It can thus be concluded that even if a jurisdiction has included an element of consent in the definition of rape, it seems reluctant to prescribe a specific form for the expression of consent.

It is certainly true that the circumstances in which consent to a sexual act is being given matter. In all researched jurisdictions there are rules on how consent can be expressed, whether it refers to reaching an agreement in contract law or consenting to medical procedures. However, the nature of sexual relations appears to be of a specific character and therefore any regulations on that matter, whether normative or customary, may not be that relevant. As a result, it is doubtful whether such a general understanding of the form of consent can be used in the context of consent to sexual intercourse. Indeed, context is everything.

We thus reach a conclusion that does not end with a full stop but rather with a question mark: are we able to define the ultimate *form* of expression of consent in the context of sexual relations? The answer is: most likely it is impossible. But this disappointing answer should not be considered a bad thing. Reaching the conclusion that, due to the complexity of sexual relationships, which by nature are burdened with uncertainty reflected through flirting and passion, we are incapable of delimitating with precision in what form consent should be given allows us to look for other elements of consent besides its form. Interestingly, some of the researched countries, as well as some discussed international instruments such as the Istanbul Convention or ECtHR case law, seem to highlight the "voluntariness" and the "own decision" reached by a consenting person. And this exactly mirrors the "free will" that accompanies the words or non-verbal expressions that we all and especially courts of law should be concerned with. Since free will can be expressed in various ways, it is perhaps not the consent as such and its form but the *communication* between parties that should get our attention.

This is certainly not a novel observation. Many scholars have already abandoned the idea of addressing the *form* of consent in favour of *communication*. As S. Schulhofer has explained, "situational factors often impair people's ability to express willingness or unwillingness. Thus, much sexual interaction falls into the space between 'no' and 'yes'"[57]. K. Harris also supports this position, claiming that "yes means yes" and "no means no"

57 S. Schulhofer, 'Consent: What it means and why it's time to require it' (2016) 17 (4) *University of the Pacific Law Review*, 665, 666.

are just "intentional strategic simplifications"[58]. And even though they are certainly important, the discussion on the expression of consent should not end with them. As Harris further concludes, it is exactly the communication that is key in developing the scope of consent, and that context is certainly needed to evaluate what happened between two people[59]. It is therefore crucial to emphasize the complexity of communication and simultaneously fight myths about communication in sexual relations that suggest that there is a simple and easy answer that can be narrowed down to a simple "yes". Perhaps E. Dowds is right when she proposes that the steps taken by the defendant to ascertain consent are determining his or her guilt, and the *process* of communication, not the *form* of consent as such plays a crucial role here[60].

Certainly, time should be invested in discussions on how consent might be construed and whether this should be the point of discussion of what constitutes rape. Legislative changes should not only be carefully designed but most importantly aimed at enhancing the effectiveness of the criminal process while reflecting the needs of victims and preserving the rights of the accused. In discussing the form of consent, we often forget that what remains crucial during trial is the evidence. Determining whether consent or an objection was communicated comes down to whom the court or jury will believe and who will be found reliable.

This leads us to three conclusions. First, the form of consent is impossible to be normatively regulated and narrowed down to such an extent that it would leave no ambiguity. Although attempts should be made to specify the law to the largest possible extent, prescribing an explicit definition in the law does not solve anything, simply because such a provision may be dead letter. We are not protected by paragraphs but only through their implementation by judicial authorities. Therefore, second, the context and communication are so crucial in sexual relations that they should be left for judicial discretion and decided on a case-by-case basis. Third and perhaps most importantly, to bring about real change the focus should

58 K.L. Harris, 'Yes means yes and no means no, but both these mantras need to go: Communication myths in consent education and anti-rape activism' (2018) 46 (2) *Journal of Applied Communication Research*, 155, 171.

59 ibid.

60 E. Dowds, 'Rethinking affirmative consent. A step in the right direction', in: R. Killean, E. Dowds, A.-M. McAlinden (eds) *Sexual Violence on Trial. Local and Comparative Perspectives*, (Routledge 2021), 162. See also Hörnle (note 12), 128–129 ("The central concepts for modern criminal law on sexual offences should be consent and communication").

be shifted towards education. What should be kept in mind regardless of the form of expression of consent is that legislative changes that may be introduced in that regard are not enough. To achieve real change, educational work has to be done concerning the responsibilities in sexual relations of men and boys and not only women and girls. Teaching the importance of engaging only in consensual sexual intercourse appears to be a crucial factor in changing the behaviour and habits of future generations. Additionally, the drafting of any new law should be accompanied by an information campaign, and training should be offered to police and others engaged in the criminal justice system, so that victims do not experience repeated trauma when reporting crime and testifying. This is the only way in which sexual offenders may eventually be brought to justice.