

# Particularized Consent and Non-Consensual Condom Removal

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## A. General Principle

### I. Form and range of consent

In the majority of the legal systems examined, consent to sexual relations may be given expressly or impliedly,<sup>2</sup> for example by gestures or other conclusive conduct.

Even in the case of expressly declared consent, however, hardly anyone will consent a priori to every conceivable sexual act. Rather, consent is limited to acts that are foreseeable to the consenting party under the circumstances.<sup>3</sup> Sexual acts that are not to be expected under the circumstances (in particular with regard to the persons involved), are therefore not covered by a “general”, non-specific consent. In this respect, every consent in sexual criminal law is “particularized”.

### II. Expression and circumstances of the declaration of consent

Within this framework, consent can be further specified, e.g., certain acts can be expressly excepted, conditions can be imposed, or consent can be given only to a precisely described sexual act; such restrictions are binding on the other person.<sup>4</sup> If one exceeds these limits, one acts without

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1 This text was translated with the help of deepl.com.

2 Cf. the chapters on Germany, Poland, and Sweden in this volume. Restrictions seem to exist in some Australian states, see chapter on Australia. By contrast, § 205a Austrian Criminal Code requires that the victim’s opposition to sex must be apparent; cf. chapter on Austria, with references.

3 E.g., chapter on Germany, in this volume.

4 Chapter on Germany, in this volume.

consent.<sup>5</sup> The legal systems represented here seem to agree on this point, at least Germany<sup>6</sup>, Italy<sup>7</sup> and especially Poland<sup>8</sup>, where the decision about the place, time and form of the sexual acts is understood as part of protected sexual autonomy.<sup>9</sup>

Restrictions may also arise from the circumstances of the declaration. Particularly in the case of long-term sexual relationships, the content of the declaration of consent may differ from the literal meaning, because both parties know how it is to be understood. In a continuing relationship, moreover, sexual behaviour that is generally not expected may be foreseeable for the parties and therefore be covered by the consent.<sup>10</sup>

Individual jurisdictions seem to have developed standards for unclear cases, for example, that consent to vaginal intercourse does not also include consent to anal intercourse<sup>11</sup> but possibly to touching of the breasts.<sup>12</sup> However, one must not forget that the scope of consent to sexual acts must in any event be decided case-by-case.<sup>13</sup>

### III. Subsequent extension of consent

In practice, the problem of distinguishing general consent from specific consent is less difficult than one might think. Often only limited consent is given at the beginning of sexual contact. However, this initial consent may be continuously supplemented by further – usually implied – declarations of consent. In this context, the particular importance of the victim's

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5 Cf. *Brodsky*, “Rape-adjacent”: Imagining legal responses to non-consensual condom removal, *Columbia Journal of Gender and Law* 32.2 (2017), 183, 190–191, with references to U.S. law.

6 Chapter on Germany, in this volume.

7 Chapter on Italy, in this volume.

8 Chapter on Poland, in this volume.

9 Chapter on Poland, in this volume.

10 Chapter on Germany, in this volume. The prerequisite of foreseeability is a consequence of the general principle that the consenting person must be able to recognize and properly assess the significance and scope of the consequences and risks resulting from his or her consent; *Hinterhofer*, *Einwilligung im Strafrecht* (1998), 63 with further references.

11 Chapter on Switzerland, in this volume; for a similar case, see chapter on Poland, in this volume. Cf. also *Brodsky* (note 5), 191.

12 Chapter on Switzerland, in this volume.

13 Expressly e.g., chapter on Poland, in this volume.

reaction to a proposed change in the sexual relationship and the subsequent conduct of the perpetrator is emphasised in Poland.<sup>14</sup>

If a person declares his or her consent to sexual contact at the outset without any further details, the standard for a successive extension of consent should not be too strict. It may be sufficient that the person giving consent indicates by his or her behaviour that he or she agrees to the extension of the sexual act. In Sweden, for example, it is argued that consent to a new sexual act may already result from the previous sexual act as sexual activity progresses, without the need for any further statement.<sup>15</sup> However, one clearly cannot simply assume an extension of the original consent if one partner had initially excluded certain sexual acts.

### B. “Stealthing” (Nonconsensual condom removal, NCCR)

Determining the scope of consent is crucial in the case of “stealthing”, the surreptitious removal of the condom before or during sexual intercourse.<sup>16</sup> The question arises whether such an unauthorized act has the effect that the subsequent sexual act is no longer consensual but now performed involuntarily. One can approach this question from different directions.<sup>17</sup>

#### I. Incapacity of resistance?

In Switzerland, it has been argued that the clandestine removal of the condom renders the victim incapable of forming her will or of resisting, so that the perpetrator commits the offence of defilement.<sup>18</sup> Similarly in some Australian states, the required “free and voluntary” consent of the victim is doubted in such cases.<sup>19</sup> This would have to apply, however,

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14 Chapter on Poland, in this volume.

15 Chapter on Sweden, in this volume.

16 This phenomenon received broader attention among experts through the studies of Brodsky (note 5), 183; cf. *Sagmeister*, *Stealthing verletzt die sexuelle Selbstbestimmung*, *juridikum* 2017, 296.

17 The following distinction is essentially also made by Brodsky (note 5), 190 et seq., who considers, on the one hand, the existence of another sexual act and, on the other hand, the concept of “rape by deception” (term of Brodsky (note 5), 194).

18 Chapter on Switzerland, in this volume. For this Argument cf. also Brodsky (note 5), 196–197.

19 Chapter on Australia, in this volume.

to all cases of deliberate deception, because any mistake would cause the victim to be incapable of consenting to the true facts. Moreover, it would presuppose that coitus without a condom is a sexual act different from coitus with a condom and is therefore no longer covered by the original consent.<sup>20</sup> Only if this is the case, the victim may be unable to form her will or to resist with regard to the new sexual act, which requires a new consent. However, the character of intercourse without a condom as a different sexual act is precisely the issue that needs to be clarified.

## II. *Different sexual act?*

Is sexual intercourse without a condom a sexual act different from safer sex?<sup>21</sup> German case law has assumed that this is the case whenever the perpetrator secretly removes the condom and ejaculates in the victim's body.<sup>22</sup> However, not every naturalistic deviation from the original consent may constitute a different sexual act,<sup>23</sup> and one does not continue the sexual act itself without consent only because of a slight divergence from what had been agreed. For example, the person giving consent may insist that the sexual partner shall wear uncomfortable high heels during the sexual act. If the partner removes them during the act, there is still no *other* sexual act. The delimitation of relevant and irrelevant deviations under criminal law must therefore be carried out according to normative criteria. In the case of stealthing, the fact that direct skin contact can have far more serious physical consequences than protected sexual intercourse speaks in

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20 This is at least partly assumed in Switzerland, see chapter in this volume.

21 The Italian case law seems to point in this direction, according to which consent can be lacking if the modalities deviate from the original agreement; see chapter on Italy, in this volume.

22 KG Berlin, Judgment of 27 July 2002, (4) 161 Ss 48/20 (58/20). See also *Geneuss/Bublitz/Papenfuß*, Zur Strafbarkeit des "Stealthing", Juristische Rundschau 2021, 189, 191–192 with further references in note 6; on Austria, see *Germ*, Zur Strafbarkeit von Stealthing in Österreich, Österreichische Juristen-Zeitung 2022, 511, 514.

23 KG Berlin (note 22) therefore based its decision on the "substantially different character" and the "different (sexual offence-related) legal quality of an extent that justifies punishability". Cf. *Makepeace*, Zur Strafbarkeit des "Stealthing" nach dem neuen Sexualstrafrecht, Kriminalpolitische Zeitschrift 2021, 10, 13–14.

favor of an *aliud*<sup>24</sup> since the risk of unwanted pregnancy and infection with sexually transmitted diseases (STDs) is significantly increased.<sup>25</sup> On the other hand, punishability cannot be based simply on a violation of sexual self-determination,<sup>26</sup> since it is *the scope* of this autonomy that is in question.

### III. Invalid consent due to deception or error?

Some of the legal systems examined assume that stealthing causes a lack of will that eliminates the initial consent.<sup>27</sup> According to this view, effective consent is lacking not (only) because the sexual act performed deviates from the one agreed upon, but because the victim's mistake about the use of the condom renders the original consent invalid from the beginning. In some jurisdictions, these considerations give rise to criminal liability on the basis of "rape by deceit".<sup>28</sup> This seems particularly apt if the victim declared before or at the start of sexual intercourse that he or she wants it only if a condom is used, and the perpetrator deliberately deceives the victim about his intentions. However, even if the perpetrator makes a spontaneous decision to remove the condom after consent has been given and during sexual intercourse, the victim is subject to an error that could constitute a lack of will.<sup>29</sup> The existence of such a consent-relevant error is assumed, for example, in parts of Australia<sup>30</sup> and Poland.<sup>31</sup>

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24 E.g., chapter on Germany, in this volume. Parts of Swiss doctrine also seem to favor classification as a different sexual act; see chapter on Switzerland, in this volume.

25 *Brodsky* (note 5), 190 et seq., also mainly relies on this argument for the punishability of stealthing; see also KG Berlin (note 22).

26 See KG Berlin (note 22).

27 This applies in particular to the explanatory memorandum on the Swedish Criminal Code, which considers NCCR to be an insignificant deception (chapter on Sweden, in this volume). In Poland and the U.S., stealthing is also discussed as a case of deception; see the respective chapters in this volume.

28 Cf. the arguments in the chapter on Poland, in this volume.

29 *Makepeace* (note 23), 13 argues that criminal liability should only arise if the act of unprotected sex is a different sexual act. But this view is not convincing. On the one hand, even a mistake without conscious deception might affect the validity of consent (e.g., *Hinterhofer* (note 10), 102 et seq.), and on the other hand, the continuation of the sexual act without protection could constitute implied deception.

30 Chapter on Australia, in this volume.

31 Chapter on Poland, in this volume.

However, not every error and deception will render consent invalid.<sup>32</sup> For example, pretending a false identity, noble origin, an intention to marry, etc. should not affect the effectiveness of consent.<sup>33</sup> The opinion that a mistake about the use of a condom is relevant to consent can be based on the same arguments that speak for the assumption of another sexual act: Unprotected sexual intercourse threatens serious physical consequences, in particular a higher risk of unwanted pregnancy and of contracting STDs.<sup>34</sup> These reasons that speak for an *aliud*, a different sexual act, also support the assumption of a relevant error eliminating consent. Both approaches lead to the same delimitation and therefore to the same result.<sup>35</sup>

#### IV. Analysis of the protected legal interest

It must be explained in more detail why the direct skin contact and the increased risk of unwanted pregnancy and infection with STDs are relevant but the removal of high heels or the pretension of being of noble origin are not. The reason lies in the normative character of sexual offenses. Sexual assaults are a form of inappropriate physical treatment. Sexual offenses are therefore, by their very nature, specific offenses against bodily integrity; their sexual character adds a special aspect to the protected legal interest. Sexual integrity is an aspect of physical integrity. The answer to the questions of whether the same sexual act is present and whether a mistake renders consent invalid depends on whether the deviation affects the legal

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32 See chapter on Germany, in this volume; for the inconsistent legal situation in Australia, see chapter on Australia.

33 To such and other errors and consequences under German criminal law *Hoven/Weigend*, *Zur Strafbarkeit von Täuschungen im Sexualstrafrecht*, *Kriminalpolitische Zeitschrift* 2018, 156, 157–158, and the chapter on Germany, in this volume.

34 Cf. KG Berlin (note 22); *Brodsky* (note 5), 191–192: Even if the perpetrator does not continue sexual intercourse until ejaculation, there is a risk of pregnancy and infection. For a similar result based on slightly different reasoning see *Germ* (note 22), 514.

35 *Corrêa-Camargo*, *Sexuelle Selbstbestimmung als Schutzgegenstand des Strafrechts*, *Zeitschrift für die gesamte Strafrechtswissenschaft* 134 (2022), 351, 368–369 claims, however, that the doctrine that only errors matter that relate to the legal interest protected by the offence in question cannot be applied to sex-related deceptions.

interest protected by the sexual offence.<sup>36</sup> This is always the case if the intervention has a significantly different effect on the victim's body. Stealthing affects the legally protected interest because of the risk of serious physical consequences due to the direct skin contact. Pretending to use a condom thus results in sexual intercourse being performed without consent – at least from the time when the condom has been removed. The same applies, for example, to feigning a lack of procreative capacity<sup>37</sup> or to concealing one's sexually transmissible disease when there is a real risk of infection. For the Austrian legal system, the relevant qualifications of sexual offenses confirm this aspect of legal protection. For example, rape is punished much more severely if it results in grievous bodily harm (§ 84 para. 1 Austrian Criminal Code) or pregnancy of the person raped. The sexual offenses in the Austrian Criminal Code therefore clearly also protect physical integrity and against unwanted pregnancy.<sup>38</sup> In order to avoid gaps in criminal liability, the abstract possibility of causing pregnancy or infection should be sufficient to constitute a sexual offense.

#### V. Legal consequences

Based on the arguments put forward here, effective consent to sexual intercourse is lacking in the case of stealthing. Whether and according to which offense definition the nonconsensual removal of the condom is punishable differs according to the significance of consent in sexual relations in each jurisdiction's criminal law. If only consent has the effect of exempting a person from punishment (“only yes means yes”)<sup>39</sup>, the offender may be liable for rape – as under the Israeli concept of “rape by deception”.<sup>40</sup>

If, on the other hand, rape and similar offences require a special modality of the act, such as the use of force or coercion, these offence definitions

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36 Some German scholars have correctly pointed out that the legal interest protected by the sexual offense is decisive for the question whether a deception is relevant; cf. *Corréa-Camargo* (note 35), 366–367 with further references.

37 Cf. *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 375 (Ct. App. 1983), cited in *Brodsky* (note 5), 192. A different assessment applies under § 205a Austrian Criminal Code; see *Germ* (note 33), 513 and for Germany *Corréa-Camargo* (note 35), 375.

38 Even if protection against unwanted pregnancy is only a minor aspect of sexual self-determination; cf. *Germ* (note 33), 512.

39 For this concept in England and Wales cf. *Hoven/Weigend* (note 33), 156.

40 As to this concept, see *Brodsky* (note 5), 194 with further references and *Hoven/Weigend* (note 33), 157. Cf. also the chapter on Sweden, in this volume.

are usually not met. However, subsidiary offences may apply, which sanction the non-consensual sexual act as such.<sup>41</sup> In Austria, for example, the lack of consent can give rise to criminal liability for “violation of the right to sexual self-determination”<sup>42</sup> (§ 205a Austrian Criminal Code)<sup>43</sup> if the victim has indicated that he or she only consents to protected sexual intercourse.<sup>44</sup> In this case, the perpetrator commits the crime because he performs the sexual intercourse “against that person’s will”<sup>45</sup>.

In Switzerland, a verdict of rape in a Stealthing case was reversed and the perpetrator was convicted of “defilement” because the court assumed that the victim was unable to properly form a will or to resist.<sup>46</sup>

In addition to a sexual offence, the perpetrator may also be guilty of an offence against public health (especially §§ 178, 179 Austrian Criminal Code) if the sexual act can lead to transmission of special STDs. If the unprotected sexual intercourse causes a real risk of disease transmission or even harms the victim’s body or health, offences against the life and limb of individuals may apply.

In 2021, California became the first U.S. state to enact an explicit civil law provision for stealthing cases.<sup>47</sup> Pulling off the condom without the consent of the other person during the act thus entitles the victim to claim damages but does not seem to create a (further) basis for criminal prosecution.<sup>48</sup>

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41 E.g., § 177 para. 1 German Criminal Code; see KG Berlin (note 22).

42 Translation by *Schloenhardt/Höpfel*, Strafgesetzbuch. Austrian Criminal Code (2016), 270.

43 Cf. the chapter on Austria, in this volume, with references.

44 *Germ* (note 22), 515–516.

45 Translation by *Schloenhardt/Höpfel* (note 42), 270; *Germ* (note 22), 515–516.

46 With reference to this decision, *Sagmeister*, *juridikum* 2017, 296.

47 *Paz*, California makes Stealthing or removing condom without consent illegal, *New York Times*, October 8, 2021, <https://www.nytimes.com/2021/10/08/us/stealthing-illegal-california.html> (accessed October 17, 2022); Cf. also the chapter on the U.S., in this volume.

48 *Stewart*, CNN, October 15, 2021, <https://edition.cnn.com/2021/10/15/opinions/stealthing-california-law-michaela-coel-stewart/index.html> (accessed October 17, 2022); *Anguiano*, “Stealthing”: California poised to outlaw removing condom without consent during sex, *The Guardian*, September 9, 2021, <https://www.theguardian.com/us-news/2021/sep/09/california-stealthing-ban-remove-condom-sex> (accessed October 17, 2022); *Chesser*, In an Australian first, stealthing is now illegal in the ACT. Could this set a precedent for the country?, *The Conversation*, October 12, 2021, <https://theconversation.com/in-an-australian-first-stealthing-is-now-illegal-in-the-act-could-this-set-a-precedent-for-the-country-169629> (accessed October 17, 2022).