

Austria

Sebastian Mayr, Kurt Schmoller¹

A. Social and legal background

1. Sexuality and gender equality in society

The historical development of Austrian criminal law on sexual offences reflects the change in society's approach to sexuality – from extensive taboo until the 1960s to respect for and protection of the sexual autonomy of each individual.² Originally intended to preserve public morals,³ the criminal law on sexual offences now primarily protects the right to make self-determined decisions about the nature and extent of sexual activity.⁴ In addition, criminal law is to guarantee adolescents an undisturbed sexual development,⁵ which is understood as part of the development of the personality.⁶

Gender equality *before the law* is constitutionally guaranteed in Article 7 para. 1 of the Federal Constitutional Law, and the state is committed to providing *de facto* equality of men and women in para. 2 of this Article. Although numerous laws have been passed to reach this goal, especially

1 We thank teaching assistant Johanna Hiesleitner MSc, LLB.oec for her support on this report. This text was translated with the help of deepl.com.

2 Cf. *Kienapfel/Schmoller*, Strafrecht Besonderer Teil III² (2009) Vorbem §§ 201 ff. recital 4 f.

3 Cf. for example the explanatory memorandum in 105 BlgNR (attachment to stenographic minutes of the National Council) 6. GP (legislative period), 4 on the Pornography Act 1950 (translated): “Such expressions of an unbridled will to live and a striving to free oneself from traditional ties have, as world history shows, been the regular consequence of every great catastrophe of mankind”.

4 Cf. the headline of the 10th division of the Austrian Criminal Code (ACC) “Offences against sexual integrity and self-determination”, translation by *Schloenhardt/Höpfel*, Strafesetzbuch. Austrian Criminal Code (2016), 266.

5 Mainly by the offences against the sexual abuse and exploitation of minors in §§ 206 ff. ACC.

6 Grundsatzterlass Sexualpädagogik (Basic Decree on Sex Education), BMBF-33.543/0038-I/9d/2015.

the Federal⁷ and State Acts on Equal Treatment⁸, further efforts are needed to accomplish it.⁹ In addition to the desired equalisation of incomes on the labour market – the gender pay gap has slightly decreased¹⁰ – the protection against misogynist and sexualised violence is dominating the public discourse.¹¹

While sexual liberation and the liberalisation of criminal law on sexual offences originally proceeded in parallel with the quest for legal equality of the sexes, the expansion of the criminal law is increasingly seen as a means to enforce equality in practice. Sexual violence is understood as a patriarchal instrument for the oppression of women, who are disproportionately affected by sexual offences.¹² The legislature has taken this into account most recently when passing the Protection Against Violence Act 2019¹³ and the extension of the punishability of joint sexual harassment.¹⁴ Criminal law is meant to combat new, socially undesirable phenomena and increase their rejection by the public.¹⁵ This development increasingly

7 Of particular importance is the prohibition of direct and indirect gender-based discrimination in employment (§ 4 of the Federal Act on Equal Treatment).

8 Gleichbehandlungsgesetze (GIBG).

9 Cf. the statement of the Council of Europe Commissioner for Human Rights on Austria, 2021. https://www.coe.int/de/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/austria-should-step-up-efforts-to-protect-women-s-rights-and-gender-equality-and-improve-the-reception-and-integration-of-refugees-asylum-seekers-and-?_101_INSTANCE_ugj3i6qSEkhZ_languageId=en_GB (accessed October 17, 2022).

10 Statistics Austria analysis of income-related gender statistics 2019, https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/soziales/gender-statistik/einkommen/index.html (accessed October 17, 2022).

11 The increase in murders of women in the first half of this year caused general concern, cf. e.g., *Hagen, Ruep and Scherndl*, *Femizide in Österreich: Land der toten Frauen*, *Der Standard*, May 6, 2021, <https://www.derstandard.at/story/2000126439940/femizide-in-oesterreichland-der-toten-frauen> (accessed October 17, 2022).

12 Cf., e.g., the contributions to the parliamentary debate, stenographic minutes of the 6th session of the National Council of 11.12.2019, 27. GP, 30 f.

13 *Gewaltschutzgesetz 2019*, BGBl. (Federal law gazette) I no. 105/2019, which implements the guiding principle of “tougher sentences for sexual and violent offenders” of the government programme from 2017, IA (initiative application of members of the National Council) 970/A 26.GP, 23.

14 Specifically, sexual harassment in § 218 of the ACC was supplemented by two additional paragraphs by BGBl. I no. 117/2017.

15 Currently, for example, there are calls for the criminalisation of so-called “catcalling”, where a person is harassed in public space with obscene slogans, cf. e.g. *Saoud, Lettner and Çelik*, *Musikerin Christl: “Catcalling sollte nicht zu unserem Alltag gehören”*, *Der Standard*, June 3, 2021, <https://www.derstandard.at/story/20>

brings sexual offences again closer to a moralising criminal law, from which the legislature deliberately distanced itself with the Austrian Criminal Code (ACC) 1975 and in the following decades.¹⁶

The renunciation of a moralising criminal law on sexual offences from the 1970s onwards¹⁷ can be seen, for example, in the decriminalisation of homosexual acts and the comprehensive protection of male sexual self-determination. For example, the convergence of the age of consent for heterosexual and homosexual acts among men in 2003¹⁸ eliminated the last gender-specific discrimination.¹⁹ Prior to this, the criminal offences of rape and sexual coercion in §§ 201 f. ACC were deliberately formulated in a gender-neutral way by an amendment in 1989,²⁰ and subsequently the criminal prohibition of homosexual prostitution was repealed.²¹

2. Purpose of criminal law on sexual offences

a) Protected interests in sexual criminal law

The ACC consolidates the central sexual offences under the heading “Offences against sexual integrity and self-determination”²², thus emphasising their orientation towards the protection of sexual autonomy.²³ Sexual violations of public decency that do not affect individual interests can be pun-

00127112366/musikerin-christl-catcalling-sollte-nicht-zu-unserem-alltag-gehoren (accessed October 17, 2022);. *Hoven/Weigend*, “Nein heißt Nein” – und viele offene Fragen, JZ 2017, 182 use the term “re-moralisation” of criminal law for Germany.

16 Cf. the development and amendments in *Kienapfel/Schmoller*, BT III² Vorbem §§ 201 ff. recital 4 f.

17 Conceptually, especially by eliminating the term “Unzucht” (fornication) *Hinterhofer* in Triffterer/Hinterhofer/Rosbaud (eds), Salzburger Kommentar zum StGB Vorbem (11. delivery 2004) §§ 201 bis 220a recital 45.

18 Entry into force on 28.2.2003, BGBl. I no. 101/2002.

19 However, not by the ordinary legislator, but by a decision of the Constitutional Court (VfGH 21.6.2002, G 6/02–11 = JBl 2002, 579), cf. *Kienapfel/Schmoller*, BT III² Vorbem §§ 201 ff. recital 55.

20 BGBl. no. 242/1989.

21 BGBl. no. 243/1989, cf. the overview of the reforms in sexual criminal law in *Kienapfel/Schmoller*, BT III² Vorbem §§ 201 ff. recital 5.

22 Cf. note 4.

23 The original title (“Criminal offences against morality”) and the respective explanatory memorandum (30 BlgNR 13. GP, 339) on the original version (“norms for the protection of a special field of general morality, namely morality in the field of sexuality”) read differently.

ished as administrative offences²⁴ but do not require a court sentence.²⁵ In this respect, the criminal offence of sexual intercourse between close relatives under § 211 of the ACC is questionable, since its antiquated title (“blood defilement”) and formulation suggest vague protected interests (“purity of blood”), while the delimitation of the criminal offence can hardly be explained rationally.²⁶

Criminal law on sexual offences protects sexual autonomy from various forms of infringement, especially from forced and other involuntary sexual acts (§§ 201, 202, 205a as well as 212 and 213 ACC). There is also protection under Austrian criminal law against the financial exploitation of sexuality (§§ 213 para. 2 and 214 – 217 ACC) and against harassment through sexual acts as well as against unwanted confrontation with sexual behaviour of others (§§ 218 and 219 ACC). Another central aspect is the protection of particularly vulnerable persons, especially children and adolescents (§§ 206 – 208a ACC), the defenceless and the mentally impaired (§ 205 ACC).²⁷

b) Criminal sanctions as ultima ratio

The focus on the protection of sexual integrity and self-determination stands in the way of defining as sexual offences conduct that only infringes

24 Cf. e.g., § 27 Salzburger Landessicherheitsgesetz (Provincial Act on Public Security).

25 The performance of a sexual act is, however, punishable by the court if it takes place in public and is, according to the circumstances, likely to cause justified annoyance through direct perception (§ 218 para. 2 ACC). At least originally, the Pornography Act (cf. fn. 3) aimed to protect public morals; although it is still in force, it has largely lost its significance due to restrictive interpretations. Assuming a protection of individual legal interests *Kienapfel/Schmoller*, BT III² Vorbem §§ 201 ff. recital 16 and *Philipp* in Höpfel/Ratz (eds), Wiener Kommentar zum StGB² (WK) (253.-255. delivery 2020), § 218 recital 1.

26 Cf. the references in *Hinterhofer/Rosbaud*, Strafrecht Besonderer Teil II⁶ (2016) Vorbem §§ 201 ff. recital 6. Rightly in favour of deleting this provision without replacement, e.g., *Hinterhofer* in Triffterer/Hinterhofer/Rosbaud (eds), Salzburger Kommentar zum StGB (SbgK) (17th delivery 2007), § 211 recital 14; *Kienapfel/Schmoller*, BT III² § 211 and *Schmoller*, Unzureichendes oder überzogenes Sexualstrafrecht? JRP 2001, 64 (82). *Philipp*, WK² § 211 recital 3 is against a deletion. Cf. *Abel*, Blut und Schande – Inzest im Strafrecht, *juridikum* 2006, 193 for a comprehensive history of the prohibition of incest.

27 *Hinterhofer/Rosbaud*, BT II⁶ Vorbem §§ 201 ff. recital 2 ff.; *Hinterhofer*, SbgK Vorbem §§ 201 bis 220a StGB recital 14 ff.

on general interests or that causes no major harm (petty cases).²⁸ Moreover, due to the severity of criminal sanctions and the stigma of conviction for a sexual offence, criminal law must only be the last resort to protect major interests. Nevertheless, the criminal law on sexual offences has been broadened step by step in the last decades and has recently been expanded to an alarming extent in both the scope of the punishability and the severity of penalties. The Criminal Law Amendment Act 2004,²⁹ in particular, raised the upper penalty limits to such an extent that in many cases even life imprisonment is possible if the perpetrator of a sexual assault thereby negligently killed the victim. This extension based only on the consequences of the act blurs the distinction between basic offences of different gravity.³⁰

In addition to the level of punishment, the scope of sexual criminal law has also been significantly enlarged. Since the ACC entered into force in 1975, the offence of pimping has been expanded (§ 216 ACC) and dealing with child pornography (§ 207a ACC) was made a severely punishable offence.³¹ After its introduction, the criminal liability for sexual harassment in § 218 of the ACC has been gradually expanded; its paragraph 1a now covers, in addition to sexual acts, the intensive touching of a part of the body belonging to the sexual sphere if the victim's dignity is thereby violated (which covers grabbing the victim's bottom)³². The recent demand to also penalise "verbal sexual harassment"³³ demonstrates a progressive tendency towards over-criminalisation³⁴ and a surreptitious departure from the ultima ratio principle in sexual criminal law.³⁵

28 Cf. e.g. *Kienappfel/Schmoller*, BT III² Vorbem §§ 201 ff. recital 1.

29 BGBl. I no. 15/2004.

30 Cf. *Grafl/Schmoller*, Entsprechen die gesetzlichen Strafdrohungen und die von den Gerichten verhängten Strafen den aktuellen gesellschaftlichen Wertungen? Verhandlungen des 19. ÖJT 2015 III/1 (Gutachten) (2015), 128.

31 As above, note 27.

32 For example, *Philipp*, WK² § 218 recital 2 and 19/7.

33 Cf. above note 13.

34 Cf. *Grafl/Schmoller* (note 30); on German criminal law *Hoven/Weigend* (note 15), 183.

35 A consequence of this principle is the structure of sexual harassment according to para. 218 subsecs. 1 and 1a ACC as "Ermächtigungsdelikt", which may not be prosecuted without the consent of the injured person (para. 218 subsec. 3 ACC); *Philipp*, WK² § 218 recital 4.

3. Overview of sexual coercion offences

Within the meaning of the “Offences against liberty”³⁶ (esp. § 105 ACC), coercion means bringing about the victim’s conduct by force or by threats directed against certain legal interests and able to cause the victim justified concern (“dangerous threat”³⁷, § 74 para. 1 no. 5 ACC).³⁸ The same means of action are required for *sexual coercion* under § 202 ACC, and stronger means are required for *rape* under § 201 ACC (violence, deprivation of liberty, threat of present danger to life or limb). Both offences are therefore sexual coercion offences in a narrow sense. All other sexual offences are not directly related to violence or threats but for the most part contain elements of coercion since they are to protect sexual self-determination from unacceptable influence. A large proportion of sexual offences are therefore “coercive offences” in a broader sense³⁹ and are intended to protect against sexual acts without the effective consent of the victim.

Coercion in a narrow sense to perform sexual acts is punished by the highest penalties in §§ 201, 202 ACC. The level of punishment is due both to the intensity of the means of coercion and the forced sexual act. Serious consequences of the act, such as the victim’s injury or death, have an aggravating effect on the punishment if caused at least negligently. The basic offence of rape (§ 201 para. 1 ACC) has the highest penalty range (two to ten years of imprisonment); it is defined as coitus or an equivalent sexual act brought about by violence, deprivation of liberty, or threat of a present danger to life or limb. For example, a person commits rape if he or she coerces the victim to perform vaginal intercourse (coitus) or oral intercourse

36 Translation by *Schloenhardt/Höpfel*, Austrian Criminal Code, 136.

37 Translation by *Schloenhardt/Höpfel*, Austrian Criminal Code, 113.

38 The offence of coercion in § 105 para. 1 ACC reads as follows: “Any person who coerces another to do, acquiesce, or omit to do an act by use of force or dangerous threat is liable for imprisonment for up to one year or a fine not exceeding 720 penalty units.” (Translation by *Schloenhardt/Höpfel*, Austrian Criminal Code, 242). Dangerous threats are legally defined in § 74 para. 1 (5) ACC as a threat of injury to body, freedom, honour, property (or the most personal sphere of life by making accessible, disclosing or publishing facts or images). The threat has to be likely to cause well-founded fears with regard to the circumstances and the personal condition of the threatened or the importance of the threatened evil. It is thereby of no regard whether the threatened evil is directed against the threatened person himself or herself, against his or her relatives or against other persons placed under his or her protection or persons personally close to him or her, *Jerabek/Ropper/Reindl-Krauskopf/Schroll* in Höpfel/Ratz (eds), *Wiener Kommentar zum StGB*² (delivery 2021) § 74 recital 27.

39 Except for incest, § 211 ACC.

(equivalent sexual act)⁴⁰ by beating (violence) or threatening to strangle the victim on the spot (imminent, present danger to life). The perpetrator of sexual coercion under § 202 para. 1 ACC is punished less severely if he forces the victim to perform other sexual acts⁴¹ or utters less serious threats, e.g., to the victim's property or honour. The effective consent of the victim to coitus or other sexual acts negates the offences of rape and sexual coercion, because they require forced sexual behaviour.⁴²

By the Criminal Law Amendment Act 2015⁴³, the legal protection against involuntary sexual acts has been expanded considerably. According to the new § 205a ACC, anyone who engages in sexual intercourse or an equivalent sexual act with a person (1.) against that person's will, (2.) taking advantage of a predicament or (3.) after prior intimidation is punishable for "violation of the right to sexual self-determination".⁴⁴ Sexual intercourse or an equivalent sexual act include vaginal and oral intercourse as well as vaginal penetration with objects.⁴⁵ This offence does not require that the perpetrator overpowers the victim's will by any particular means.⁴⁶ The perpetrator acts "against the will" of the victim not only where he or she expressly objects, but also where the victim's non-consent is known to the perpetrator.⁴⁷ If, on the other hand, there is consent, it is conceptually impossible to act against the will of the person concerned.

The abuse of defenceless and mentally impaired persons is punishable by severe penalties if the perpetrator takes advantage of their condition to perform coitus or an equivalent sexual act (§ 205 para. 1 ACC) or any other

40 Cf. *Kienapfel/Schmoller*, BT III² Vorbem §§ 201 ff. recital 54 ff. with further references.

41 A sexual act only occurs when a primary or secondary sexual characteristic is touched intensively; OGH (Oberster Gerichtshof, Supreme Court) JBl 1990, 807; *Hinterhofer/Rosbaud*, BT II⁶ § 202 recital 10; *Hinterhofer*, SbgK § 202 recital 24; *Bertel/Schwaighofer*, Österreichisches Strafrecht Besonderer Teil II¹⁴ (2020) § 202 recital 2. Cf. on this term *Kienapfel/Schmoller*, BT III² Vorbem §§ 201 ff. recital 19 ff.

42 For example, *Philipp*, WK² § 201 recital 38 and § 202 recital 17.

43 BGBl. I no. 112/2015.

44 Translation by *Schloenhardt/Höpfel*, Austrian Criminal Code, 270.

45 Cf. *Philipp*, WK² § 201 recital 20 ff.

46 In the case of the first variant of § 205a ACC ("against that person's will") the distinction between socially adequate and punishable conduct is solely the will of the victim; *Oberlaber/Schmidhuber*, Die Verletzung der sexuellen Selbstbestimmung gemäß § 205a StGB, Österreichische Richterzeitschrift (ÖRZ) 2015, 175.

47 *Oberlaber/Schmidhuber*, (note 46); 689 BlgNR 25. GP, 34 gives the example that the victim begins to cry. Cf. also § 177 of the German Criminal Code, which refers to the "noticeable" will of the victim, and *Hoven/Weigend* (note 15), 183 ff.

sexual act (§ 205 para. 2 ACC). Sexual abuse of juveniles under § 207b para. 1 ACC has a certain proximity to sexual coercion offences if the lack of maturity of a person under 16 years of age and the perpetrator's age-related superiority are exploited for sexual acts. Coercion elements are also contained in § 207b para. 2 ACC, which requires the exploitation of a minor's predicament. § 212 ACC similarly penalises "taking advantage" of certain positions of authority, such as that of a chaplain or educator,⁴⁸ if the person in authority thereby causes a sexual act to be performed by or on the victim.⁴⁹ The victim's "consent" is irrelevant in all these cases because the perpetrator takes advantage of circumstances that prevent the victim from forming a free will and therefore does not obtain his or her effective consent. From the victim's point of view, the sexual act is "involuntary".⁵⁰

The production of pornographic images of minors by use of severe force according to § 207a para. 2 subset 2, 1st case ACC is also a sexual coercion offence. The same applies to coercion to prostitution or to participation in pornographic depictions under § 106 para. 1 (3) ACC – which, however, is not classified as a sexual offence but as an offence against liberty.

4. *Consent in criminal law*

The ACC does not contain any general provision on consent in criminal law; its effect and scope result from the interpretation of individual offences.⁵¹ § 90 ACC, however, expressly regulates consent for the offences of bodily harm; these offences are not committed unlawfully if the injured person consents and the injury is not immoral.⁵²

a) *Dogmatic classification*

The effective consent of a person who can dispose of the interest in question eliminates criminal liability because either no statutory offence is

48 *Kienapfel/Schmoller*, BT III² §§ 212 – 213.

49 Cf. on the regulation in detail and on the special intent requirements § 212 paras 1 and 2 ACC.

50 *Hinterhofer*, SbgK Vorbem §§ 201 bis 220a StGB recital 15.

51 For the preconditions of effective consent elaborated in the literature, cf. B. below.

52 Other provisions refer to consent, for example §§ 96, 98, 102 or 169 StGB; with further references *Kienapfel/Höpfel/Kert*, AT I¹⁶ recital 15.55.

committed or the act is justified.⁵³ Whether consent negates or justifies an offence depends on the wording and the interpretation of that offence. The wording of some offences negates the possibility of consensual commission, e.g., if the definition provides that the offender “coerces” (e.g., §§ 105, 201 f. ACC⁵⁴), acts “against the will” of the victim (§ 205a ACC) or acts “without the consent of the person entitled” (§§ 110, 136 para. 1 ACC); this is referred to as assent negating the offence.⁵⁵ The same applies if a criminal offence requires a “deprivation of liberty” (§ 99 ACC), a “kidnapping” (§§ 100 et seq. ACC) or a “privation” (§ 127 ACC). By contrast, consent may eliminate the unlawfulness of the act (consent in the narrow sense) if the wording of the offence also covers consensual commission, such as in the offences of bodily injury in §§ 83 ff. ACC.⁵⁶ It is disputed whether consent to damage to property (§ 125 ACC) negates the offence⁵⁷ or justifies it.⁵⁸

The victim’s consent does not exempt the perpetrator from conviction where the definition of the offence implies consent (e.g., homicide on demand of the victim, § 77 ACC) or where the purpose of the norm (e.g., due to the victim’s particular vulnerability) requires punishment even in the case of consent.⁵⁹ In general, individuals cannot effectively consent to an act or a result if the offence also protects general legal interests⁶⁰ or is intended to protect individual rights of an indeterminate number of persons (e.g., public health or the health of an unlimited group of persons, § 178 ACC).⁶¹

53 E.g. *Hinterhofer* in *Hinterhofer* (ed), *Praxishandbuch Untreue* (2015), 126 f.

54 Cf. E.g. *Philipp*, WK² § 201 recital 38.

55 E.g. *Steininger*, *Strafrecht Allgemeiner Teil* I³ 11/91 with further references.

56 Cf. *Hinterhofer*, *Einwilligung im Strafrecht* (1998), 10 ff. with further references on the state of opinion in literature. In the following, the term “consent” is used in a broader sense that includes assent excluding an offence.

57 This is the prevailing opinion in literature and jurisdiction, cf. OGH EvBl 1986/50 and *Kienappfel/Schmoller*, *Strafrecht Besonderer Teil II*² (2017) § 125 recital 57 with further references.

58 Cf. *Fuchs/Zerbes*, *Strafrecht Allgemeiner Teil* I¹¹ (2021) 16/5.

59 Cf. *Hinterhofer*, *Einwilligung im Strafrecht*, 42 ff.

60 *Steininger*, AT I³ 11/93; for a different opinion cf. *Triffterer*, *Strafrecht Allgemeiner Teil*² (1994) 11/151, according to whom the individual interest must merely outweigh the general interest.

61 Referring to general interest cf. *Murschetz* in *Höpfel/Ratz* (eds), *Wiener Kommentar zum StGB*² (279th Delivery, 2020) § 178 recital 1 u 6; *Flora* in *Triffterer/Hinterhofer/Rosbaud* (eds), *Salzburger Kommentar zum StGB* (20. Delivery 2009) § 178 recital 38. Referring to an indeterminate number of affected persons *Kienappfel/Schmoller*, BT III² §§ 178–179 recital 16.

b) *Principle of autonomy*

A liberal criminal law protects individual rights only in the interest of their holders⁶² – exempting consented acts from punishment is therefore an expression of the autonomy of the individual to dispose of their own legal positions and to renounce them.⁶³ Consent to the violation of individual legal rights, however, is ineffective if the need for protection against hasty decisions outweighs the need for temporary autonomy.⁶⁴ For example, consent to sterilisation can generally only be given after the age of 25 (§ 90 para. 2 ACC). Consent to genital mutilation never has the effect of exempting a person from punishment (§ 90 para. 3 ACC). The scope and limits of consent derive conclusively from the concept of autonomy.

c) *Limits of consent*

Effective consent must be declared externally before the offence is committed.⁶⁵ Consent presupposes that the declarant can dispose of the legal interest protected by the penal provision⁶⁶ and is capable of recognising and assessing both the value of this legal interest and the consequences of his consent.⁶⁷ This is not the case, in particular, if the formation of the person's will has been illicitly influenced by others.

Under these conditions, consent is in principle effective even if it appears incomprehensible or unreasonable to third parties – the core of the right to self-determination is precisely to be able to disregard the opinions of others.⁶⁸ However, according to § 90 ACC, consent to bodily harm and threats to physical safety can only be given to a limited extent: The injury or endangerment must not in itself be contrary to *boni mores*.⁶⁹ One can

62 Consent means in this context a conscious waiver of legal protection, *Steininger*, AT I³ 11/89 and 290.

63 "Recognition of the individual's right to self-determination", *Hinterhofer*, Einwilligung im Strafrecht, 8.

64 *Schmoller*, Sterbehilfe und Autonomie – Strafrechtliche Überlegungen zum Erkenntnis des VfGH vom 11.12.2020, Juristische Blätter (JBl) 2021, 147 (152 et seq.).

65 Prevailing opinion, cf. e.g., *Triffterer*, AT² 11/161 with further references.

66 *Hinterhofer*, Die Einwilligung im Strafrecht, 23.

67 *Kienapfel/Höpfel/Kert*, Strafrecht Allgemeiner Teil I¹⁶ (2020) recital 15.71 with further references.

68 *Hinterhofer*, Die Einwilligung im Strafrecht, 69 et seq. with further references.

69 On sterilisation or genital mutilation, see above b).

without any additional requirements consent to minor bodily injuries.⁷⁰ Yet, as a matter of principle, the infliction of serious bodily injuries is against *boni mores* and therefore cannot be consented to,⁷¹ except in cases where the serious bodily injury serves a specific, legally accepted interest, such as the removal of an organ for transplantation. In this assessment, not only positive law but also moral values recognised in the community must be taken into account.⁷²

B. Prerequisites for consent to sexual acts

1. Capacity to consent

a) Age of consent

In the Austrian criminal law on sexual offences, different age limits (“age of consent”) apply to consent to sexual acts. Children, i.e., persons who have not yet reached the age of 14 years, cannot effectively consent to sexual acts. There is, however, no criminal punishment⁷³ for sexual abuse of children if the victim is of a minimum age,⁷⁴ there is only a small age difference between the perpetrator and the victim,⁷⁵ and the victim has neither been treated cruelly nor has been particularly humiliated for a long period, nor have serious consequences occurred. The lack of “consent” of a child victim of sexual acts is significant insofar as the offences of rape and sexual coercion (§§ 201 f. ACC) can apply – in addition to the sexual abuse of children – when violence or threats have been used.⁷⁶

Juveniles under the age of 16 years are protected from exploitation of their lack of maturity by § 207b para. 1 ACC and from endangerment of their moral and mental development by § 208 ACC. If the victim has not

70 On this differentiation according to the severity of the injury cf. e.g., *Kienapfel/Schroll*, Strafrecht Besonderer Teil I⁴ (2016) § 90 recital 55 ff. with further references.

71 Cf. 30 BlgNR 13. GP, 221.

72 *Schütz* in *Höpfel/Ratz* (eds), Wiener Kommentar zum StGB² (149th delivery 2016) § 90 recital 69.

73 The offence is nevertheless committed illegally and culpably, but punishment is exempted, cf. e.g., *Kienapfel/Schmoller*, BT III² §§ 206 – 207 recital 5 and 40; *Hinterhofer/Rosbaud*, BT II⁶ § 206 recital 14 and § 207 recital 10.

74 At least twelve (§ 207 para. 4 ACC) or thirteen (§ 206 para. 4 ACC) years of age.

75 Not more than three (§ 206 para. 4 ACC) or four years (§ 207 para. 4 ACC).

76 Cf. e.g., *Hinterhofer/Rosbaud*, BT II⁶ § 206 recital 16.

yet reached the age of 18 years, anyone who takes advantage of a predicament for sexual acts commits sexual abuse of juveniles (§ 207b para. 2). In both cases, the “consent” of the particularly vulnerable juvenile does not exempt the perpetrator from punishment.⁷⁷

Similarly, children and juveniles cannot give legally valid consent to the production of pornographic images and their dissemination (§ 207a ACC) or to sexual acts for payment (§ 207b para. 3 ACC).

b) Capacity of insight and judgment

Any consent requires that the declaring party is able to recognise and assess the value of the legal interest concerned and the consequences of the consent.⁷⁸ In contrast to capacity under civil law, however, no comprehensive capacity is required,⁷⁹ but only a natural, offence-specific capacity of recognition and assessment.⁸⁰ This presupposes a certain degree of mental maturity, which may be lacking even if the age of consent has been reached, for example if the person giving consent is mentally retarded or intoxicated.⁸¹ Whether drunk persons can consent to sexual acts depends on the circumstances of the individual case,⁸² especially on the degree of alcoholisation.⁸³

Neither §§ 201–202 nor § 205a ACC focus on explicit consent but require coercion or at least acting against the will of the victim. Ineffective consent therefore does not directly establish criminal liability for these offences.⁸⁴ A perpetrator can commit the offence under § 205 ACC only if he or she takes advantage of the condition of a defenceless person or of a per-

77 This follows the idea that these groups cannot – depending on the situation – exercise their right to sexual self-determination at all or only to a limited extent, *Philipp*, WK² § 207b recital 5 with further references.

78 *Triffterer*, AT² 11/164.

79 Cf. *Steininger*, AT I³ 11/93.

80 *Kienapfel/Höpfel/Kert*, AT¹⁶ recital 15.71; *Hinterhofer*, *Einwilligung im Strafrecht*, 82 ff; *Zipf*, *Die Bedeutung und Behandlung der Einwilligung im Strafrecht*, ÖJZ 1977, 379 (384).

81 E.g. *Schütz*, WK² § 90 recital 33.

82 Cf., e.g., *Steininger*, AT I³ 11/93 with further references.

83 According to *Kienapfel/Höpfel/Kert*, AT¹⁶ recital 15.72, however, the consent of drunk persons should only be legally effective in exceptional cases.

84 The situation is different if the perpetrator intoxicates the victim and forces him or her to perform sexual acts in an intoxicated state; *Hinterhofer/Rosbaud*, BT II⁶ § 201 recital 8 with further references.

son who is not (or no longer) capable of understanding or acting due to mental impairment to abuse the victim for sexual acts. Mentally impaired persons are persons suffering from mental illness, mental disability, a profound disorder of consciousness, or an equivalent serious mental disorder.

2. *Form of consent*

Consent is an expression of will which appears externally in the behaviour of the person waiving legal protection.⁸⁵ This declaration can be explicit or implied, i.e., expressed non-verbally through conclusive behaviour.⁸⁶ In the case of sexual coercion offences, the preconditions for effective consent are regarded restrictively⁸⁷ – violence and threats indicate a lack of consent. Consent is not given, for example, if the victim merely does not defend himself or herself after having explicitly expressed his or her rejection of the sexual act.⁸⁸ Ambiguous statements also do not usually constitute consent.⁸⁹

3. *Ineffective consent*

If the perpetrator uses violence or threatens the victim in order to make him or her sexually submissive, the victim's "assent" does not constitute effective consent. Even if the victim tolerates the perpetrator's sexual acts, he commits rape or sexual coercion if the threat⁹⁰ could give the victim reason for concern and was directed against specific, important legal interests. Influencing the victim's will ("intimidation"⁹¹) below this threshold may be punishable as a violation of sexual self-determination under § 205a ACC if coitus or an equivalent sexual act is performed.⁹²

85 *Schütz*, WK² § 90 recital 30.

86 Prevailing opinion, cf., e.g., *Triffiterer*, AT² 11/161 with further references. Especially for § 205a ACC punishability should not depend on this mere inner will, 689 BlgNR 25. GP, 34.

87 *Philipp*, WK² § 201 recital 39.

88 Cf. note 70 with reference to OGH 5.3.2015, 12 Os 9/15p.

89 Cf. note 70.

90 Cf. note 32.

91 "Einschüchterung"; on this term, which is below violence and dangerous threat cf. *Philipp*, WK² § 205a recital 15.

92 *Hinterhofer/Rosbaud*, BT II⁶ § 205a recital 7.

In principle, obtaining consent by deception does not make a sexual act punishable. Although the victim cannot form his or her will without defects when false facts are pretended, the perpetrator only performs the sexual act “against the will” of a person in the case of *deception related to legal interests*.⁹³ A violation of sexual self-determination under § 205a ACC is committed if the victim is led to believe that vaginal penetration with an object is a necessary medical treatment, but not if a person is persuaded to engage in sexual acts by a false promise of a reward.⁹⁴ Errors that do not concern the sexual act as such but only the intention (willingness to marry, interest in a long-term relationship), person (noble origin, wealth), or other circumstances of the partner (sincere, unmarried, faithful) or third parties do not affect the validity of consent. The situation is different if the victim is not deceived about characteristics of the sexual partner, but about the identity of the person with whom he or she is having sexual intercourse (e.g., by pretending to be the victim’s spouse in the dark). In such cases, an error is relevant to the protected legal interest and makes the sexual act a punishable interference with sexual self-determination.

4. Significance of consent

Only minors, mentally impaired and defenceless persons are comprehensively protected against non-consensual interference with their sexual self-determination. In all other cases, the perpetrator is only liable to prosecution if he uses force, threatens, intimidates the victim, exploits the victim’s predicament, or at least acts against the victim’s will. Coitus or equivalent sexual acts, however, are only committed against the victim’s will as defined in § 205a ACC if the victim’s rejection is expressed in a way that it is recognisable.⁹⁵ It is not the consent that must be declared, but the opposing will – a mere internal rejection is not sufficient.⁹⁶ Whether the victim

93 *Hinterhofer/Rosbaud*, BT II⁶ § 205a recital 7. For details on the deception related to legal interests *Hinterhofer*, *Einwilligung im Strafrecht*, 97 et seq. Generally in favour of criminal liability in the case of deceptive consent, *Oberlaber/Schmidhuber*, ÖRZ 2015, 178.

94 *Hinterhofer/Rosbaud*, BT II⁶ § 205a recital 7: Inducing minors to engage in sexual acts directly against payment, however, is punishable under § 207b para. 3 ACC. The opposing view (*Oberlaber/Schmidhuber*, ÖRZ 2015, 178) also subsumes cases of false promises (“I’ll get you a career as a photo model”) under § 205a ACC.

95 *Oberlaber/Schmidhuber*, ÖRZ 2015, 175.

96 Sceptic about this *Tipold* in Leukauf/Steininger, *Strafgesetzbuch. Kommentar*⁴ (2017), § 205a recital 9.

in fact declared his or her refusal of sexual acts or there was only a sham protest is to be judged according to the circumstances of the individual case – in principle, however, a refusal is to be taken seriously.⁹⁷ There is no action “against the will” of a person, for example, if the apparent protest is part of a consensual, agreed-upon ritual between partners.

C. Scope of consent to sexual acts

1. Time of consent and revocation

Consent can be validly given only before the relevant act has been performed.⁹⁸ Subsequent consent to a sexual act that was involuntary at the time of the offence, or forgiveness of it, do not affect criminal liability under §§ 201 ff. ACC.

Conversely, the victim’s remorse after the sexual act about the previously declared consent does not cause the partner’s criminal liability for a sexual offence. Nevertheless, once consent has been given, it can be revoked at any time without reason or form until the end of the sexual act, e.g., during coitus.⁹⁹ As long as such a revocation has not been expressly or impliedly declared, the continuation of the sexual act remains lawful even if the victim now inwardly rejects it.¹⁰⁰ If, on the other hand, the offender objectively could have noticed the revocation, a sexual offence may be committed if and as soon as he has corresponding intent.¹⁰¹ For example, if the perpetrator after some time during the initially consensual coitus notices that the victim is crying, he commits the offence under § 205a ACC if he continues the coitus. If in this situation he uses force to make the crying victim comply with his wishes, he commits rape (§ 201 ACC).

97 In the case of sexual coercion offences, consent is only cautiously assumed, cf. note 70.

98 Prevailing opinion, cf., e.g., *Triffterer*, AT² 11/161 with further references.

99 The revocability of consent depends on the legal interest protected by the offence (*Fuchs/Zerbes*, AT I¹¹ 16/32). Sexual autonomy does not allow considering the declarant to be bound to his once declared consent. This follows in particular from § 205a ACC, because the will of the victim can be formed anew at any time.

100 On the requirement of a declaration of consent in general and on the requirement of an outwardly expressed, rejecting will in the case of § 205a ACC, see above B. 2. and A. 3.

101 Thus, in the case of § 205a ACC, the perpetrator must at least seriously consider it possible and accept the fact that he is now acting against the victim’s will.

2. Extent of consent

The extent of consent is to be determined according to the concrete circumstances of the individual case; its content may also differ from the objective meaning of the declaration, especially between persons who are familiar with each other. In principle, however, consent only extends to sexual acts that are to be expected under the circumstances, but not to sexual practices that are unusual in a given situation – consent only covers what the person giving consent can foresee.¹⁰² Usually, initial consent to sexual acts is not granted across the board, but further statements and gestures can gradually extend a preliminary limited consent.

An offender who exceeds the scope of consent may commit a sexual coercion offence even if the victim does not notice his or her arbitrary behaviour. If a condom is secretly removed before or during coitus and the sexual act is continued unprotected, although the victim had expressly or impliedly insisted on safe sex (“stealthing”), the perpetrator acts against the victim’s will from this point on and commits an offence under § 205a ACC;¹⁰³ the victim is mistaken about circumstances relevant to the legal interest because the prohibition of sexual offences also aims to protect the victim against unwanted pregnancy and sexually transmitted diseases.¹⁰⁴ The same applies to feigning a lack of procreative capacity, e.g., due to an

102 This is a result 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, 63 (for this principle) with further references.

103 Also: *Sautner/Halbig*, in *Gewaltschutz und familiäre Krisen*, § 205a StGB recital 5; *Germ*, Zur Strafbarkeit von Stealthing in Österreich, ÖJZ 2022, 514–515.

104 Cf. the qualifications of pregnancy or grievous bodily harm of the victim in § 201 ACC. With a few exceptions (e.g., incest under § 211 ACC), sexual offences imply a “mistreatment” because like offences against life and limb, they protect against inappropriate physical force. For Austria, the question discussed for § 177 para. 1 German Criminal Code as to whether sexual intercourse without the use of a condom constitutes a “different sexual act” than “safer sex” may remain undecided (*Geneuss/Bublitz/Papenfuß*, Zur Strafbarkeit des Stealthing”. Anm zu KG Berlin 27.7.2002, (4) 161 Ss 48/20 (58/20), Juristische Rundschau (JR) 2021, 189 (191 et seq.)). The criminalisation of sexual acts against the will of the victim is – except in cases of threat and use of force – only punishable (§ 205a ACC) if the non-consensual conduct consists of coitus or an equally severe sexual act. The victim consented to coitus, but only due to deception about facts relevant to legal interests (!) and sexual self-determination was violated in a punishable manner (with the same result *Sagmeister*, Stealthing verletzt die sexuelle Selbstbestimmung, *juridikum* 2017, 296 (297)).

alleged vasectomy.¹⁰⁵ On the other hand, there is no error that eliminates consent if a sexually transmitted disease is concealed but its transmission is impossible under the concrete circumstances (“safe sex”, medical suppression of an infection, etc.).

Whether a person actively participates in the performance of the sexual act has no effect on punishability under §§ 201 et seq. ACC. The wording of the sexual offences explicitly also covers cases in which the victim is coerced or induced by the perpetrator to perform sexual acts on the perpetrator or on himself, herself, or a third party.¹⁰⁶

3. *Final refusal?*

Once consent to sexual acts has been given, it can be revoked at any time without any reason or form. The same applies to the refusal of engaging in sexual acts, as long as the will of the victim is not unduly influenced, i.e., by coercion, intimidation, or deception, and the victim is not in a situation of predicament. Persuading another person to perform or tolerate sexual acts is generally permitted; physical advances, however, may be punishable as sexual harassment under § 218 para. 1 or 1a ACC, especially if the person had explicitly refused.

D. *Intent as to absence of consent*

Criminal offences against sexual integrity and self-determination can only be committed intentionally; the ACC does not comprise any negligent sexual offences. This means that the offender must at least seriously consider the possibility of fulfilling all elements of the offence and accept that possible result.¹⁰⁷ If serious consequences of the offence, however, increase the penalty, e.g., if a rape results in pregnancy or the death of the victim (§ 201 para. 2 ACC), these circumstances are attributed to the offender if he has caused them negligently (§ 7 para. 2 ACC).

105 Against criminal liability under § 205a ACC *Germ*, ÖJZ 2022, 513.

106 Cf., e.g., § 201 para. 1, § 202 para. 1, § 205 paras 1 and 2 and § 205a para. 2 ACC.

107 Increased requirements are stipulated in § 207a para. 3a ACC regarding the punishable access to child pornography on the internet, which must be done with definite knowledge.

The sexual coercion offences require that the offender at least seriously deems it possible that he coerces the victim (§§ 201–202 ACC), that he takes advantage of his or her predicament or previous intimidation, or that he acts against the victim's will (§ 205a ACC), and accepts the requisite circumstance. In the case of offences that protect sexually vulnerable groups of persons, the intent must relate to the victim's defencelessness, psychological impairment, low age, etc. (§§ 205, 206 et seq. ACC).

A person who has sexual intercourse with another person against his or her will is punishable under § 205a para. 1, case 1 ACC only if he or she recognises the victim's (expressed) refusal, i.e., includes it in his or her intent.¹⁰⁸

The perpetrator's intention to coerce another person implies the knowledge of acting without the latter's consent.¹⁰⁹ The subjective element of rape is fulfilled, for example, if the perpetrator threatens the victim with a knife because he seriously believes that the victim may not consent to sexual intercourse, and thus accepts the possible lack of consent. If, on the other hand, the perpetrator relies on the victim's consent – even for incomprehensible reasons –, he does not intend to commit the offence as defined in §§ 201, 202 and 205a ACC. Since the courts, however, usually infer the offender's intent from external circumstances, it is hardly possible to assume a lack of intent when the perpetrator has used force, deprivation of liberty, or serious threats.¹¹⁰ Nevertheless, the absence of consent may not be assumed in principle – this would be contrary to the presumption of innocence; nor does consent have to be expressly confirmed. If the sexual assault, however, comes as such a surprise to the victim that he or she is unable to express his or her refusal, criminal liability for sexual harassment under § 218 ACC may apply.¹¹¹

E. Special status of sexual offences in criminal law

Sexual offences are subject to numerous special provisions with regard to sanctions and procedural law. For example, the early termination of proceedings without a finding of guilt if the accused fulfils certain conditions

108 E.g., *Philipp*, WK² § 205a recital 21.

109 Coercion objectively requires acting against the will of the other person, cf. *Philipp*, WK² § 201 recital 38.

110 *Hinterhofer*, Einwilligung im Strafrecht, 123.

111 *Philipp*, WK² § 205a StGB recital 8. In contrast, §§ 201–202 ACC applies if the perpetrator “assaults” the blindsided victim with violence.

(diversion), is considerably restricted in sexual offence cases. Normally, diversion can be granted for offences with a range of sentences up to five years imprisonment; for sexual offences, diversion is possible only if the maximum sentence is three years imprisonment or less.¹¹²

In the case of a conviction for serious sexual offences against minors or defenceless persons, professional or other activities in institutions with these vulnerable persons can be prohibited for an indefinite period of time (“ban on activities”, § 220b paras 1 and 2 ACC).¹¹³

Moreover, a conviction of a sexual offence is expunged after one and a half times, in serious cases after twice the period provided for other offences (§ 4a para. 1 and 2 Austrian Expungement Act). Previous convictions are hence publicly visible for a longer period of time and burden the sexual offender, especially in his professional advancement.

If the victim was a child or a juvenile at the time of the commission of the offence, the limitation period for a sexual offence does not start until the victim reaches the age of 28 years (§ 58 para. 3 (3) ACC).¹¹⁴

If a person convicted of a sexual offence or a sexually motivated act of violence¹¹⁵ is conditionally released from prison or from a preventive measure,¹¹⁶ it is possible to place him or her under “judicial” supervision to prevent further delinquency; the enforcement of supervision may be entrusted to the police (§ 52a ACC).

Finally, the Protection against Violence Act 2019¹¹⁷ provides that prison sentences imposed for rape under § 201 ACC can no longer be fully suspended (§ 43 para. 3 ACC).

112 Thus, of the sexual coercion offences in the narrower sense, only § 205a ACC is eligible for diversion, cf. on the other sexual offences *Schroll/Kert* in Fuchs/Ratz (eds), *Wiener Kommentar zur StPO* (297. delivery 2019) § 198 recitals 6 and 12. Opposing the exclusion of diversion for §§ 202 and 205 ACC *Kienapfel/Schmoller*, *BT III*² Vorbem §§ 201 ff recital 85.

113 The prerequisite is that such activity was already carried out or at least intended at the time of the offence and that there is a danger that the activity will be used to commit further such offences with not merely minor consequences.

114 The same applies to criminal offences against life and limb and against freedom.

115 These are offences against life and limb or freedom if committed for the purpose of sexual arousal or sexual gratification (§ 52a para. 1 (2) ACC).

116 In particular, mentally abnormal offenders can be housed in institutions for an indefinite period of time by the criminal court if they are still dangerous (§ 21 ACC).

117 BGBl. I no. 105/2019.

F. Summary

Austrian criminal law on sexual offences protects the autonomy of each individual to decide freely on the type and extent of his or her sexual activity. A person's valid consent therefore negates the offences of rape (§ 201 ACC) and sexual coercion (§ 202 ACC). Sexual acts are punishable as crimes of coercion under § 205a ACC only if the victim declared that he or she does not consent to the act. Children, juveniles, mentally impaired persons, defenceless persons and persons in dependency, however, are particularly protected under criminal law and can consent to sexual acts only to a limited extent or not at all.

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