

# Switzerland

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## A. Background

### I. General attitude in society toward sexual relations

In Swiss society as a whole as well as in the area of sexual offences law, at least in theory, the autonomy of the individual rather than traditional rules of decency is becoming more and more the central issue. However, rape myths are still deeply engrained both in society and in the justice system.<sup>1</sup> To cite just one example: In several police advice manuals, one could until recently find advice for women on how to prevent sexual assault. One such advice was that women should not consume too much alcohol because that would make them appear to be “an easy target”.<sup>2</sup> Media coverage of sexual violence also frequently perpetuates myths and stereotypes about rape, rapists, and rape victims. When it comes to gender equality, Switzerland is not doing particularly well. According to the Global Gender Gap Report 2022, Switzerland is ranked only 47<sup>th</sup> on “Economic Participation and Opportunity”.<sup>3</sup> Despite equal opportunity laws in place, discrimination still occurs, in particular due to the traditional role assignment and division of labor between the sexes. There are still significant gaps in gender equality.<sup>4</sup>

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1 See, e.g., Miriam Suter, Karin Wenger, “*Die Einvernahme war für mich so schlimm wie die Vergewaltigung selbst*”, Republik 18.06.2020 < <https://www.republik.ch/2020/06/18/die-einvernahme-war-fuer-mich-so-schlimm-wie-die-vergewaltigung-selbst>>.

2 See, e.g., Silvan Zemp, *Kapo St. Gallen entschuldigt sich wegen Frauenratgeber*, srf-news 15.03.2021, < <https://www.srf.ch/news/schweiz/fall-sarah-everard-kapo-st-gallen-entschuldigt-sich-wegen-frauenratgeber>> (citing the manual).

3 World Economic Forum, *Global Gender Gap Report 2022*, 328.

4 See also Anne-Sylvie Dupont, Zoé Seiler, *Die direkte rechtliche Ungleichbehandlung von Frauen und Männern im Schweizerischen Bundesrecht*, Rechtgutachten, 2021.

## II. Criminal laws on sexual conduct

Title Five of the Swiss Criminal Code is entitled “Offences against Sexual Integrity”, the first subchapter is “Endangering the development of minors”, and the subchapter containing the sexual coercion offences is entitled “Offences against sexual liberty and honour”. The legislature intends, however, to delete the word “honour” as soon as possible.<sup>5</sup> According to the Federal Supreme Court, criminal laws on sexual conduct are intended to protect two legal interests: the “undisturbed sexual development of children and adolescents” and the “right to sexual self-determination”.<sup>6</sup>

In Switzerland, the importance of the *ultima ratio* principle is strongly emphasized, including by the legislature. However, the current trends in modern criminal law tend to point in a different direction. For example, criminal law has recently been toughened with regard to pornography, although the legitimacy of this offence is quite questionable.<sup>7</sup>

## III. Definition of sexual coercion offences

The legal definitions of rape and indecent assault are to be found in Art. 189 and 190 of the Swiss Criminal Code.<sup>8</sup> The articles read as follows:

### **Art. 190 Offences against sexual liberty and honour / Rape**

<sup>1</sup> Any person who forces a person of the female sex by threats or violence, psychological pressure or by being made incapable of resistance to submit to sexual intercourse is liable to a custodial sentence of one to ten years.

<sup>2</sup> Repealed.

<sup>3</sup> If the offender acts with cruelty and in particular if he makes use of an offensive weapon or any other dangerous object, the penalty is a custodial sentence of not less than three years.

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5 18.043, Strafraahmenharmonisierung und Anpassung des Nebenstrafrechts an das neue Sanktionenrecht, Vorlage 3: Bundesgesetz über eine Revision des Sexualstrafrechts, Bericht der Kommission für Rechtsfragen des Ständerates vom 17.02.2022 (hereafter cited as: Explanatory Report), BBl 2022 687.

6 See, e.g., Bundesgericht (Federal Supreme Court, BGer), 6B\_1265/2019, 9.4.2020, E. 3.5.2.

7 See, e.g., Nora Scheidegger, *Ist das noch Kinderpornografie?*, Schweizer Zeitschrift für Strafrecht 2014, 327; Anna Coninx, Nora Scheidegger, *Gewaltpornografie und moderne Sexualmoral*, Zeitschrift des Bernischen Juristenvereins 2022, 339.

8 In this chapter, Articles without further specification are those of the Swiss Penal Code.

**Art. 189 Offences against sexual liberty and honour /  
Indecent assault**

<sup>1</sup>*Any person who uses threats, force or psychological pressure on another person or makes that other person incapable of resistance in order to compel him or her to tolerate a sexual act similar to intercourse or any other sexual act shall be liable to a custodial sentence not exceeding ten years or to a monetary penalty.*

<sup>2</sup> *Repealed.*

<sup>3</sup> *If the offender acts with cruelty, and in particular if he makes use of an offensive weapon or any other dangerous object, the penalty is a custodial sentence of not less than three years.*

The Swiss Criminal Code thus defines rape as “coerced sexual intercourse” involving either violence, threats, psychological pressure or making the (female) victim incapable of resistance. Acting without the other person’s consent or even ignoring the victim’s explicit “no” is hence not sufficient to establish the elements of the sexual offence of rape or indecent assault.<sup>9</sup>

The rape provision covers only vaginal rape, whereas coerced anal and oral penetration are covered by article 189 (Indecent assault). However, the Supreme Federal Court consistently holds that the penalty for coerced sexual acts that are similar to intercourse may not be significantly lower than the penalty the judge would have imposed for rape (given otherwise comparable circumstances).<sup>10</sup>

After many years of advocacy by the scientific community and NGOs,<sup>11</sup> the Swiss parliament is currently debating the introduction of a consent-based definition of rape and indecent assault (“No means No”-Rule). According to the draft, the arts. 189 and 190 will also cover acts that the perpetrator performs on the victim against her or his (verbally or non-verbally) expressed will, even without an element of coercion. Additionally, according to the draft all offenses are to be formulated in a gender-neutral manner. The proposed amendments to the current wording of the arts. 189 and 190 read as follows:

9 BGer 6B\_912/2009, 22.2.2010, consid. 2.1.3., see also Nora Scheidegger, *Das Sexualstrafrecht der Schweiz. Grundlagen und Reformbedarf* (2018).

10 BGE 132 IV 120, consid. 2.5.; BGer, 6B\_78/2017, 6.9.2017, consid. 2.1.

11 See, e.g., Nora Scheidegger, *Das Sexualstrafrecht der Schweiz. Grundlagen und Reformbedarf* (2018); Nora Scheidegger, Agota Lavoyer, Tamara Stalder, *Reformbedarf im schweizerischen Sexualstrafrecht – Egoistisch, rücksichtslos, kalthertzig – aber strafrechtlich nicht relevant?* <https://sui-generis.ch/article/view/sg.122>.

Art. 189 Draft Criminal Code

(1) Any person who, against the will of another person, performs a sexual act on that person or makes that person perform such an act shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

Art. 190 Draft Criminal Code

(1) Any person who, against the will of another person, performs on that person or makes that person perform coitus or an act similar to coitus involving penetration of the body shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

#### IV. General role of consent in criminal law

Depending on the offence, consent is a justification or negates the definition of the offence. Crimes for which consent may provide a justification include those that result in bodily harm, including assault.

There is no general statutory provision on consent in the Swiss Criminal Code. Therefore, the requirements for valid consent have been developed by case law and doctrine.<sup>12</sup> Essentially, four cumulative conditions must be met for consent to be valid:

- a) Consent must be declared or communicated.
- b) The person concerned must be capable of giving consent.
- c) The person concerned must be entitled to give up the legal interest. (One can only dispose of one's own legal interests. No one may consent to the violation of interests of the general public.)
- d) Consent must be voluntary and informed.

Since both the crimes of rape and sexual indecent assault implicitly require that the victim did not consent to the sexual conduct, (factual) consent negates the definition of these offences. Similarly, consent may also negate certain property crimes, such as trespassing (Art. 186, Unlawful entry) or theft (Art. 139).<sup>13</sup>

The underlying rationale for recognising consent is to respect individual autonomy and agency. The constitutionally protected rights to physical integrity, sexual self-determination, property etc. entitle individuals to ma-

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12 See, e.g., Günter Stratenwerth, *Schweizerisches Strafrecht, Allgemeiner Teil I, Die Straftat*, 4<sup>th</sup> ed. 2011, § 10 Die Rechtswidrigkeit, 205–259.

13 Stratenwerth, *supra* note 12, at 209.

ke their own decisions about their bodies, health, sexuality etc. These individual decisions are also to be respected by the criminal law.<sup>14</sup>

The defence of consent has several limits due to considerations of public policy. The current criminal law in Switzerland does not recognise consent by the victim as a defence for deliberately killing others. According to Art. 114 of the Swiss Criminal Code, the killing of a person is punishable even if it was carried out at the serious and insistent request of the person killed. On the other hand, killing by omission (passive euthanasia) can be effectively consented to.<sup>15</sup> Also, negligent homicide may be consented to, thus exempting the perpetrator from punishment – for example, a drunk driver is not liable for negligent homicide if his passenger has joined him in the car knowing that he was drunk.<sup>16</sup>

There are limits to consent in relation to one's own body. Female genital mutilation (Art. 124 Swiss Criminal Code), for instance, is an offense to which consent cannot be validly given.<sup>17</sup> According to legal doctrine and case law, consent may only be given for non-aggravated bodily injury. In the case of serious bodily harm (Art. 122), consent is only valid if it appears proportional to the reasonable interest of the consenting person (e.g., in the case of necessary surgery or an organ donation). This restriction can be explained by the fact that the German rule on consent (§ 228 German Penal Code) has been uncritically adopted in Switzerland, even though the Swiss Criminal Code does not provide for such a restriction on consent.<sup>18</sup>

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14 Martino Mona, *Die Einwilligung im Strafrecht*, 2017.

15 Christopher Geth, *Passive Sterbehilfe*, 2010.

16 Laura Jetzer, *Einverständliche Fremdgefährdung im Strafrecht – zugleich ein Beitrag zur Mitwirkung an Selbstgefährdung*, 2015.

17 05.404 Parlamentarische Initiative, Verbot von sexuellen Verstümmelungen, Bericht der Kommission für Rechtsfragen des Nationalrates, 5651, 5669 (“Weil eine Genitalverstümmelung nach Artikel 124 StGB in der Regel kein sinnvoller und vertretbarer Eingriff darstellt, können weder die urteilsfähige erwachsene Person noch die Eltern eines urteilsunfähigen Kindes in eine Genitalverstümmelung nach Artikel 124 StGB einwilligen.“).

18 See Philippe Weissenberger, *Die Einwilligung des Verletzten bei den Delikten gegen Leib und Leben*, 1996, 50.

## B. Requirements for valid consent to sexual acts

### I. General capacity to give consent

#### 1. Age

The legal age for sexual consent is 16 years of age (Art. 187 (1)(1)). However, there is a special provision for sexual activity between peers: According to Art. 187 (2), no penalty may be imposed if the difference in age between the persons involved is three years or less. However, if the juvenile offender uses force or coercion, arts. 189 or 190 may apply.

If the offender is younger than 20 years of age at the time of the first sexual act, and if there are special circumstances (e.g., a relationship between offender and victim), *or* if the victim is the spouse or registered partner of the offender, the responsible authority may dispense with prosecution, referral to the court, or the imposition of a penalty (Art. 187 (3)). However, the legislature is planning to eliminate this "marriage exemption".<sup>19</sup>

Art. 188 provides for an additional protection for minors. This offense makes it criminal for a person to engage in sexual acts "by exploiting his or her relationship with a minor over the age of 16 who is dependent on him due to a relationship arising from the minor's education, care or employment or another form of dependent relationship".

#### 2. Consciousness, mental health

Art. 191 criminalizes the abuse of persons who are "incapable of judgment or resistance". Therefore, individuals with mental impairments can validly consent to sex if they have a certain knowledge and voluntariness with respect to the decision to engage in a specific sexual activity. But even if a mentally disabled person completely lacks competence in judgement, engaging with her would not automatically lead to criminal punishment for the other person (because this would impose an absolute ban on sexual activities for adults with severe mental disabilities). This is why the term "missbrauchen", i.e., *abuse*, in Art. 191 of the Swiss Criminal Code is important: It makes it possible to differentiate between actual exploitation

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19 Explanatory Report (note 5), BBl 2022 687, 21.

of a handicapped person and – at least “factually” – consensual sexual relations.<sup>20</sup>

Unconscious persons are “incapable of resistance” in the sense of Art. 191. However, there are some grey areas: if intercourse with the sleeping partner has been established as “a facet of the relationship” and the partner consents to it in advance, courts will usually not apply Art. 191, because the element of “missbrauchen” (abuse) would not be present.

Art. 192 and Art. 193 criminalize the abuse of a position of power (e.g., in a mental institution) and the exploitation of dependency (e.g., between a psychiatrist and his or her patient). If the victim consents, but his or her consent is or may be considered as induced by the exploitation of a position of power or dependency, the offender is liable to a custodial sentence not exceeding three years or to a monetary penalty.

### 3. *Intoxication*

If the victim is (voluntarily) intoxicated to the point of being incapable of judgment or resistance and the offender knowingly has sexual relations with that person, the offence of “Sexual acts with persons incapable of judgment or resistance” in Art. 191 is applicable. It may not always be easy to differentiate between “substance-affected consent” and “intoxicated consent”. According to the Supreme Federal Court, a person is not yet “incapable of resistance” if her or his inhibitions are merely diminished due to alcohol. However, the application of art. 191 does not require unconsciousness in the sense of a comatose state. Generally speaking, a person is probably too intoxicated to consent if he or she is too intoxicated to walk or talk, is vomiting or urinating on himself or herself, or is too uncoordinated to undress.<sup>21</sup>

If the offender himself sedates or intoxicates an unknowing victim, Arts. 189 and 190 (rape and indecent assault) apply.

## II. *Ways of giving valid consent*

Consent to sexual relations can be expressed verbally or nonverbally, and in certain circumstances consent can even be implied. Depending on the

20 BGer 6S. 359/2002, 07.08.2003 consid. 4.2.

21 See for example BGer 6B\_96/2015, 20.08.2015 consid. 2.3.

specific circumstances of a particular situation, consent can be implied, e.g., from the request to wear a condom. However, if the offender previously used coercion, the request to wear a condom cannot be interpreted as consent.<sup>22</sup>

A mere lack of protest does not count as consent *per se*. But, as noted above, the Swiss Criminal Code defines rape (Art. 190) based on the force used by the perpetrator or the resistance of the victim rather than on a lack of freely given consent. Therefore, if the victim does not protest or resist, the offender usually does not have to use coercion, and arts. 189 and 190 do not apply. Additionally, resistance has an important evidentiary significance, and a lack of resistance can be used to question the *mens rea* of the offender.

In general, the *mens rea* element is not satisfied if the offender genuinely believed that the victim consented to the sexual act. According to some scholars, the notion of *vis haud ingrata* can be relevant with regard to the offender's *mens rea*, meaning that the offender may lack *mens rea* if the victim yields after what the offender believed was just "sham resistance".<sup>23</sup> However, the Swiss Federal Court stated that the *mens rea* element is usually satisfied if the victim clearly protested and/or resisted and that there is thus usually no room for the defense of mistake of fact about consent in such cases.<sup>24</sup>

### III. Grounds for negating the validity of formal consent

#### 1. Constraint

If the offender uses force, threats of force or psychological pressure to induce the victim to "consent" to sex, this token consent is considered invalid and the offender is guilty of rape or indecent assault.<sup>25</sup> The variant of the offence of "putting the victim under psychological pressure" covers,

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22 See BGer 6B\_278/2011, 16.6.2011.

23 Günter Stratenwerth, Guido Jenny, Felix Bommer, *Schweizerisches Strafrecht, Besonderer Teil I: Straftaten gegen Individualinteressen*, 2010, § 8, N. 15.

24 6B\_267/2016, 15.02.2017 consid. 5.2. and 6B\_894/2021, 28.03.2022, consid. 3.4. (« L'élément subjectif est réalisé lorsque la victime donne des signes évidents et déchiffrables de son opposition, reconnaissables pour l'auteur, tels des pleurs, des demandes d'être laissée tranquille, le fait de se débattre, de refuser des tentatives d'amadouement ou d'essayer de fuir. »).

25 See, e.g., BGer 6B\_278/2011, 16.6.2011.



for example, constellations in which the offender threatens to use violence against persons close to the victim, as well as situations of persistent intimidation, continuous bullying or sustained psychological terror in which no additional violence or threat is required to make the victim comply.<sup>26</sup>

## 2. *Fraud*

Currently, sex by deception is not a criminal offence in Switzerland, although there has been some discussion as to whether faking a medical indication to get the patient to consent to what in fact is a sexual act should be considered a crime (more specifically: "Sexual acts with persons incapable of judgement or resistance", Art. 191).<sup>27</sup> After the proposed revision of the Swiss criminal code, this conduct is to be covered by a separate offense (Art. 193 Draft Criminal Code: "Deception about the sexual character of an act").

### C. *Reach of consent*

#### I. *Timing of consent*

In general, consent must be obtained before any sexual act begins. According to legal doctrine and case law, there is no such thing as "retrospective consent" or of obtaining consent *after* the sexual act. However, arts. 187, 192 and 193 currently permit non-prosecution or the withholding of a penalty if the perpetrator has married the victim after the offence was committed. The legislature plans to eliminate this exemption because of concerns that victims may feel pressured to agree to a marriage or a registered partnership in order to avoid legal consequences for the older person.<sup>28</sup>

"Non-consent" in sexual assault cases includes situations where consent was initially given but subsequently withdrawn by the victim. A person who initially consents to sexual intercourse does not thereby give up her right to terminate the encounter at whatever point she chooses. So, if a

<sup>26</sup> See 6B\_1040/2013, 17.8.2014.

<sup>27</sup> See, e.g., BGer 6B\_453/2007, 19.02.2008 consid. 3.4.3. («Diese Übergriffe hat sie nur wegen ihres Irrtums über die medizinische Indikation geduldet. Dies allein reicht für die Annahme einer Widerstandsunfähigkeit nicht aus, womit der Beschwerdegegner den Tatbestand der Schändung nicht erfüllt hat.»).

<sup>28</sup> Explanatory Report (note 5), BBl 2022 687, 21.

person tells her or his partner to stop, and he or she forces her to continue through some form of coercion, he or she is guilty of rape or indecent assault, provided that he noticed that the victim withdrew consent. However, if the victim just says “no”, the offender usually does not have to use coercion so that arts. 189 and 190 (at least currently) do not apply.

## II. Scope of consent

It is generally accepted that consent to a specific sexual act does not automatically constitute consent to other sexual acts. For example, consent to vaginal penetration does not extend to anal penetration. On the other hand, consent to vaginal penetration probably includes consent to touching the breasts. However, it is difficult to establish generally applicable rules. Some scholars argue, e.g., that in cases of “stealthing” there is no consent at all.<sup>29</sup> They reason as follows: We accept the premise that different sexual acts require separate consent. Contact with the skin of a penis is significantly distinct from contact with a condom. Therefore, in cases of “stealthing”, these two different sexual acts each require separate consent because what happened (unprotected penetration) is not that for which consent was given (protected penetration).<sup>30</sup> However, acting without the other person’s consent *per se* is not sufficient to establish the definitional elements of the sexual offense of rape. This is why there has been a lot of discussion in recent years about whether “stealthing” should be considered a sexual act with a person “incapable of judgement or resistance” (Art. 191). The Federal Supreme Court recently decided that “stealthing” is not punishable under art. 191, since a victim of “stealthing” is not principally incapable to resist. As noted above, the Swiss parliament is currently debating a draft act amending the sexual offenses. According to this draft and the accompanying explanatory report, “stealthing” is to be punishable under the revised articles 189 (indecent assault) and/or 190 (rape) of the Swiss Criminal Code.<sup>31</sup> Consent that has been given in a factual sense does not necessarily amount to legally effective consent. A token of consent,

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29 See the review of the relevant literature in BGer 6B\_265/2020, 11.05.2022.

30 BGer 6B\_265/2020, 11.05.2022, consid. 4.3. (“Das Entfernen des Kondoms gegen den Willen und ohne das Wissen der Partnerin [bildet] eine Zäsur zum bisher einvernehmlichen Geschlechtsverkehr. Es begründet eine gesonderte, neue Handlung ...“).

31 Explanatory Report (note 5), BBl 2022 687, 34 («Die Einwilligung in eine sexuelle Handlung mit Kondom deckt somit dieselben Handlungen ohne Kondom nicht

e.g., saying “yes” or participating actively, has the power to bring about a change of rights and duties within a relationship only if it sufficiently reflects the agent’s own will. In the presence of autonomy deficits, even though a person may appear to have “given consent” in a factual manner, the consent is not legally valid. First, competence is a key component of consent. Persons who are not able to understand the meaning and purpose or the scope and significance of their decisions are considered to be incapable of making an autonomous decision, and thus, incapable of giving valid consent to sexual relations (arts. 187 and 191).<sup>32</sup> Second, consent is considered deficient or flawed if the victim has been coerced into consenting (Arts. 189 and 190). Therefore, if a victim says “Let’s just get it over with” after having been coerced, her consent is not considered valid.<sup>33</sup> Similarly, if the victim only participates actively because she is in a state of dependence, her active participation is not considered legally valid. As the Swiss Federal Court stated: “Where the person is dependent on the offender, he or she is no longer entirely free in his or her decision to consent to or refuse sexual acts. In this situation, if the person allows sexual acts to take place and even gives his or her express consent and cooperation, the perpetrator is still punishable under Art. 193 if the person’s dependence has made him or her comply”.<sup>34</sup>

### III. Finality of consent

In general, it is accepted that it is possible to validly consent to sex after saying “no” several times. On the other hand, no valid consent can be given in situations involving coercion, threats, intimidation, or physical force. However, the legal definition of coerced sex (rape and indecent assault) generally does not include less severe tactics (e.g., persuasion, emo-

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ab. Dies ist also strafbar und wird vom Tatbestandsmerkmal “gegen den Willen” erfasst.»).

32 BGE 146 IV 153 consid. 3.5.6 (“Lassen sich Kinder im Alter wie vorliegend (acht-einhalb- bis zehneinhalbjährig) ohne sich zu wehren in sexuelle Handlungen involvieren, kann daraus nicht auf eine freiwillige Mitwirkung geschlossen werden; es ist eine immer nur vermeintliche Freiwilligkeit.“).

33 BGER, 6B\_278/2011, 16.6.2011.

34 BGE 131 IV 114: “Ist [die Person] vom Täter abhängig, so ist sie in ihrer Entscheidung, in sexuelle Handlungen einzuwilligen oder sie zu verweigern, nicht mehr völlig frei. Duldet sie in dieser Lage sexuelle Handlungen, ja gibt sie dazu ihre ausdrückliche Zustimmung und Mitwirkung, so ist der Täter doch strafbar [nach Art. 193], wenn die Abhängigkeit der Person sie gefügig gemacht hat.“

tional manipulation, promises) applied to autonomous adults. Therefore, mere persuasion is an accepted way of getting the other person to consent. Courts even assume that it might not be “uncommon” that in a relationship the man insists on sex, and the woman does not actually want it but then eventually (implicitly) agrees to it and “lets the man – albeit joylessly – have his way”.<sup>35</sup> That being said, it might be difficult in specific cases to differentiate between persuasion and verbal coercion.

#### D. Intent as to lack of consent

For a conviction of rape or indecent assault (arts. 189 and 190), it is necessary to prove that the perpetrator acted intentionally. However, conditional intent (“Eventualvorsatz” or *dolus eventualis*) is enough. *Dolus eventualis* is defined in the second sentence of art. 12 para. 2 of the Criminal Code. According to this provision, a person is presumed to have intent “as soon as he regards the realization of the act as being possible and accepts this”. Regarding the offence of rape, it is necessary to prove that the offender realized the possibility that the other party is not consenting and that he is coercing her and nevertheless proceeded with the sexual act, accepting that risk. It is important to note that the question of *mens rea* does not only apply to the element of non-consent but also to the element of coercion and the “conjunction of coercion and nonconsent”.

The actor’s honest belief in consent negates the *mens rea* of the offense, even if such belief was not based on reasonable grounds. However, the Federal Supreme Court has stated that verbal resistance must be taken seriously.<sup>36</sup> In rape cases involving physical violence or express threats of physical harm, proof of the *actus reus* usually is sufficient to establish *mens rea* with respect to coercion as well as non-consent.<sup>37</sup>

Currently, there is no offence in the Swiss Criminal Code that covers mere negligence with regard to sexual conduct. Instances of reckless conduct are, however, often considered to be *dolus eventualis*.<sup>38</sup> The only of-

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35 Appellate Court of Zürich, OGer, SB110706 v. 23.4.2012 (“Es dürfte nicht selten vorkommen, dass in einer Beziehung der Mann auf Sex drängt, die Frau indes – ohne Nennung eines spezifischen Grundes – dies nicht will, sich dann aber schliesslich (implizit) doch damit einverstanden erklärt und den Mann, wenn auch freudlos, gewähren lässt.”).

36 BGer 6B\_1149/2014, 16.07.2015 consid. 5.11.

37 Scheidegger (note 11), at 219.

38 A special category of “recklessness” does not exist in Swiss Criminal Law.

fence covering negligent behaviour can be found in Art. 187 (Sexual Acts with Children), para. 4: “If the offender acts under the misconception that the child is 16 years of age or older, but he would not have made this error had he exercised due care, the penalty is a custodial sentence not exceeding three years or a monetary penalty.”

### *E. Sexual offenses that do not require lack of consent*

Some sexual offences do not require lack of consent. Regarding the offence of Art. 187, it is irrelevant whether the child gave factual consent, because children under the age of 16 years cannot give valid consent.<sup>39</sup> Similarly, mentally impaired person may not be able to give valid consent. However, the presence of their mere factual consent can help to differentiate between criminal exploitation of handicapped persons (Art. 191) and at least “factually” consensual sexual relations with mentally disabled persons, which are not illegal per se.

Arts. 188, 192, 193 cover several types of abuse of dependence and power relations. In these cases, the victim typically consents to the sexual acts but does so only because of her inferior position.<sup>40</sup>

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39 But see above for the “close-in-age exemption in Art. 187 para. 2, allowing minors to consent to sex with partners three or fewer years older.

40 Cf. note 34.

