E-ISSN 3008-6299

THE CRIMINAL SCIENCES JOURNAL
TCSJ
"AL.I. CUZA" POLICE ACADEMY

SOME CONTROVERSIAL ASPECTS REGARDING CONSENT IN CRIMINAL LAW

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Abstract: *The consent of the injured party represents one of the fundamental institutions of criminal law, regulated as a justifying cause capable of removing the unjustified nature of an act provided by criminal law when it concerns social values over which the holder can legally dispose. By analyzing the legal regulation, doctrinal opinions, and relevant case law, the study highlights the interpretation difficulties generated by determining the validity of consent, defining the available social values, and assessing the effects that the victim's expression of will produces on criminal liability. A coherent and balanced interpretation of the consent institution contributes both to the effective protection of social values safeguarded by criminal law and to ensuring a fair application of criminal law rules.*

Keywords: *consent of the injured party; justifying cause; criminal law; autonomy of will*

Through a legal interpretation, the term consent denotes an approval, authorization, or acceptance expressed by a person regarding a particular conduct or legal situation (Antoniu, Bulai, & Chivulescu, 1976). From the perspective of criminal law, the consent of the victim/injured party constitutes a circumstance that exempts from liability the person who committed an act provided for by criminal law, provided that the person affected by that act had the legal capacity to dispose of the right that was infringed or placed in danger (Urs, Duțu, et al., 2018). From the perspective of systematic interpretation, the concept finds its foundation in civil law, where it is defined either as an agreement of wills resulting from the understanding reached between two or more persons or as a manifestation of will capable of producing legal effects (Antoniu, 2003). When transposed into the field of criminal law, as previously illustrated, this notion acquires particular significance, as an individual's will no

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longer represents merely an element of private legal relationships, but may directly influence the existence of the unlawful character of an act provided for by criminal law.

According to the provisions of the Criminal Code, the consent of the injured party constitutes a justificatory ground whenever the injured party could legally dispose of the social value harmed or endangered by the commission of the act (Article 22 of the Romanian Criminal Law). This regulation implies that the manifestation of will of the holder of the legally protected social value may remove the unlawfulness of the offender's conduct, provided that such acceptance is expressed freely, knowingly, and validly. Consequently, an act cannot be regarded as lawful for the holder of the right and unlawful for the person acting with that holder's consent (Pașca, 2015). In essence, the victim's consent represents an expression of the autonomy of will of the holder of a disposable right and constitutes the point of convergence between the victim's will and the offender's conduct. In such circumstances, the injured party knowingly accepts the interference with his or her interests, and such acceptance excludes any contradiction between the offender's conduct and the legal order.

In legal scholarship, the issue of the criminal-law relevance of the victim's consent has generated divergent opinions. Part of the doctrine acknowledges the legal effects of the injured party's will, considering that it may influence the existence of an offence, its legal classification, or even the justified nature of the act. Conversely, other authors maintain that the general interest protected by criminal law prevails over individual autonomy, thereby denying the possibility that the victim's consent may produce significant effects in the sphere of criminal liability (Socevoi, & Moraru, 2021).

In identifying the rationale underlying the justificatory effect of consent, legal doctrine starts from the premise that the holder of a disposable social value may waive the protection granted by criminal law (Streteanu & Nițu, 2014 apud Barbu, 2025). To the extent that the law recognizes an individual’s ability to dispose of a particular social value, accepting an interference with that value cannot be regarded as contrary to the legal order. However, this reasoning is not applicable to all values protected by criminal law. Where a social value is of fundamental importance both to the individual and to society, the interest in its protection extends beyond the sphere of the holder’s personal interests and acquires a public dimension. In such circumstances, the individual’s will is insufficient to remove the criminal-law protection afforded to that social value.

The relevance of the victim's consent is not limited to the justificatory ground provided for by Article 22 of the Criminal Code. Rather, it is reflected in numerous criminal offences in which the existence, absence, or defectiveness of consent constitutes a determining element for the existence of the offence itself.

The practical significance of consent is directly reflected in the legal classification of various offences. Thus, in matters concerning the termination of pregnancy, the absence of the pregnant woman's consent constitutes an essential element expressly required by law for the existence of the offence. In this context, the will of the person protected by the criminal norm

represents not merely a factual circumstance but a decisive condition for establishing the unlawful nature of conduct. Likewise, in the case of child trafficking, the legislature has expressly established the principle that the consent of the minor victim is legally irrelevant, being incapable of constituting a justificatory ground or excluding the offender's criminal liability. This legislative solution is based on the need to provide enhanced protection to persons in a state of vulnerability.

Particular relevance is also found in the offence of incest. For this offence to exist, the sexual act must take place between persons related in the manner prescribed by law, and valid consent must be present. Where consent is absent or affected by circumstances that invalidate it, such as the victim's young age or inability to understand the significance of the act, the conduct will not be classified as incest but may instead fulfil the constituent elements of aggravated rape. Consequently, the existence or absence of consent not only affects criminal liability but may also determine the very legal classification of the criminal act.

The analysis of consent in relation to sexual offences requires particular attention to the situation of minors (Brînză, & Stati, 2023). The legislature proceeds from the presumption that a person who has not attained a certain degree of maturity lacks the capacity to express fully informed and freely given sexual consent. In this context, legal scholars have advocated the introduction of a mandatory psychiatric evaluation for minors who are victims of sexual offences. Such an assessment would make it possible to determine the minor's level of discernment and psycho-moral maturity, thereby providing courts with an additional instrument for assessing the validity of the manifestation of will in the particular circumstances of a case (Czika, 2021).

Furthermore, among the various forms of vitiating consent, special significance is attached to situations in which the offender takes advantage of the victim's inability to express his or her will. In the case of minors, age-related vulnerability may constitute a pre-existing condition that the offender exploits to commit the criminal act. Such exploitation amounts to a form of indirect coercion, since the offender takes advantage of a condition of inferiority or helplessness that prevents the victim from genuinely expressing opposition (Cioclei, 2020).

Both national and European case law have made significant contributions to the development of the concept of consent. In M.C. v. Bulgaria (ECHR, 2003), the European Court of Human Rights held that the central element of the offence of rape is the absence of the victim's consent rather than the use of physical force. The Court emphasized that the existence of consent must be assessed considering the specific circumstances of the case and requires a voluntary manifestation of will resulting from the exercise of free choice.

In another line of case law concerning medical interventions, the indispensable nature of the patient's informed consent has been emphasized. Carrying out medical procedures without obtaining the individual's prior consent may entail both criminal and civil liability for the damage caused, since patient autonomy constitutes a fundamental component of the protection of individual rights (ECHR, 2009).

A relevant example concerning the practical application of the justificatory ground of the injured party's consent was provided by a case in which, following a verbal dispute, the injured party proposed to the defendant that they settle their conflict through a physical confrontation in a secluded location, a proposal that was accepted by the latter (Judgment No. 553/2026 of 30 April 2026). The court held that valid consent had been expressed by the injured party, capable of operating as a justificatory ground, since the victim's agreement had been given freely, seriously, and unequivocally, by a person capable of understanding the consequences of such a confrontation. Furthermore, the consent concerned a disposable social value, namely bodily integrity, and had been expressed prior to the commission of the acts of violence. The court also considered that the mere fact that the injured party suffered more serious injuries than the defendant was not sufficient to remove the legal effects of the previously expressed consent, in the absence of a manifest imbalance between the participants or circumstances demonstrating that the agreement had been vitiated.

In another case (Judgment No. 378/2025 of 8 May 2025), the court held that the existence of a defect affecting consent cannot be presumed but must be demonstrated through circumstances capable of proving a genuine impairment of the injured party's decision-making process. Accordingly, the mere allegation that consent was vitiated is insufficient to remove its legal effects. In the case under examination, the court found that the defect of error was not present, since the injured party had a complete and accurate understanding of the essential circumstances of the meeting that led to the conflict and therefore consciously and deliberately agreed to participate in the acts of violence. Likewise, deceit (fraud) could not be established as a defect of consent in the absence of fraudulent practices or deceptive conduct on the part of the defendant capable of determining the expression of consent.

The importance of case law lies in the fact that it provides concrete criteria for interpreting the concept of consent and contributes to the uniform application of criminal law provisions in judicial practice.

One of the most debated issues concerns the validity of consent in the context of medical interventions. Legal scholars have observed that, in numerous situations, the requirement of obtaining free and informed consent may conflict with the necessity of performing the medical procedure or with the requirements of a criminal investigation. From this perspective, it has been argued that the patient's manifestation of will may sometimes become merely formal, lacking genuine self-determination, which raises questions regarding the authenticity of the consent expressed (Antoniu, 2014).

Another controversy concerns the effects of consent in cases involving acts of violence committed during mutually accepted confrontations. Pursuant to Article 22(2) of the Criminal Code, the consent of the injured party produces no legal effects in relation to offences against life, thereby affirming the absolutely non-disposable character of the right to life. Consequently, the victim's agreement cannot justify conduct leading to death or constituting attempted homicide.

By contrast, in matters concerning the right to physical integrity, the legislature has not imposed an absolute prohibition. In the absence of an express limitation, a significant part of legal doctrine accepts the justificatory effect of consent in relation to certain acts of violence, provided that the harm inflicted upon physical integrity does not result in the total and irreversible loss of the protected social value. Accordingly, the disposability of the right to physical integrity is recognized only insofar as the sacrifice of that value remains partial and reversible (https://www.universuljuridic.ro/articole/, 2026).

In conclusion, the effectiveness of consent depends upon the disposable nature of the social value to which it relates. While certain rights allow for the manifestation of individual autonomy, others, such as the right to life, enjoy absolute protection and therefore fall outside the sphere of values over which their holder may freely dispose. This limitation reflects the legislature's concern for safeguarding the fundamental interests of society and maintaining a balance between individual freedom and the legal order.

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