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ORIGINAL ARTICLE

# The question of sexual consent: Between individual liberty and human dignity<sup>☆</sup>



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**Summary** In sexual matters, the concept of consent has recently come to the forefront. The concept allows a distinction to be made, notably from a legal standpoint, between what is considered to be raped and what is not. It is however a concept that is difficult to define with any clarity; its boundaries are fuzzy and it is the subject of much controversy, particularly with regard to the issues of prostitution and sadomasochistic practices (BDSM) within the ethics of sexuality. The purpose of this article is to attempt to clarify the terms of the debate. It firstly questions the foundations of sexual consent by analysing the differences or the conceptual confusion between desire and will, based initially on a reading of the philosophers of the 17th century René Descartes and Baruch Spinoza, who have opposing ideas with regard to the position of desire relative to intellect in human beings, before moving on to the psychoanalyst Sigmund Freud, who introduces the idea of unconscious desire. The article then shows that the impossibility of absolute liberty, and therefore consent free of any constraint, leads certain feminist organisations to question individual consent, even when it has been clearly formulated, and to invoke against this the notion of human dignity in a transcending sense, inspired by Immanuel Kant, the German philosopher of the 18th century. This concept is examined and studied in cases of prostitution and sadomasochism (BDSM). The conceptual analysis ultimately reveals the metaphysical nature both of the individualistic approach of consent and of the Kant-inspired approach of human dignity.

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## Introduction

The concept of consent is central to the ethics of sexuality. It permits a distinction to be made between what is considered to be sexual assault and what is not. Now, this is not necessarily obvious or to be taken for granted, given that there is on the one hand a concept of consent based on will

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or disassociated from desire (Caouette, 2015), and on the other hand a concept of consent based on desire, or which believes that consent to sexual relations when these are not desired is consent to forcible entry and a source of trauma (Martine, 2013).

The question then arises of the value of consent, when that to which one has consented appears to contravene moral values that are upheld in society as being important. The notion of human dignity is accordingly used by some present-day feminists in order to reject consent to sexual relations with prostitutes or which are sadomasochistic.

It is these two issues, that of consent being founded on desire or will on the one hand, and that of the recognition of consent through a principle of transcendence on the other hand, which will be hereafter highlighted.

## Some statistical data

### Sexual assaults

According to the World Health Organisation (WHO), worldwide, 35% of women indicate that at some time in their life, they have been exposed to sexual violence from their partner or someone else (WHO, 2014). In the United States, according to the 2010 survey of the National Center for Injury Prevention and Control of the Centers for Disease Control and Prevention, 18.3% of women and 1.4% of men state that they have been raped sometime over the course of their life, and 44.6% of women and 22.2% of men state that they have suffered other forms of sexual violence without penetration (Black et al., 2011).

### The figures for prostitution

With an entire section of prostitution dominated by criminal networks and human trafficking, and given the high ideological stakes that disrupt the principles of scientific research (Weitzer, 2005), it is difficult, if not impossible, to establish the number of people throughout the world engaged in an activity of prostitution. The figure of 40 to 42 million people practising prostitution throughout the world is sometimes suggested (Charpenel, 2012).

### Sadomasochistic practices and fantasies

There are very few figures available from surveys of the general population on followers of sadomasochistic sexual practices. A 2008 study by the School of Public Health and Community Medicine of the University of New South Wales in Australia, reports that 1.8% of sexually active people stated that they had indulged in practices which can be considered as BDSM in the year preceding the survey (Richters et al., 2008). In France, there are statistical data to be found in a survey dating back to 1993, coordinated by the INSERM (National Institute of Health and Medical Research), which sought to analyse sexual behaviour, not in terms of BDSM practices, but of the related fantasies. According to this survey, the prevalence of fantasies involving punishment and bondage was very low, from 0.5 to 1.8% depending on the practices and the gender (Bajos et al., 1998).

## Consent, a matter of desire or will?

These statistical data relate to sexual relations without consent and practices for which we shall look at the value of consent. The question of the foundation of consent refers back to the idea we have of human beings and of the way people interact.

In a very general sense, desire is an urge directed towards something. Will could therefore very well be included under this heading, as could need, longing, wishing, etc. However, such a jumble of definitions does not permit us to think about concrete situations or to decide between what does or does not form consent.

### Desire as an action of will controlled by intellect: the Cartesian approach

In the third maxim of his provisional moral code, in the *Discourse on the Method*, Descartes stated that he should try to change his desires rather than changing how things stand in the world (Descartes, 1953 [1637]). For him, desire comes from will, and will is only led to desire things presented to it by intellect. It is therefore possible to change his desires since desire is will, and will is itself controlled by intellect. Consent would then rest upon will enlightened by intellect and would consist in the very determination of desire in terms of the object of such desire through a rational thought process.

### Desire preceding intellect: the Spinozist concept

This approach to desire, in which it is preceded by intellect, would be called into question on the one hand by Spinoza, a quasi-contemporary of Descartes, and on the other hand by the founder of psychoanalysis: Sigmund Freud. For Spinoza, to be a human being is, fundamentally, to have desires. This primacy of desire in human beings derives from the fact that it is inherent in the essence of any creature to strive to persevere in its being. Desire presents this defining feature in which it is not merely the endeavour to persevere in one's being, but moreover the consciousness of this endeavour (Spinoza, 1965 [1677]).

Hence, desire precedes intellect and, contrary to Descartes, Spinoza does not believe that intellect is capable of changing desires. Desire as endeavour falling under the heading of human essence precedes any object which may be desired, and the objects which are acquired through desire are more a function of the circumstances than of a reasoned choice which might indicate to us one object or another as being desirable. Desire can therefore no longer be considered the fruit of choice. Hence, if to consent is to choose freely, desire cannot form the basis of consent.

### Desire preceding intellect: the Freudian approach

Freud would go even further. For him, the partition between desire/intellect takes the form of a partition between the unconscious and conscious mind. At the point at which Spinoza defined desire as the endeavour to persevere in one's being, accompanied by consciousness, the

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