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"If Consent is Bought, It Is Not Freely Chosen": Compromised Consent in Prostituted Sex in Ireland

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Abstract

This article offers feminist arguments for the reconsideration of consent as a legal concept, informed by insights gained through the work of the *#MeToo* movement and other feminist campaigns. It suggests that consent may be seen as legally compromised in certain contexts of structured gender inequality, such as domestic violence, workplace sexual harassment, and prostitution. The legal understanding of consent in such contexts is antithetical to the conception of consent as "freely and voluntarily" given within a mutual sexual relationship. This understanding of consent underpins the recent introduction of the Nordic model approach into Irish law through the Criminal Law (Sexual Offences) Act 2017, which criminalizes the purchase of sexual services; an approach which has been subject to criticism from those who assert that laws criminalizing sex purchase offend against personal autonomy. It is argued here that a reappraisal of consent as capable of being legally compromised in certain contexts can justify the introduction of laws like the 2017 Irish reform from a feminist perspective.

Keywords

Ireland, prostitution law, Nordic model, consent, *#MeToo*

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“IF CONSENT IS BOUGHT, IT IS NOT FREELY CHOSEN”: COMPROMISED CONSENT IN PROSTITUTED SEX IN IRELAND

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ABSTRACT

This article offers feminist arguments for the reconsideration of consent as a legal concept, informed by insights gained through the work of the *#MeToo* movement and other feminist campaigns. It suggests that consent may be seen as legally compromised in certain contexts of structured gender inequality, such as domestic violence, workplace sexual harassment, and prostitution. The legal understanding of consent in such contexts is antithetical to the conception of consent as “freely and voluntarily” given within a mutual sexual relationship. This understanding of consent underpins the recent introduction of the Nordic model approach into Irish law through the Criminal Law (Sexual Offences) Act 2017, which criminalizes the purchase of sexual services; an approach which has been subject to criticism from those who assert that laws criminalizing sex purchase offend against personal autonomy. It is argued here that a reappraisal of consent as capable of being legally compromised in certain contexts can justify the introduction of laws like the 2017 Irish reform from a feminist perspective.

KEYWORDS

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IN THIS PAPER, IT IS PROPOSED THAT A LEGAL CONCEPT of “compromised consent” can be helpful in advancing a feminist argument justifying the introduction of laws criminalizing the purchase of sex. This concept is derived from other established legal frameworks because the law already recognizes that “no means no,” but that a “yes” can be conditional in certain coercive contexts. For example, an apparent consent to sex may not always be legally valid in criminal law, where the person who appears to consent is under-age or has been trafficked, for example. This insight is applied in other legal settings too, notably in workplace sexual harassment cases where the legal framework is premised on the notion that consent can be compromised in circumstances where a power imbalance is exploited by the harasser.

It is argued that this conception of consent as capable of being legally compromised in different exploitative contexts may usefully be applied in considering the case of prostitution. Where sex is bought and sold under conditions of structural gender inequality, the seller's consent may best be understood as legally compromised, an understanding that can justify the introduction of “Nordic model” laws criminalizing the purchase of sex. Such laws are based on that originally introduced by Sweden in 1999 seeking to reduce demand for prostitution by targeting the buyers of sex, while decriminalizing those engaged in selling sex. The Swedish law was passed

following a feminist-led campaign for change, based on a view of prostitution as exploitative of the (predominantly) women who sell sex; a form of structural gender inequality in a context where the buyers are almost invariably men; a societal gender inequality (Skilbrei & Holmstrom, 2013; Ekberg, 2004; Svanstrom, 2004). This view of prostitution as structurally exploitative is supported by the work of many feminist scholars, notably Maddy Coy, who asserts that “prostitution as a gender regime reproduces gender as a hierarchy ... and thus undermines movements towards gender equality” since it “disproportionately involves men buying access to women's bodies,” which enables men to exercise power over women's bodies; involves emotional labor; and ultimately reproduces heteronormativity (2012, pp. 4-5).

Since the introduction of the first sex purchase ban law in Sweden, a growing momentum in support of this approach may be identified among policymakers in different countries; similar laws have been passed in Norway, Iceland, Canada, France, and Israel – as well as in Northern Ireland and Ireland. Such laws have however been subject to sustained criticism from those who argue that a sex purchase ban offends against personal autonomy by denying the agency of the (mostly) women who choose to engage in selling sex. Tellingly, feminist scholars who oppose Nordic model laws have not sought to critique them from the basis of defending a man's autonomous right to buy sex.

Those writing from a “sex work” perspective tend to advocate for legal structures in which prostitution is decriminalized or legalized, as in jurisdictions like Germany, the Netherlands, or New Zealand. The contrast between these two perspectives has developed following the emergence of second-wave feminism, and over the decades since has become described as “the most divisive distinction in feminist thinking” (Kingston 2014, p. 10), generating an immense body of academic literature (Phoenix, 2017). This literature however has become increasingly dominated by those who argue that women exercise agency by engaging in “sex work” (O'Connor, 2017, p. 8). Arguments defending prostitution based on the language of agency and of women's “right to choose” have a powerful resonance among feminist campaigners, particularly in Ireland, where the pro-choice movement has only recently succeeded in bringing about the legalization of abortion through a referendum passed in 2018—long after most other European jurisdictions.

The autonomy argument is thus superficially attractive, but it is argued that it is fundamentally misconceived when applied to prostitution. For feminists to suggest that the law should validate women's “choice” to sell sex is like suggesting that women should be free to “consent” to being trafficked or to being subjected to domestic violence or workplace sexual harassment. The autonomy argument's flawed premise is exposed when the academic discourse on prostitution is considered alongside the gains achieved by feminist campaigns against rape and domestic violence, and more recently, by the *#MeToo* movement on sexual harassment. The concept of “compromised” or conditional consent will be examined in the context of these campaigns and movements. It will also be applied to justify the 2017 law reform, which introduced both the Nordic model approach and a statutory definition of consent into Irish law.

Consent in Different Legal Contexts

In Ireland, as in many other jurisdictions, criminal laws prohibiting sexual assault and rape require the prosecution to show beyond reasonable doubt that the complainant/victim's consent to the sexual act was absent and that the accused was aware of this before an accused can be convicted. An exception is made where the

complainant is under a stated age (in Ireland, it is 17 for sexual intercourse; 15 for other sexual acts). If they are underage, then they are deemed legally incapable of giving consent.

The criminal law accepts the concept that consent may be compromised or deemed legally absent not only within the legal “age of consent” context but also in criminal legal frameworks prohibiting trafficking in persons. Many such laws derive from international Treaties like the 2005 Council of Europe Convention on Action Against Trafficking in Human Beings and EU Directive 2011/36/EU on preventing and combating trafficking in human beings. In Ireland, the Criminal Law (Trafficking) Act 2008 gives effect to international obligations by criminalizing the trafficking of persons for sexual exploitation; a defense is not available where a trafficked person “consents” to being trafficked, in recognition that any apparent consent has been coerced.

Recognition that consent may be compromised is also well-established within the context of domestic violence, where the interventions of courageous survivors have helped to debunk many of the problematic myths around violence in the home; and have fed into changes in the legal understanding of key concepts like “consent.” As a result of this advocacy, positive legal changes were introduced in Ireland through the Domestic Violence Act 2018, which provides improvements in court processes and treatment of victims as well as creating an important new offense of “coercive control.” This offense is defined in section 39 as occurring where a person “knowingly and persistently engages in behavior” against their partner who is “controlling or coercive” and which has a serious effect by causing serious alarm or distress which has a “substantial adverse impact on their usual day-to-day activities;” or by causing them to fear that violence will be used against them. The definition was modeled upon a similar offense previously introduced into English law under section 76 of the Serious Crime Act 2015; “controlling or coercive behavior in an intimate or family relationship.”

Both offenses recognize that many abusers in a domestic setting use controlling behavior to coerce their partner into apparent acquiescence or acceptance of the abuse, thus marking an important development in society's understanding of domestic violence. As Dorchen Liedholdt writes (2003, pp. 174-5):

Domestic violence has come to be understood not as a discrete series of violent acts but as a system of power and control the batterer institutes and maintains over his victim through the use of an array of interconnected strategies: isolation, intimidation, emotional abuse, economic abuse, sexual abuse, and threats...

Coercive control is now a criminal offense, but legal interventions to address domestic violence are frequently carried out through non-criminal means. A network of family law mechanisms such as “barring orders” (prohibiting an abuser from entering the family home) exist to protect victims, who must initiate civil proceedings through the family courts to obtain legal remedies; breach of such orders does carry a criminal sanction.

Just as with domestic violence law, the area of workplace sexual harassment is regulated through both criminal and civil procedures, as campaigns inspired by the *#MeToo* movement internationally have established that harassment in the workplace is actionable whether or not consent has apparently been given. It has become accepted that sexual advances can represent an unlawful abuse of power in certain

contexts; for example where an employee believes that she has no option but to “consent” to an unwanted advance by a manager if she wishes to keep her job.

Sexual harassment is not itself a crime in Ireland, although “harassment” is criminalized under section 10 of the Non-Fatal Offences Against the Person Act 1997, narrowly defined as “persistently following, watching, pestering, besetting or communicating with” a person, so as to “seriously interfere” with their “peace and privacy” or to cause “alarm, distress or harm” to them – effectively covering what is colloquially known as “stalking.” There is no requirement for the prosecution to prove absence of consent. More frequently, sexual harassment is actionable in civil law, through employment equality legislation which enables employees to sue their employer under section 14A of the 1998 Employment Equality Act where they have suffered “unwanted verbal, non-verbal or physical conduct of a sexual nature.” Those alleging harassment before the civil courts or tribunals do not need to prove that they did not consent to any sexual advances – unlike the prosecution in a rape trial. The civil law test is based upon the less onerous requirement to show that the conduct was “unwanted” and had “the purpose or effect of violating a person’s dignity...”

Thus, in both criminal and civil law, it is recognized that a spectrum of circumstances exists within which consent may be seen as compromised. But only recently in Irish law has a legal definition of consent been provided. Following years of campaigning to strengthen the law for victims by feminist activists, survivors’ groups and rape crisis centers, the Criminal Law (Sexual Offences) Act 2017 became law in Ireland. In Part 8 of the Act, a statutory definition of consent was included for the first time in section 48, providing that a “person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.” A number of situations are listed where a person “does not consent to a sexual act” in law, including where they are asleep, unconscious, mistaken as to the nature of the act or the identity of any other person involved; or incapable of consenting due to the effect of alcohol or drugs. The buying of consent is not itself covered, although it is provided that a person does not consent where “the only expression or indication of consent or agreement to the act comes from somebody other than the person himself or herself.”

Following the introduction of section 48, the fundamental basis upon which consent is now rendered legally valid in Irish law is that the person consenting to a sexual act has “freely and voluntarily agree[d]” to participate in the act. This language is based upon that used in similar legislation in different jurisdictions, generally introduced following campaigns by feminist activists and rape crisis centers; in England, for example, section 74 of the Sexual Offences Act 2003 provides that “a person consents if he agrees by choice, and has the freedom and capacity to make that choice.”

Campaigns for statutory definitions of consent have been generated by decades of frustration experienced by feminist activists over difficulties with securing convictions for rape due to perceived concerns over lack of clarity, typically among jurors, on the legal meaning of “consent.” Such laws are often accompanied by “affirmative consent” policies widely used in feminist advocacy, by activists running “consent workshops” on university campuses and by survivor support groups and others. All stress the need for mutual agreement in equal sexual relationships.

Apart from the creation of the new statutory definition of consent, the 2017 Act also introduced a series of significant procedural and evidential reforms to the trial of sexual offenses. However, its most controversial provisions were those introduced in Part 4 to criminalize the “purchase of sexual services,” thereby incorporating the Nordic model into Irish law. These provisions are discussed further below, and the

concept of “compromised consent” applied to justify their introduction from a feminist perspective.

Irish Law on Prostitution

Irish law on prostitution has a complex history—from the Contagious Diseases Acts and Vagrancy legislation of the nineteenth century to the focus on the so-called “common prostitute” in early-twentieth century legislation (Luddy, 2007). Difficulties around providing proof of “indecent exposure” in order to secure convictions in the 1980s led to a change in the law in 1993. But despite changing legal regimes, some themes remained constant throughout. Above all, the sale or purchase of sex was not itself an offense; the criminal law was not designed to suppress prostitution, just to curb its public display.

This remained the case, with no momentum for any change in the legal framework for regulation of prostitution until the publication of a report by Kelleher et al. (2009), which provided a detailed overview of the extent of trafficking and prostitution in Ireland. The report concluded that “Of the estimated 800-1,000 exploited in the Irish commercial sex trade at any given time, between 87 and 97 percent are migrant women, with 51 nationalities identified, at least 10 percent being trafficked women and girls” (O'Connor & Yonkova, 2019, p. 42). The report proved to be a catalyst for the development of a new Turn Off the Red Light (TORL) campaigning coalition, made up of non-governmental organizations (NGOs), trade unions, political organizations, and other groups advocating as a policy goal the reduction or elimination of prostitution through criminalizing the purchase of sex.

Their campaign culminated after some years in the introduction of the Criminal Law (Sexual Offences) Act 2017, which applied the Nordic model through Part 4, within which section 25 creates a new offense of “payment etc. for sexual activity with prostitute.” Significantly, while the purchase of sex is now criminalized, the offense of soliciting or importuning no longer applies to a person who offers sex for sale – thus effectively decriminalizing the sellers of sex in public (other offenses around brothel-keeping and pimping were retained).

It is unsurprising, given the highly polarized nature of academic debate on prostitution, that markedly different analyses of the 2017 Irish law have been offered in academic and policy discourse. Support for the 2017 reform as an example of progressive feminist law-making has been expressed for example by Beegan and Moran (2017, p. 72), in concluding that the new law “targets demand, challenges society's attitudes to men's violence against women and sends a clear message that the body cannot be sold, bought or violated.” Similar acknowledgment is provided in a recent EU-funded comparative report, commissioned by the Immigrant Council of Ireland, in which the Irish law reform is described (2018, p. 29) as being “underpinned by principles of gender equality and human rights ...” In an interim report, commissioned by the government into the implementation of the legislation mid-way through the three year statutory review period (Shannon, 2020), a broadly positive view is provided of what is described as the “equality” approach adopted in the 2017 Irish law; and forthcoming empirical research into the commercial sex trade in Ireland in the context of the review (O'Connor & Breslin 2020) will show that the introduction of the 2017 Act has not caused any surge in violence against persons in prostitution, despite claims to the contrary by some opponents of the legislation. However, those who oppose the new law have critiqued it, not only for failing to protect those engaged in the sex trade, but also for failing to recognize women's agency; Ward (2017, p. 99) asserts

that it represents a “move to deny consent to all sex workers as a group, as a principle of law.” Similarly, Fitzgerald & McGarry (2016, p. 289) argue that Irish “neo-abolitionist discourse” has operated “through gendered and racialized assumptions about sex workers and migrant women” and has mis-framed and misrepresented “sex-working women.” David Ryan (2017, p. 12) has argued that decriminalization would instead represent “the most viable chance of practically addressing the needs of sex workers and developing the systems in which their safety can be better protected.” Tom O'Malley has been similarly critical, suggesting (2017, p. 88) that “the problem with the Swedish approach now adopted in Irish legislation is that it appears to presume conclusively that everyone who engages in sex work does so unwillingly or, at any rate, for reasons largely beyond his or her control.”

“Compromised Consent” in Prostitution

These “sex work” critiques of the 2017 Irish law have been powerfully challenged by Monica O'Connor (2017; 2018), based on her own empirical work carried out in Ireland. O'Connor uses a continuum concept to describe how choice, agency and coercion can co-exist for women within prostitution, so that “consent” is effectively compromised, as it may be for women experiencing domestic violence. She argues (2017, p. 15) that women's own accounts of the lived experience of prostitution sex contribute to recognition of the “coercive context in which consent is given and obtained in prostitution” and of “the importance of differentiating between adult consensual sex, implying mutual, desired sex and prostitution sex described by women in [her] study which is better defined as buyers gaining acquiescence to commit unwanted sexual acts.”

Dorchen Liedholdt similarly applies insights from domestic violence campaigns to develop an understanding of prostitution, arguing (2003, pp. 170-1) that “prostitution often does not require overt physical coercion or verbal threat since the system of domination perpetuated and enforced by sex industry businessmen and buyers is intrinsically coercive” and that (2003, pp. 174-5):

The power and control model used to understand the modus operandi of perpetrators of domestic violence is rarely applied to tactics of procurers, pimps, brothel owners, and other sex industry profiteers. This fact is likely the consequence of the success of the notion that prostitutes are sex workers who choose prostitution over other career options. The reality, however, is that the strategies of power and control used by battering husbands and boyfriends are identical to the strategies used by their counterparts in the sex industry.

This analysis, and O'Connor's conception of a continuum concept within which “consent” and choices are exercised, in prostitution as in domestic violence, provides support for the understanding that in some situations of structured gender and inter-sectional disadvantage, consent may be regarded in law as compromised. This understanding of consent also derives support from Catharine MacKinnon's assertion that:

Prostituted sex... is considered consensual because it is paid. In fact, women are disproportionately bought and sold in prostitution by men as a cornerstone of combined economic, racial, age-based, and gendered inequality, in which money functions as a form of force in sex....layers of inequality [are] involved in this technically consensual sexual activity..” (2016, pp. 447-8).

MacKinnon's argument has been subject to critique by those who say that it might universalize all heterosexual intercourse as coercive in conditions of general gender inequality, conflating a level of coercion that might justifiably be tolerated legally with a level that is appropriately criminalized. In this context, Robin West, while acknowledging (2005, p. 452) the importance of MacKinnon's work in establishing that "non-consensual, as well as consensual but unwanted sex has undermined women's quest for equality, liberty, and human dignity," contends (2005, p. 448) that "[u]nwelcome sex is often, perhaps even very often, non-consensual; when it is so, it is indeed rape. But unwelcome sex is not always non-consensual; thus, it is not always rape." More recently, she has argued further that it may be perilous to over-rely on consent, and that while "commodified sex" may be described as consensual, it is unwelcome and likely to cause "harms to physical, psychic and moral integrity." (West, 2020, p. 27).

Even with West's modified approach, MacKinnon's critique of consent-based sex crime laws exposes the limitations of the individual-agency based arguments made against the Nordic model. Applying her critique, it is argued that prostituted sex may best be categorized as falling between "non-consensual" sex (rape) and "consensual" sex (mutually desired, where consent is "freely and voluntarily" given). In prostituted sex, consent is not "freely and voluntarily" given. Rather, it becomes a commodity, bought and sold. The seller does not "desire" the sex; their sexual gratification or pleasure is not the point of the transaction nor the concern of the buyer. Thus, their consent may be understood, not as absent (as in rape) but rather as "compromised" due to the structures of the exploitative "gender regime" of the sex trade. Within these structures, consent may be compromised in a number of different ways; including those where a woman is effectively controlled or coerced into prostitution by her partner or pimp, or those where a woman has been trafficked from another jurisdiction. Consent in prostitution is a complex concept—as it is more generally in sexual relations. As this author and others have explored previously in a public health context (McCarthy-Jones et al., 2019), "willing" sex may be contrasted to "forced" and "persuaded" sex; and health outcomes have been found to differ depending on the nature of a person's first sexual experience. Indeed, that study, in focusing specifically on the first time that individuals had experience of sexual intercourse, illustrates that consent itself, like other human behaviors, cannot be understood independently of the context in which it is given or offered. Moran (2013), among others, has provided a graphic account of the particular coercive context in Ireland within which "consent" is given in prostituted sex.

Conclusion

So, consent is complicated, and as the *#MeToo* movement and feminist campaigns on domestic violence have established, it may be compromised in a profoundly unequal setting. This conception of compromised consent, based upon the experiences of those harassed and largely without power in the workplace, should inform academic and political discourse on prostitution. As Farley points out (2018, p. 2), "sexual harassment is what prostitution is. If you remove the sexual harassment (and) unwanted sex acts, there is no prostitution. If you eliminate paid rape, there is no prostitution." Similarly, Moran and Farley (2019, p. 1374) argue that "Prostituted sex is coerced sex by its nature. The cash is the coercive force."

Applying this understanding then, Nordic model laws may be justified in affording substantive recognition to the contexts and power structures within which consent is given. Such laws recognize prostitution as a form of structured private exploitation

within which consent is compromised, in the context of gender and intersectional inequality. And they recognize the self-evident truth that consent which is bought is not consent, which is “freely and voluntarily” given.

Those who advocate for such laws thus see the choices made and consents given by most of those engaged in prostitution within a broader structural setting of profound inequalities based on gender, class, and ethnicity. Within this context, as within a workplace hierarchy, consent may be compromised. The sex in this context is not wanted, desired, or mutual sex – and may be the predicate for legal recourse.

By contrast, what unites those arguing for legalized prostitution is at its core an individualized understanding of consent and choice, divorced from its context. Many arguments made in favor of legalizing prostitution derive from a view that sex workers should essentially be free to trade in the marketplace; a classic liberal or libertarian perspective. Such arguments fail to address the social and economic structures within which individual choices are made and consents given, with an emphasis upon prioritizing individual agency over broader contexts.

Indeed, the dominance of the “sex work” argument within academic discourse has been attributed to a marked shift towards a libertarian perspective in scholarship generally. Sylvia Walby (2011, p. 23) for example has identified a “neoliberal” turn in the academy—“a shift in intellectual enquiry about systems of power to that of agency ... [which] functions in practice towards deflecting analytic interest away from the powerful and from systems of power.” She suggests (2011, pp. 19-20) that the celebration of individual agency within contemporary third-wave feminist writing effectively masks the way in which commercialized sexuality represents a new form of control over women. Similarly, West (2018, p. 997) describes those who support legal prostitution as “[l]iberal, pro-sex and postmodern feminists [who side] with nonfeminist liberals ...”

For now, while the “sex work” perspective remains dominant in academic discourse, it is clear that the view of prostitution as an inherently exploitative “gender regime” within which consent is compromised has exerted greater influence on civil society and policy-makers, in Ireland and in many other jurisdictions.

The 2017 Irish reform, like the 1999 Swedish law, represents recognition of prostitution as a practice of gender inequality; its passage followed an organized feminist and trade union-led campaign. This campaign took place within a very particular Irish social and political context, in a country moving from a conservative religious-dominated culture of secrecy and repression around sexuality towards a more equal society with a sexual culture informed by strong principles of mutuality. This movement has informed recognition that the law can and should intervene to prevent harm, where choices are coerced and consent compromised through the exploitation of inequalities. Drawing from legal frameworks addressing sexual harassment and domestic violence, this law reform is based upon a conception of “compromised consent” that is helpful to justifying laws specifically criminalizing the purchase of sex.

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