ARTICLES

Drafting New Rape Law

How Dutch Legislators Talk About Sexual Consent

Hoko Horii & Annelien Bouland

1 Introduction

On 8 March 2021, the Dutch Minister of Justice and Security presented a Bill to reform the law on rape. In this Bill rape no longer requires 'coercion'. Instead, the absence of 'consent' becomes the defining element of rape. The reform is part of a wider European trend. Across Europe, a number of countries are moving from coercion-based definitions of rape to consent-based definitions of rape in criminal law. In 2018, for instance, Sweden moved to make the lack of positive consent the basis for rape by creating the crime of negligent rape. In Switzerland, too, reforms on the law on rape are underway.[1] In 2022, the new rape law in Belgium came into effect, centring on the lack of consent as a crucial element in determining the commission of the crime. The trend toward consent-based definitions of rape seems provoked by societal changes in what is deemed acceptable and criminal sexual behaviour. They are also precipitated and prompted by international human rights obligations, most notably under the Istanbul Convention (2011).

If consent is central to these European reforms, debate exists as to what exactly constitutes consent to sex, and how to operationalize consent in rape law. Does consent require a positive affirmation or should the refusal to engage in sexual intercourse be at the heart of consent? What circumstances would undermine the validity of a person's apparent consent? Should consent always be communicated verbally or non-verbally and what is considered positive non-verbal behaviour in sex?

This article has two related aims. First, we examine how the Dutch legislator articulates consent, and how consent takes shape in the new criminal rape provisions. Second, we critically engage in the motivations for the reform and analyze how the Dutch formulation of consent relates to the feminist theories of sexual consent.

Our analysis draws on a close reading of the different preparatory documents produced over the course of reform, restricting ourselves to the period 2016-spring

1 Mansour 2022.

Recht der Werkelijkheid 2023 (44) 1
doi: 10.5553/RdW/138064242023044001002

2022.[2] This approach builds loosely on sociological studies about frames and problem definitions and what frames and problem definitions say about how a social problem has come to be understood as a problem and how it should be resolved[3] – particularly in relation to public policy. As Bacchi points out, this facilitates an understanding of the assumptions, logics, and knowledge that underpin these representations and helps develop an appreciation for what has been left out.[4] Although this methodology has tended to be used in relation to public *policy*, legal texts too may promote and produce certain understandings of social problems and preclude others. Inspired by these studies, we approach law primarily as a discourse. We examine how consent is represented and articulated, what problem definitions or motivations underlie the reform, and what alternative understandings have been left out.

Our close reading of the different preparatory documents focused on the sections that set out the reasons for reform, that described the problems the reform aimed to tackle and the explained how the new law should be understood and how its different elements should be interpreted. With a view to the question of how Dutch legislators articulate consent and how they motivate the reform, each author first produced a qualitative and inductive analysis of these documents, developing codes that emerged from the data. This process produced remarkably similar codes and analyses. The codes were developed and adjusted based on several major themes, namely: consent and coercion, the normative and symbolic function of law, social norms, and education. Minor themes were also identified, namely: modernization of the law, online offenses, the #MeToo movement, and gender. On the basis of these themes, we, together, came to discuss and structure the several findings that we present in this article.

Following this introduction, we will first discuss the different ways in which scholars have taken on the topics of rape, coercion, and consent in relation to legal definitions of rape. We will provide an overview of global legal developments in sexual crimes for which consent has become increasingly central, as well as relevant theoretical work on rape and sexual consent. Second, we focus on the Dutch rape law reform and set out the timeline of the reform process to date. Then, we analyze how consent is articulated and discussed by the Minister and Members of Parliament and what motivations are given for the making of the new rape law. In the conclusion, we draw out the main issues dominating Dutch rape reform.

2 Bills, Explanatory Memoranda, Letters to Parliament produced by the Minister of Justice and Safety and as well as the (minutes of) Parliamentary discussions of the Bill to date and the advice of the Council of State. Although our analysis does not focus on the consultations or expert meetings, we have also examined the documents pertaining to these processes, because Members of Parliament and the Minister often referred to or mobilized their advice to support their position.

3 Benford & Snow 2000; Bacchi 2012; Bletsas & Beasly 2012.

4 Bacchi 2012.

2 Recent Legal Developments on Sexual Violence Law

The past two decades have seen significant development of international law on rape. The 2004 decision of the European Court of Human Rights (ECHR), the *M.C. v. Bulgaria* case, held that any sexual act without consent must be punished and effectively convicted, even when the victim did not physically resist, a decision that would turn into an important international benchmark.[5] The decision reads:

> '[T]he Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy.'

In 2011, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) entered into force. The Convention classifies rape and all other non-consensual sexual acts as criminal offences.[6] They are to be defined as crimes against the physical integrity and sexual autonomy of a person, as opposed to crimes of violence in a narrow sense and crimes against morality, public decency, honour, or the family and society. GREVIO, the independent expert body responsible for monitoring the implementation of the Istanbul Convention by the Parties, indicated in a 2020 report that the rape law of Sweden represents an example that should be followed by the other member states: Swedish law, in which rape hinges on the lack of mutual consent is 'in full compliance' with the Istanbul Convention. In the same year, the Secretary General of the Council of Europe stated that the Istanbul convention requires states to reform their rape laws so that it defines rape as 'sex without consent'.[7]
Reflecting this 'new' international standard, in recent years many countries have been changing domestic legislation on sexual violence. The change is often characterized as a shift from 'coercion-based' rape law to 'consent-based' rape law. Coercion-based rape law defines the crime of rape as forced sex, evaluating whether the act takes place in 'coercive circumstances'.[8] By contrast, some countries follow what is called a consent-based definition, where the sexual act is illegal if it is not voluntary, centring around the existence or non-existence of 'unequivocal and voluntary agreement'.[9] In this model, physical violence, threats, and coercion are no longer prerequisites for defining rape. In addition to the example of Sweden and other countries referred to in the introduction of this article, a number of other European countries have adopted a consent-based definition in recent years, using

5 *M.C. v. Bulgaria* ECHR, Applic. no. 39272/98 (ECtHR, 4 December 2003).
6 See Art. 36(1) of the Istanbul Convention and Recommendation (2002) and Explanatory Memorandum H/Inf (2004), para. 35, which States criminalize all acts when there was no mutual consent, including when the
victim showed no resistance, and the Council of Europe Parliamentary Assembly (PACE) Resolution 1691 (2009).
7 Secretary General 2020.
8 Dowds 2020, p. 35.
9 Dowds 2020, p. 35.

Recht der Werkelijkheid 2023 (44) 1
doi: 10.5553/RdW/138064242023044001002

various terms, including not only 'consent', but also 'voluntariness' (*e.g.*, Iceland, Finland, Denmark, Greece, and Norway).[10]

Still, differences exist in the way consent has come to be defined. For instance, central to the 2016 German definition of sexual assault and rape is the question of whether the sexual penetration was 'against the apparent will of another person'. Accordingly, the new law is referred to as *Nein heist Nein*.[11] The Spanish legislature defines consent as the explicit expression of a person's will. Here consent is about an affirmative 'yes'.[12] The processes of the rape law reform in these countries show that the exact terms used in the eventual criminal provision (*e.g.*, 'voluntariness', 'consent', 'recognizable will') moreover tell us little about how *exactly* these are interpreted. In, for instance, Denmark, the choice between 'voluntariness' and 'consent' was hotly debated, yet while the eventual provision referred to consent, the explanatory note also found guidance in the proposal based on voluntariness.[13]

The set of literature also shows that the move toward a consent-based definition of rape is often framed as an important 'symbol': in a number of countries a strong emphasis is placed on the expressive function of the law.[14] The idea is that the law should validate and promote the idea that sex should be consensual. The expectations of the law's expressive potential are high, in the case of Sweden going as far as framing reform as an 'education imperative'.[15] As may be expected, this emphasis on the symbolic function of law has been criticized by some for failing to provide legal certainty and stands in tension with criminal law's function of demarcating and sanctioning criminal behaviour.

3 Feminist Conceptualizations of Sexual Consent

The above-mentioned shift towards the consent model rests, in part, on the mainstreaming of feminist thought. Sexual autonomy is no longer only protected in situations where citizens are coerced into sex and are thus unable to protect their sexual autonomy themselves. However, feminists have also been critical of consent-based rape law. The next two sections will outline key feminist ideas about sexual violence, which inform our analysis later in this article. One such idea is that sexual violence is a structural issue rooted in gender inequality, which also relates to the call for a power sensitive analysis of the context in which sexual consent is provided. Another crucial idea is that the interpretation of the concept of 'reasonable belief' tends to reflect rape myths and gendered discourse around sex.

10 Bragadóttir 2020; Alaattinoğlu, Kainulainen & Niemi 2020; Jokila and Niemi 2020; Vestergaard 2020; Bladini & Andersson 2020; Nilsson 2020; Wegerstad 2021.
11 Lindenberg 2019; Kölbel 2021; Hörnle 2017.
12 Faraldo-Cabana 2021; AP in Madrid 2022.
13 Vestergaard 2020.
14 Jacobsen & Skilbrei 2020; Faraldo-Cabana 2021; Wegerstad 2021.
15 Wegerstad 2021, p. 736.

3.1 Sexual Violence as a Structural Problem and Redefinition of Force

So, how has sexual violence come to be understood as a structural issue? Beginning in the 1970s, feminists of different stripes emphasized that sexual crimes cannot simply be understood as a crime of violence nor that they are about honour or public morality. Instead, new understandings of rape started to become commonplace: rape is a violation of a person's sexual autonomy. In addition, rape came to be seen as a key mechanism of patriarchy. They stressed that rape culture was about male domination over women. By this logic, as MacKinnon points out 'rape is not an isolated event or moral transgression or individual interchange gone wrong but an act of terrorism and torture within a systemic context of group subjugation, like lynching'.[16]

For instance, some *quid pro quo* sexual intercourse is considered rape, if we consider the coercive nature of the pressure resulting from the power differentials between the consent-giver and the consent-receiver.[17] When some feminists describe prostitution as 'commercial sexual violence',[18] this reflects the idea that includes economic and other coercive pressures as 'force', which often compel women's consent to sexual acts. Some scholars argue that deception, misinformation, or the lack of information can undermine sexual consent.[19]

Feminists specifically have grappled with the concept of consent under patriarchy. MacKinnon, for instance, argues that, given gender oppression and uneven power structures, women are not truly free to make unconstrained choices with regard to their sexuality.[20] In her view, the concept of consent loses its meaning when the two parties entering into an agreement are not equally powerful[21] and should be abandoned in rape law.[22]

In the Netherlands, under the influence of feminist activism sexual violence started to be reframed as a political concern and a social problem instead of a personal problem in the 1970s.[23] This led, by 1991, to an expansion of the legal definition of rape: marital rape became punishable and the definition of coercion was widened.[24] Still, Dutch feminist legal scholars have pointed out that the judicial interpretation of coercion in rape cases under current law (see Section 4) is rather narrow.[25]

Now, as we will see, the Dutch plan to make *consent* central to the definition of rape to further strengthen the protection of sexual autonomy. A crucial question here is how coercion and consent are interpreted and conceptualized. For instance, Dowds points out that much depends on how 'unequivocal and voluntary agreement' in the consent model, or 'coercive circumstances' in the coercion model, are

16 MacKinnon 1989, p. 172.
17 Falk 1998.
18 Jeffreys 1997.
19 Dougherty 2013.
20 MacKinnon 1989.
21 Jackson 1992.
22 MacKinnon 2006: MacKinnon 2016.
23 Römkens 2016, p. 295-296.
24 Zeegers 1999.
25 Kool 2003; Zeegers 1999.

Recht der Werkelijkheid 2023 (44) 1
doi: 10.5553/RdW/138064242023044001002

interpreted.[26] It is therefore essential to ask what kinds of forces, constraints and pressures are considered to undermine the validity of a woman's (apparent) consent.

3.2 Mental State and Reasonable Belief

Philosophical debates over sexual consent generally centre around victims' subjectivities. Yet, the legal process of prosecuting rape crimes is often dependent on the subjectivity of the defendant. In order to establish rape, the prosecution must show that the defendant was in certain state of mind with regard to the victim's lack of consent. This subjective element of 'mental state' (sometimes referred to as *mens rea*), relating to the defendants' intention to commit a crime, is a necessary element to convict the defendant. In establishing these subjective elements, common law jurisdictions in particular have tended to rely on the standard of 'reasonable belief'. Different views are identified about the conditions under which it is deemed reasonable for one to believe that the other is consenting to sexual intercourse.

Pineau argued that the prevailing conception of reasonableness relies on 'aggressive-acquiescence' model, which holds that male aggression and female reluctance are normal parts of seduction.[27] This logic is the backdrop against which 'reasonable belief' is assessed in rape cases. Instead Pineau proposes a 'communicative sexuality' model, which requires people engaged in sex to communicate about their respective desires.[28] In this model, where communicative sex does not occur, one does not know if the other party is consenting – thus, if they nonetheless believe that the other party is consenting, then that belief is unreasonable.

This debate over 'reasonable belief' reveals that the social construction of rape myths and gendered discourse around sex result in blurred perceptions around what constitutes legal and illegal sexual activity. As Larcombe argues, gendered discourses on rape function to 'make it increasingly "reasonable" that an accused (or the criminal law) may not be able to know whether a complainant was consenting or not'.[29] For example, when pornographic and popular media portrays women as enjoying forceful sex, it generates a discourse where a defendant can claim that the sexual act was consensual and simply 'rough sex' that was enjoyed by the victim.

So, 'reasonable belief' is the product of gendered perceptions and discourse. For the very same reason, 'reasonable belief' is subject to changes depending on shifts in society's sexual mores. For instance, Powell's et al. analysis of Australian rape trials indicated some discernible shifts in the discourse on rape taking place since the introduction of the communicative model of consent.[30] This model has enabled

26 Dowds 2020.
27 Pineau 1989.
28 Pineau 1989, p. 231.
29 Larcombe 2005, p. 28.
30 Powell et al. 2013.

prosecutors to shift focus to the accused person's awareness of consent,[31] as the accused cannot rely on their assumption of consent.

In the Netherlands, this debate is articulated in terms of abuse of power. The Dutch feminist scholar Zeegers argues that judges should consider defendants' behaviour against the background of the power relations that existed between the man and woman at the time.[32] Therefore, the question should be if the defendant, considering his relation to the victim, deprived her of the freedom to decide for herself whether she wanted to engage in sexual intercourse.[33] This approach would shift judges' focus from victims' behaviour to defendants' behaviour. As the article will show, the current rape law reform in the Netherlands reflects significant shifts in the application of 'mental state'. The debates revolve around the balancing act between focusing more on defendants' behaviour and responsibility and upholding the principle of legal certainty.

The idea of 'reasonable belief' reminds that the law is both a reflection of broader societal discourses and a powerful reinforcement of ever-shifting socio-cultural norms and values. A discourse, according to Foucault, is not only an instrument and an effect of power, but also is 'a hindrance, stumbling-block, a point of resistance and a starting point for an opposing strategy', which 'transmits and produces power: it reinforces it, but also undermines and exposes it, renders it fragile and make it possible to thwart it'.[34] By this logic, legal determinations of what counts as 'consent' or 'reasonable belief' are constantly made and re-made within a broader context of societal discourse and cultural meanings.

The set of literature presented in this section shows that rape, consent, and coercion all can encompass vastly different meanings depending on how one defines them. As these concepts could also be narrowly or broadly interpreted, we should be attentive to how exactly 'consent' and 'coercion' are talked about, and what these words actually mean when they are articulated in law.

4 The Current Dutch Rape Provision and The Timeline of Reform

The current Dutch rape law follows a so-called coercion model: sexual integrity is protected only when one's freedom to protect one's sexual integrity oneself is impaired.[35] The provision criminalizes the coerced sexual penetration of the body, where coercion may be exerted through violence, the threat of violence, or another act or threat thereof.

In this provision, coercion is understood to exist when and where it was *so difficult* for the victim *to evade or resist* that (it can be established that) the defendant exercised coercion or when and where the victim could not 'reasonably expected' to

31 Pineau 1989, p. 229.
32 Zeegers 2002, p. 452.
33 Zeegers 2002, p. 452.
34 Foucault 2012, p. 101.
35 Lindenberg 2019, p. 10.

Recht der Werkelijkheid 2023 (44) 1
doi: 10.5553/RdW/138064242023044001002

resist or evade.[36] Thus, while its application leads to differing outcomes in practice, this standard roughly means that coercion requires that (1) the act needs to be against the will of the victim; (2) the act needs to be unavoidable; and that the defendant needs to have intent on (3) the non-consent of the victim and (4) the unavoidability of the act for the victim.[37]

In the same provision, 'another act or threat thereof' sees to a number of types of behaviour and, most notably, includes psychological pressure. Behaviours that have been qualified as 'another act or threat thereof' comprise physical acts, (*e.g.*, firmly grasping the victim), the use of commanding language (*e.g.*, ordering the victim to bend down), the use of authority or dominance (*e.g.*, intentionally posing as a 'prophet of God' and saying that undergoing sexual acts is an order from God), inadvertent sexual acts, and acts that take place in a situation in which the victim cannot escape such acts independently of the accused. One example is a case where a man used the cultural and religious authority he held in the community the complainant and her family belonged to, as well as the large age difference between him and the complainant to coerce her into sex.[38] The man convinced the complainant of the presence of angry ghosts in her home and subsequently acted as if a spirit had entered his body and told complainant that she was his wife that he was entitled to her and/or that he wanted to play with her one last time because otherwise he would never leave her alone. Yet while the scope of the current rape provision depends in large part on the concept of 'another act or threat thereof', case law on when coercion is exerted through 'another act or threat thereof' has been fairly haphazard.[39]

A plan to reform the Law Against Sexual Crimes was first announced in 2016 by the then Minister for Justice and Safety Ard van der Steur.[40] Concerned with lack of system and with inconsistencies in the code as well as with the emergence of new online forms of sexual crime, the Ministry had ordered a review of the code and its functioning.[41] The review confirmed problems of incoherence, inconsistence and ambiguity in norm setting and recommended a thorough revision of the code. Yet the authors of the report also raised a number of questions relating to reforms of the crimes of sexual assault and rape. In his 2016 announcement to Parliament, the Minister stated he would take up the suggestion of a complete overhaul as well as that he wished to broaden protection against a number of online forms of sexual crimes, notably against children. Picking up on the questions raised by the report's authors, he moreover stated he will 'consider the extent to which protection against lewd acts should be broadened'.[42] The Bill would be ready for consultation to the public by fall 2016, he announced. However, the process would take considerably more time: only in spring 2020 did the Minister present his Bill for consultation.

36 HR 12 december 2006, ECLI:NL:HR:2006:AY7767; Lindenberg &Van Dijk 2016; ter Haar, Kesteloo & Korthals 2019; Schreurs et al. 2019.
37 Lindenberg and Van Dijk 2016. See also: ter Haar, Kesteloo and Korthals 2019; Schreurs et al. 2019.
38 ECLI:NL:GHDHA:2016:3981, *uitspraak*, Hof Den Haag, 27 December 2016; *Hoger beroep*.
39 Lindenberg & Van Dijk 2016.
40 *Kamerstukken II* 2015/2016, 29279, no. 300 (Letter to Parliament, 29 February 2016).
41 Lindenberg & Van Dijk 2016.
42 Letter to Parliament, 29 February 2016 (no. 39), p. 9.

In the intermediate period, the issue of protection against unwanted or forced sex increasingly gained in importance. In a December 2018 letter to Parliament about the reform, the new Minister Ferdinand Grapperhaus indicated he contemplated the criminalization of sexual acts 'against the will'.[43] In May 2019, the Minister confirmed his intention and elaborated extensively on the rationale and formulation of this new offense of sex against the will.[44] He moreover decided to split the consultation phase in two, apparently due to the profundity of the reform. The first Bill the Minister presented for consultation to the public in the spring of 2020 served as a *preliminary* Bill. In addition to crimes of sexual assault and rape, for which coercion remained a requirement, it criminalized the negligent crime of 'sex against the will', a crime that would not require the proof of intent but for which negligence sufficed.[45]

> Article 239 (Sexual interaction against the will)
> 1 He who performs sexual acts with a person or causes a person to perform sexual acts with him or with himself or with a third party or causes a person to undergo sexual acts by a third party while he knows or should reasonably suspect that these acts are performed against the will of that person shall be punished by imprisonment for a term not exceeding four years or a fine of the fourth category.
> 2 If the acts referred to in the first paragraph consist of or include sexual penetration of the body, this shall be punishable by imprisonment for a term not exceeding six years or a fine of the fourth category.[46]

The preliminary Bill also revised the definition of rape. Coercion remained a requirement but rape would no longer be restricted to penetration of the body of the object of criminal protection. Rape would include the forced penetration of what the Bill refers to as the victim as well as of a third person – whether coercion is exerted in person or online. Public consultation of the preliminary Bill revealed a mixed reception. A number of public and civil society organizations welcomed the plan to criminalize sex against the will. Others, however, argued that that 'sex against the will' is rape, and that the new provision should be scrapped and replaced by broadened definitions of assault and rape.[47] Members of Parliament adopted the latter stance. On 9 November 2020, the MPs part of the standing committee on Justice and Safety, including members of the coalition parties, asked the Minister to drop the two-tack approach of separate criminalization of sex against the will and adopt a consent-based definition of rape and assault.[48] The Bill he presented on

43 *Kamerstukken II* 2018/19, 29279, 34843, no. 483 (Letter to Parliament, 21 December 2018).
44 *Kamerstukken II* 2018/19, 29279, 34843, no. 518 (Letter to Parliament, 22 May 2019).
45 Note that the Dutch criminal code distinguishes between crimes and offences, whereby the first category contains the more serious violations. These always have a *mens rea* element which either require criminal intent (*dolus*) or guilt/recklessness (*culpa*).
46 De Minister van Justitie en Veiligheid 2020c.
47 See https://www.internetconsultatie.nl/wetseksuelemisdrijven, last accessed on 20 September 2022.
48 *Kamerstukken II* 2020/2021, 34843, 31015, no. 44 (Record of Debate, 9 November 2020).

Recht der Werkelijkheid 2023 (44) 1
doi: 10.5553/RdW/138064242023044001002

8 March 2021 hence further revised definition of rape.[49] Both an intent and a negligent variant of rape are distinguished, which would set it apart from a number of recent reforms in other European countries.[50] For intentional rape, violence, force and threats constitute aggravating circumstances.[51]

> 'Article 242 (Negligent Rape)
> 1 He who performs sexual acts with a person which acts consist of or include sexual penetration of the body while he has serious reason to suspect that this person lacks the will to do so, shall be punished as guilty of negligent rape by imprisonment for a term not exceeding four years or a fine of the fourth category.
>
> Article 243 (Intentional rape, qualified intentional rape) [new, 242].
> 1 He who performs sexual acts with a person which acts consist of or include sexual penetration of the body when he knows that this person lacks the will to do so, shall be punished as guilty of intentional rape with imprisonment of not more than nine years or a fine of the fifth category.
> 2 He who is guilty of intentional rape preceded, accompanied or followed by coercion, violence or threats shall be punished with imprisonment of not more than twelve years or a fine of the fifth category.'[52]

In line with formal law-making requirements, the Council of Ministers gave its fiat to the Bill and sent out to the Council of State for advice on 14 December 2021. The advice of the Council of State, formulated and published in June 2022, endorses the importance of the reform of rape law, yet opinions, amongst more minor remarks, that the demarcation of separate intent and negligent crimes is insufficiently clear. Relatedly, it questions the need of the negligent variants for rape and for assault.[53] The Bill has been formally presented to Parliament in the fall of 2022. As becomes clear from their written questions, MPs have overall responded positively to the Bill. A number of questions were raised about the precise demarcation of the intent and negligence, some MPs also cautiously questioned the need for a separate criminalization of negligent rape.[54] Plenary debate is expected to take place in late spring of 2023.

49 This reform is paralleled in the new definition of sexual assault (De Minister van Veiligheid en Justitie 2021).

50 Iceland and Denmark are examples of countries which have recently adopted a consent-based definition of rape that requires intent (Bragadottir 2020; Vestergaard 2020). The Swedish reformed law includes intentional and negligent rape (Wegerstad 2021).

51 There are other changes in the definition of rape: the penetration does not need to happen on the body of the victim etc.

52 De Minister van Justitie en Veiligheid 2021.

53 See https://www.raadvanstate.nl/actueel/nieuws/juni/samenvatting-wet-seksuele-misdrijven/@127956/w16-21-0369-ii/ (last accessed on 22 September 2022).

54 *Kamerstukken II* 2022/2023 36222, no. 5.

5 Articulation of Consent in the Debate

5.1 A Shifting Definition of Consent

Over the course of the elaboration of – and debates over – the two Bills, the way consent is articulated has changed. At first, protection against 'involuntary sex' and 'sex against will' are the terms with which the aims of the reform are expressed. Later, these are 'sex in the absence of will' or 'in the absence of a positive expression of will'.

The Minister first set out the plan for reform in 2019. He writes to Parliament that '[t]he bar of proof for prosecution for involuntary sexual acts is [currently] too high'.[55] Hence, the Minister argued, the penal law needs to criminalize 'sex against the will'. The MPs adopted these terms. In parliamentary discussion they voiced approval, agreeing that penal law should protect against involuntary sex. But what is involuntary sex? And how may involuntariness be established? Criminal law requires that such involuntariness be proven without a doubt. The Minister elaborated:

> 'A "no" is a "no." If this is not complied with, boundaries are crossed and it is criminal conduct. This is also the case when a "no" is not clearly expressed, but the other person's involuntariness should be inferred from the facts or circumstances.'[56]

However, the focus on involuntariness would soon give way to 'the absence of will'. The critique engendered by the preliminary Bill ushers frames reflecting a more expansive interpretation of consent. Following the public consultation of the preliminary draft, a MP for D66 asked the Minister: 'Do you agree that Article 36 of the Istanbul Convention assumes "only yes is yes" and Article 239 of the Preliminary Bill assumes "no is no"'?[57] Of course, the contention over 'yes' and 'no' tells us little. A 'no' can be expressed non-verbally and may be expected to be inferred from facts and circumstances, as is also clear from the above statement of the Minister. 'Yes' does not necessarily refer to verbal communication. More important perhaps, the eventual 2021 Bill does not mention 'yes' but rather speaks of 'no' or another negative counteraction, whether verbal or physical, as well as the absence of a positive will. Still, it is clear that the tone and also the understanding of consent shifts. Instead of 'against the will' and 'involuntariness' the focus comes to lie on 'lack of will'. Now it is sex in the absence of will that penal law needs to protect against.

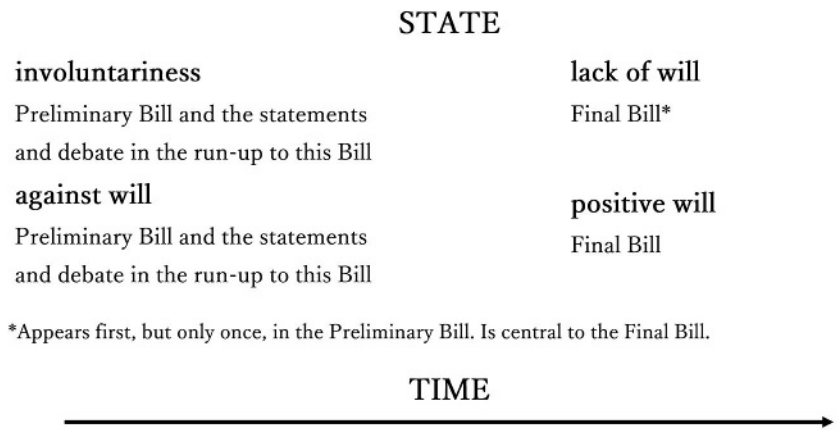
55 *Kamerstukken II* 2018/19, 29279, 34843, no. 518 (Letter to Parliament, 22 May 2019), p. 2.

56 *Kamerstukken II* 2018/19, 29279, 34843, no. 518 (Letter to Parliament, 22 May 2019), p. 2. The same statement is included in De Minister van Justitie en Veiligheid 2020a.

57 *Kamerstukken II* 2020/2021, 34843, 31015, no. 44 (Record of Debate, 9 November 2020), p. 9.

Recht der Werkelijkheid 2023 (44) 1
doi: 10.5553/RdW/138064242023044001002

Figure 1 Shifting Definition of Consent



'[…] lack of will has a wider action radius than sexual contact against the will', the Minister indicates in the Explanatory Memorandum of the new 2021 Bill.[58] Indeed, the notion of 'against the will' appears to presuppose a will *not* to engage in sex. A lack of will, on the other hand, seems to indicate that there is no will to *engage* in sex. Even so, the difference is rather subtle. Sex against the will can be established on the basis of clear 'no' or 'reluctant gestures or movements'.[59] And, when 'someone adopts a hesitant or shifting attitude' at the start of or during the sexual acts' this gives rise to a duty to investigate for the initiator to see whether these acts may be involuntary.[60] There is lack of will, on the other hand:

> 'in explicit verbal or physical holding back behaviour which makes it clear that the other person does not want it, but also when this is expressed, for example, by pronounced passive behaviour or by obvious (non)verbal signals from the other person which cannot be missed by the initiator, which indicate a reluctant position. Not only the one who initiates the sexual contact, but also the other person should verbally or by a clear responsive attitude give evidence of a positive expression of will with regard to the sexual contact.'[61]

Although the Minister underscores that he does not seek to require affirmative consent, the new understanding of consent does move more or less in this direction, especially when it comes to negligent rape, as we will see below.
Because of the focus on the criminalization of non-consensual sex, translating first as involuntary sex and later as sex in the absence of 'will', the notion of force

58 De Minister van Justitie en Veiligheid 2021.
59 *Kamerstukken II* 2018/19, 29279, 34843, no. 518 (Letter to Parliament, 22 May 2019), p. 4.
60 De Minister van Justitie en Veiligheid 2020, p. 8.
61 8 March 2021: MvT 2021 Bill, p. 10.

appeared mostly as a foil to the discussion on reform.[62] The 2021 Bill criminalizes coerced rape as an aggravated form of rape and states that 'coercion occurs when the perpetrator creates such circumstances or abuses the circumstances in such a way as to make it impossible for another person to act otherwise', which, although it is hard to see how exactly, in the view of the Minister, broadens the current interpretation the High Court gives to coercion.[63] Of course, unwanted sex may be accompanied by psychological pressure that does not make it impossible to act otherwise, but that is nonetheless experienced as pressure. In the 2021 Bill, these situations fall under the definition of non-qualified rape.

This suggests that, when rape law adopts a consent-based model by using the terms such as involuntary sex, sex against will, lack of (positive) will, coercion remains criminally relevant, and the change equates to the feminists' idea of broadening the definition of force. This expansive definition of force includes psychological pressure, but how expansive exactly it will be interpreted remains a critical question. As we shall see below, for instance, situations in which there exists an age or power differential between the people engaging in sex are seen to create a form of psychological pressure.

5.2 Power and (in)Equality

While inequality is a key theme in the wider legal reform of the law on sexual crimes and the feminist discussions on sexual violence, the question of free consent, and hence of whether power differentials may preclude consent, receives markedly little attention. The crimes the 'sex against the will' (*preliminary* Bill) and rape are not framed as being about inequality but categorized as forms of 'involuntary sex'. 'Unequal sex', on the other hand, is protected by different provisions criminalizing sexual abuse, for instance, sexual activity with a minor or with a functionally dependent person. Yet, while the question of free consent is not addressed head-on, in rape cases (and, previously, sex against the will) judges should – according to the Minister – take power differentials into account as 'context' in their evaluation of whether or not the sexual interaction was consensual. It is clear that, in situations where there exists a vast difference in power between the perpetrator and victim, the perpetrator may be expected to proceed with care. In extreme situations 'creating a relationship of dependency or taking advantage of an overbalance situation' may, in line with current case law, constitute a form of psychological pressure that constitutes 'coercion' – which in the 2021 Bill is punishable as aggravated 'coerced' rape.[64] Other situations of overbalance could in the *preliminary* Bill have given rise to intentional or negligent 'sex against the will'

62 Note that in an interview with the *Volkskrant* on 29 September the Minister grossly misconstrues the way coercion is now interpreted in Dutch courts. This is also noted by the MPs of D66 and GroenLinks, *Kamerstukken II* 2020/2021, 34843, 31015, no. 44 (Record of Debate, 9 November 2020). See also Schreurs et al. 2019.

63 De Minister van Justitie en Veiligheid 2021, p. 11.

64 This is already relevant to the interpretation of coercion under the current law, and it will continue to be relevant to the interpretation of what should give rise of the suspicion that the sexual act is not voluntary in the negligent and/or intent variant of the new law.

Recht der Werkelijkheid 2023 (44) 1
doi: 10.5553/RdW/138064242023044001002

or, in the 2021 Bill, intentional or negligent rape. For instance, the Memorandum to the *preliminary* Bill of 12 May 2020 reads:

> 'In addition to explicit verbal signals and the behavior of the other person, facts and circumstances that should give rise to the suspicion that sexual acts may not be voluntary can also result in criminal liability. For example, if someone in an unequal situation, such as a (numerical) overbalance situation, fails to check for unintentional sexual acts.'[65]

> 'Furthermore, criminal sex against the will may involve sexual contact in an unequal situation, in which the person engaging in sexual contact would have been aware or at least should have been aware of the fact that acts against the will may be taking place.'[66]

Hence the existence of a power imbalance itself does not constitute criminal liability, but it is in the backdrop of the assessment of whether the perpetrator should have been aware that the sexual act was against the will of the victim. This is particularly the case for the negligent forms of sex against the will and, later, rape. Power differentials are a part of the context which is considered important when evaluating the negligent variants. This includes the situation in which the victim is outnumbered, or when there is a significant age difference or difference in authority.

And what about 'the inherent power differentials' between men and women, which feminists have been discussing? How far has gender (in)equality been discussed and considered in the debate? Gender relations are mentioned as part of the wider policy on sexual violence. Explicit mention is observed for instance in the Letter of Secretary of State Public Health, Wellbeing and Sport:

> 'We also know that people with intellectual disabilities are at increased risk of sexual violence and that women are more often victims than men. Unequal gender relations and stereotypical views of masculinity and femininity play a role in this. This is also reflected in the fact that the vast majority of perpetrators of sexual violence are men.'[67]

Yet so far, the actors involved in the elaboration of rape reform have been remarkably silent about power differentials between men and women. The most explicit mention may be in the breakdown of the prevalence of sexual violence in the Explanatory Memoranda of the two Bills, in which victims and perpetrators are specified by gender. Still the MPs, and at times also the Minister, occasionally draw from feminist scholarship on sexual violence, for instance, when they use the notions of victim blaming, secondary victimization, and dispel the myth of the

65 De Minister van Justitie en Veiligheid 2020, p. 8.
66 De Minister van Justitie en Veiligheid 2020, p. 38.
67 Kamerstukken II 2020/2021, 34843, no. 45, p. 2 (Letter to Parliament, 4 February 2021).

'classical rape'. However, these notions receive far less attention than references to neuropsychological knowledge on the 'freezing' or tonic immobility of victims.[68] Importantly, gender equality is drawn on to motivate the inclusion of the sexual penetration of one's own body and the body of another in the new rape definition. The Minister states it will ensure 'equal justice to female and male victims', as it 'happens that male victims to be forced into sexual penetration of the perpetrator's body'.[69] Thus, gender equality is mobilized primarily to motivate the gender neutral definition of new rape law.

5.3 The Mental State: Negligence and Intent

Various situations in which power differentials between two parties are seen to create psychological pressure, as described above, may give rise to a duty to investigate on the part of the person instigating the sexual interaction. The instigator is to check whether the other consents to the sexual interaction. While reform is represented mainly as putting consent front and centre – for changing the objective element of the crime, or *actus reus* – we suggest that perhaps the most striking difference the reform may make is the introduction of negligent crime for rape and sexual assault. For this reason, the demarcation of intent and negligence are the subject of considerable elaboration.

Already in the *preliminary* Bill, sex against the will comprised situations in which the object of criminal responsibility had the intent and in which they were negligent. The 2021 Bill contains a separate criminalization of negligent and intent rape. The intent variant of rape is explained as follows:

> 'In the intent variants of sexual assault and rape, the accusation is against ignoring, disregarding or taking for granted. This may include situations in which a person performs sexual acts on another person when the other person has clearly said "no," "I don't want this," or "don't," or words to that effect. Or the performance of sexual acts, despite clear non-verbal physical counter-reactions from the other person, such as explicitly holding back, crying or freezing or stiffening the body. Such non-verbal reactions may also include conditional intention, consciously accepting the likelihood that sexual acts will take place while the other person lacks the will to do so and accepting this consequence.'[70]

68 This contrasts, for instance, to French debates on sexual violence (including rape) where the feminist theories have been frequently mobilized (Dekker 2022a).

69 De Minister van Justitie en Veiligheid 2020, p. 4. See also at for instance *Kamerstukken II* 2020/2021, 29 279, 34843, no. 618 (Letter to Parliament, 29 September 2020).

70 De Minister van Justitie en Veiligheid 2020, p. 10-11. Note that the Memorandum preliminary bill in case the victim froze the perpetrator would generally be deemed to have behaved recklessly, although their behaviour may under circumstances be qualified as intentional.

Recht der Werkelijkheid 2023 (44) 1
doi: 10.5553/RdW/138064242023044001002

Sexual (non)consent can thus be expressed both by verbal and non-verbal means (*e.g.*, holding back, crying, freezing or stiffening the body[71]). Intent here ranges from: ignoring, disregarding and taking for granted.
For negligent rape, the central question is as the Minister states 'what someone, the basis of the facts and circumstances, should at least have known about the other person's position toward to the sexual acts he or she wanted to commit'.[72] A person who initiates sexual acts needs to be alert for 'contraindications and to whether the other person is really in for sexual contact'.[73] This is explained repeatedly, for instance as follows (quoting one of many explanations):

> 'In the case of the offence of negligent sexual assault, an important responsibility rests on the person who initiates sexual contact to keep an eye on whether the other person is willing. The consequence of this is that a person can also be criminally liable if he or she puts him or herself in a situation where he or she is no longer able to be alert to the other person's position, for example through the use of alcohol or drugs, loses his or her ability of judgement as a result and wrongly assumes that there is a positive expression of will on the part of the other person. This applies all the more in situations in which the parties involved do not have an (intimate) relationship and have only recently become acquainted with each other, for example in nightlife.'[74]

Here too it is clear that sexual (non)consent can be expressed both by verbal (*e.g.*, 'I don't know if I like this', or 'I don't think I'm ready for this') and non-verbal means (*e.g.*, hesitant, shifting or passive attitude or body language).
The negligent variant would significantly increase criminal liability compared to the current law. In the 2021 Bill, it suffices that victims' expressions point to a 'lack of positive will' (*i.e.*, hesitance or doubt). The point here is that the initiator has the responsibility to check on the will of the other person and to seek their positive consent or wait for them to take the (further) initiative. If the facts and circumstances give rise to it, there may be a duty of investigation on the part of the person initiating the sex. This sees to 'contraindications or signals that cannot be missed by any right-thinking person', the Explanatory Memorandum to the 2021 Bill reads. As non-exhaustive examples it lists 'various and/or continuous signs that indicate reluctance on the part of the other person, such as a wavering, shifting or passive attitude at the start of or during the sexual acts or a failure to show physical interaction or to stop participating at any point'. All these discussions inform what 'reasonable belief' would mean for the investigation of negligent rape.

71 The 'freezing' response is also referred as 'tonic immobility', and is frequently discussed in the debates throughout the First and Second Bill. In the technical briefing of Parliament, a sexologist contributed to the understanding of this reaction stating that it is normal victim behaviour, also among men, and that in fact 70% of rape victims does nothing. She described it as 'an evolutionary adaptive defense mechanism in emergency situations where flight or fight is no longer possible'.
72 De Minister van Justitie en Veiligheid 2020, p. 41.
73 *Kamerstukken II* 2020/2021, 34843, 31015, no. 44 (Record of Debate, 9 November 2020).
74 De Minister van Justitie en Veiligheid 2021.

It is perhaps not surprising that the introduction of the plan to include the negligent crime raised some concern with regard to 'legal certainty'. For instance, during a Parliamentary Debate on February 2020 an MP concludes:

> '[T]he threshold for successful prosecution should be lowered, but not to the point of eroding legal certainty. You need to know when you are committing a crime.'[75]

At this point, legal certainty was raised to challenge or question the new proposal. However, MPs have increasingly taken on a more principled stance in favour of reform and now seem less occupied with the question of whether or not the reform offered sufficient certainty about which behaviour is and is not criminalized.
Central to the introduction of the negligent crime of, first sex against will, and later negligent rape, is the place of responsibility, which shifts from the victim to the perpetrator.

> 'As a result of the new lower limit for criminal liability in the negligence offences, more responsibility is placed on the person initiating sexual contact.'[76]

It is the responsibility of the initiator to keep an eye on, be attentive to, and check the other person's positive intent or lack thereof. In the Parliamentary Debate on 20 February 2020, the Minister stated:

> 'I think that our law should express that if you participate in our society and if you have or want to have contacts with another person that lead to sex, then you just always have a duty of informing yourself. […] You just have a reasonable duty of informing yourself, to find out if the other person wants, and the judge makes that determination.'[77]

Although the Minister does not indicate what one should inform oneself about, we suggest this should be interpreted as a responsibility to inform oneself about whether the other consents, and thus to be attentive to signs of (non)consent, which seems to presume a familiarity with social conventions surrounding sex. On one hand, this shift resonates with the feminists' idea that the judicial investigation should focus more on defendants' behaviour and responsibility instead of victims' behaviours. On the other hands, though, feminists also alert us that 'reasonable belief' is informed by gendered conventions in today's society. As we will reflect in the conclusion of this article, the subjective element of mental state will likely be at the center of the subsequent parliamentary debate.

75 *Kamerstukken II* 2019/2020, 34843, no. 40 (Record of Debate, 20 February 2020), p. 9. MP Van Wijngaarden (VVD).
76 De Minister van Justitie en Veiligheid 2021, p. 11.
77 *Kamerstukken II* 2019/2020, 34843, no. 40 (Record of Debate, 20 February 2020), p. 35.

Recht der Werkelijkheid 2023 (44) 1
doi: 10.5553/RdW/138064242023044001002

6 Motivations for the Reform

6.1 The 'Problem of the Threshold' and Sexual Autonomy

How is the problem reform will resolve portrayed? And what interests will the reform protect? Importantly, the shift in the definition of consent from 'involuntary sex' and 'sex against the will' to 'sex in the absence of will' or 'in the absence of a positive expression of will' is accompanied by a reconceptualization of the problem the reform sets out to remedy. Initially, the reform aimed to make it easier to prosecute perpetrators of unwanted sex; the goal of the reform was to *lower the threshold*. The current law was deemed to have *too high* a threshold for a conviction, a problem a new law would remedy. At the first announcement and discussion of reform, what we will refer to as the 'frame of the threshold', was used persistently both by the Minister and the MPs, echoing a more longstanding concern in Parliament with access to justice and problems of attrition for victims of sexual crimes. 'It is important that there are low-threshold possibilities to counter involuntary sex.'[78] Notably the Minister and the MPs thus did not make a binary distinction between consent and coercion as central element of sexual violence. Rather they evoked a continuum. More important, perhaps, this frame reveals that the central element of the current rape crime – which, as set out above, requires coercion – was portrayed to be involuntariness, not coercion.

As the goal of the reform shifts from protecting against sex against the will to sex without a positive will, the frame of the threshold recedes to the background. In the MPs' responses to the preliminary Bill and final Bill, a more principled distinction between the current and proposed law starts to take centre place. This also means that the interests the reform sets out to protect are cast in a somewhat different light. The purpose of reform is to protect sexual autonomy, sexual integrity and bodily integrity.

> 'Our society has as a fundamental right the bodily integrity and therefore also the right to free sex.'[79]

Hence, the goal of the *preliminary* Bill was primarily set out to be the *better* protection of these interests.

> 'With this tightening of the criminal law, the sexual autonomy of every person is better protected by criminal law.'[80]

Strikingly, in the course of the elaboration of reform, the goals of respecting sexual autonomy, sexual integrity, and bodily integrity take on a more central role. The explanatory memorandum to the 2021 Bill, moreover, suggests that the conception of freedom/autonomy shifts:

78 *Kamerstukken II* 2019/2020, 34843, no. 40 (Record of Debate, 20 February 2020), p. 7. These are the words of MP Bisschop (SGP).

79 *Kamerstukken II* 2019/2020, 34843, no. 40, p. 7 (Record of Debate, 20 February 2020), p. 36.

80 *Kamerstukken II* 2018/19, 29279, 34843, no. 518 (Letter to Parliament, 22 May 2019), p. 2.

> 'Whereas the current offenses of sexual assault and rape assume punishability upon "breaking through" the other person's will, in the new crime forms it already begins in the absence of the other person's will for sexual contact.'[81]

6.2 Law and Social Norms

A key justification for reform is the perception of shifting sexual norms and it has been emphasized that this rape law reform has been initiated with the need to 'bring the criminal law in line with social norms'. The reform is to solve a problem of a growing gap between social norms and legal norms. In this regard, the #MeToo movement is also referred to as one of the major causes of changes in 'the social norm' about sexual transgressive behaviour.

> 'The criminal legislation largely reflects the prevailing sexual morality and norms behavior that deserves punishment from a social point of view. High statutory penalty ceilings express the seriousness of the criminal accusation. In recent years, societal views on sexual border crossing have become stricter.'[82]

> 'Partly as a result of the #Metoo movement, the boundaries of what we consider acceptable behavior within our society have also shifted.'[83]

This change of 'social norm' is identified and documented by two polls that have also been conducted by the Ministry during the drafting process to gauge public opinion – Amnesty also commissioned a poll as part of its campaign for reform.[84] The idea is that law should change in accordance to the new 'social norm' about what constitutes sexually permissive and sexual transgressive behaviour. However, the law is seen to be as not only a reflection of the 'social norm', but also as a creator of the new norms. There, similar to a number of other European countries where reform recently took place or is currently being debated,[85] the expressive or symbolic function of law is emphasized, in different words:

> 'Criminal law also has a clearly normative and deterrent function. It serves to deter people from transgressing norms.'[86]

> '[T]his bill sends a clear signal to (potential) perpetrators that sexually transgressive behavior is not acceptable and will be severely punished. This bill therefore also has an unmistakable normative and preventive effect.'[87]

81 De Minister van Justitie en Veiligheid 2021, p.11.
82 De Minister van Justitie en Veiligheid 2021, p. 2.
83 De Minister van Justitie en Veiligheid 2020b.
84 Milou Gutter, Flitspeiling wetsvoorstel seksuele misdrijven (Kantar, 15 november 2019); Miriam Winninghoff, Modernisering zedenwetgeving: Een kwalitatief onderzoek (Ferro Explore, 24 January 2019) Definitieve rapportage. Versie 1.0.
85 Jacobsen & Skilbrei 2020; Wegerstad 2021.
86 *Kamerstukken II* 2020/2021, 29279, 34843, no. 618 (Letter to Parliament, 29 September 2020), p. 2.
87 De Minister van Justitie en Veiligheid 2020, p. 1-2.

Recht der Werkelijkheid 2023 (44) 1
doi: 10.5553/RdW/138064242023044001002

The discussion on the maximum punishments for each category of punishable acts also reflects on this symbolic function of law.

> 'The criminal legislation largely reflects the prevailing sexual morality and norms behavior that deserve punishment from society's point of view. High statutory penalty ceilings express the seriousness of the criminal accusation.'[88]

Similarly, the symbolic function of the law is discussed as a reason why change of the term 'sex against will' to 'rape' was considered important. For instance, reflecting a common response to the consultation of the preliminary Bill, the Minister summarizes;

> 'To do better justice to the experiences of victims and to send a strong signal that sex should always be voluntary, it is recommended that all forms of involuntary sex be criminalized as *rape*.'[89]

While the law's expressive function relates to the capacity of a law to generate compliance by what it says, not by what it sanctions, the law's function of 'sending signals' is represented as closely linked to its deterrent function. The paragraph below discusses both general and specific deterrence that the new law would contributes to.

> 'The new legal framework has the effect of making the risk of criminal liability more foreseeable for (potential) perpetrators. Clear criminal norms send a clear signal to (potential) perpetrators that sexually transgressive behavior is not acceptable and will be severely punished. It is assumed that this has a deterrent effect and contributes to a positive change in behavior. If norms are violated, criminal intervention and appropriate punishment can take place. Perpetrators of serious sexual offenses can be imprisoned for a longer period of time.'[90]

At various moments and in various contexts the symbolic or expressive function of law is extended to a broader goal of sexual education, especially when it concerns 'young people'. For instance, in a Meeting on the First Bill (9 November 2020) that differentiated rape from sex against the will, the Labour Party Group expressed:

> 'Do you also see that a distinction between "real rape" and "less real rape" sends a bad message to young people?'[91]

88 De Minister van Justitie en Veiligheid 2020, p. 1.
89 *Kamerstukken II* 2020/2021, 29279, 34843, no. 618 (Letter to Parliament, 29 September 2020), p. 2.
90 De Minister van Justitie en Veiligheid 2021, p. 23.
91 *Kamerstukken II* 2020/2021, 34843, 31015, no. 44 (Record of Debate, 9 November 2020), p. 24.

Education for youth is mentioned also as *complementary* to legal reform in the fight against sexual violence, a preventive measure on top of the new law. Especially considering the introduction of the negligent rape and assault, education and awareness-raising of the new legal norms seem poignant. This also links back to the discussion on legal certainty. While the concern with the expressive function of law may push aside considerations relating to legal certainty, education may serve to enable people to avoid committing a crime, particularly in relation to negligent rape, where the charge is not that the person knew consent was lacking, but should have known. By this logic, it is essential that the new legal change goes hand in hand with education and communication about the legal norms about sexual transgressive behaviour, for people to know what they should have known about social and legal boundaries of sexual consent.

7 Conclusions

In this article, we have analyzed how consent is understood and given juridical shape in the making of the new Dutch rape law as well as what motivations lawmakers provide for reform. In popular discourse, consent and coercion are contrasted as radical opposites. The set of feminist literature on sexual consent has shown that rape, consent, and coercion all can encompass vastly different meanings depending on how one defines them. Moreover, analyses of recent rape law reforms in other countries reveals that the use of different terms (*e.g.*, 'consent', 'voluntary', or 'against the recognizable will') does not always point to a difference in criminalization. The current so-called 'coercion-based' Dutch law shows that coercion can be interpreted rather broadly. Present-day governmental discourse on rape law reform reveals that the meaning of voluntariness in relation to sex has shifted from 'against the will' to the 'lack of will'.

Taken together, the binary contrasting of consent-based definitions of rape and coercion-based definitions (for instance, by Amnesty Campaigners) or rather their treatment as different points on a continuum (the Dutch governmental discourse of 'lowering the threshold'), appears primarily to be a matter of *representation*, or even political choice. These frames, we suggest, should not be taken at face value, but should rather be analyzed as indicative of what the values are that legal reform is understood to promote – ambitions which, in actual practice, may (not) be met.

The Dutch case study also clearly showed that the shift of the 'social norm' is portrayed as both justification for the legal reform and a key goal of the reform. This also means that the expressive and educational function of law is deemed important, like in other European countries where reform takes place. Especially after the #MeToo movement, several European governments have displayed concern with 'sexual autonomy/integrity', leading to a shift in what is considered wrongdoing: violation of sexual autonomy, instead of the act of violence or coercion. This is in line with victim experiences and should be considered a feminist triumph. Yet in the Netherlands there is remarkably little attention for the problem of gender inequality and feminist understandings of rape as an instrument of patriarchy are pushed aside in favour of more liberal feminist understandings of

Recht der Werkelijkheid 2023 (44) 1
doi: 10.5553/RdW/138064242023044001002

autonomy and consent as choice. Governmental discourse represents rape as a gender-neutral crime. While it is to be commended that rape law aligns better with the types of sexual violence men tend to experience, the fact that the primary victims of rape are women receives next to no attention in governmental discourse, meaning that the eventual reform may end up neglecting the types of gendered inequality that could under circumstances preclude consent. This disregard echoes the Dutch gender neutrality in relation to other types of violence which are commonly understood as forms of gender-based violence: sexual street harassment and domestic violence,[92] as well as the relative disregard for gender inequality in the Swedish and Finnish rape reform processes.[93]

The most striking difference the reform may make is the introduction of negligent crime for rape and sexual assault. Both the analysis of literature and the Dutch debate in this article showed that the meaning given to consent in rape trials is profoundly influenced by the subjective elements of mental state required. For negligent crimes, the investigation centres around 'mental state' – what the suspect knew, should have known, or is expected to know about the victim's will. Here, tension exists between the idea of sexual autonomy and law: if it is a matter of autonomy, the victim's subjectivity is everything. Indeed, the Dutch government discourse on rape law reform reveals a strong emphasis on the subjectivity of the object of protection of the criminal law, or 'the victim'. The new law at least tries to shift the responsibility to the suspects/initiators for being attentive, checking on the signs, and educating themselves about what is socially considered as sexually transgressive behaviour and as 'sexual consent'. Yet criminal law requires *mens rea*. Hence the focus is on the subject of criminal responsibility and what they could reasonably believe, or should have known. The latest advice from the Council of State problematizes the proposed negligent variant, pointing out that the line between intent and negligent crimes is not sufficiently clear. Hence, this will likely be at the centre of the subsequent parliamentary debate.

It seems without doubt that the Netherlands will follow the European trend toward rape law reform, but it is yet to be seen in what form exactly. More importantly, it is as yet unclear how the new law will change the practice of reporting, arresting, investigating, prosecuting, and judging sexually transgressive behaviours, and hence what the effects of the law will be beyond expressive or symbolic effects – one major concern in the implementation of the new law is the lack of (human) resources to investigate sexual crimes. The noted salience of social conventions on sex as well as the lack of attention to gendered inequalities means that in implementing the new law it is worth closely monitoring what will be legally treated as 'negligence' – when the initiator *should have known* that the sexual acts were involuntary.

92 Römkens 2016; Dekker 2022b.

93 Wegerstad 2021; Alaattinoğlu et al. 2020.

References

Alaattinoğlu, D., H. Kainulainen & J. Niemi, 'Rape in Finnish Criminal Law and Process - A Discussion on, and beyond, Consent', *Bergen Journal of Criminal Law & Criminal Justice*, 8 2020(2), p. 33-53. https://doi.org/10.15845/bjclcj.v9i2.3238.

AP in Madrid, 'Spanish Parliament Approves "Only Yes Means Yes" Consent Bill', *The Guardian*, 26 May 2022, sec. World news, https://www.theguardian.com/world/2022/may/26/spanish-parliament-approves-only-yes-means-yes-consent-bill.

Bacchi, C., 'Introducing the "What's the Problem Represented to be?" approach',in: *Engaging with Carol Bacchi: Strategic Interventions and Exchanges*, C. Beasly & A. Bletsas (ed.), Adelaide: University of Adelaide Press 2012, p. 21-23. https://doi.org/10.1017/9780987171856.

Benford, R.D. & A.S. David, 'Framing Processes and Social Movements: An Overview and Assessment', *Annual Review of Sociology*, 2000-26(1), p. 611-639. https://doi.org/10.1146/annurev.soc.26.1.611.

Bladini, M. & W.S. Andersson,'Swedish Rape Legislation from Use of Force to Voluntariness - Critical Reflections from an Everyday Life Perspective', *Bergen Journal of Criminal Law & Criminal Justice*, 2020-8(2), p. 95-125. https://doi.org/10.15845/bjclcj.v8i2.3241.

Beasley, C.-& A. Bletsas (ed.), *Engaging with Carol Bacchi: Strategic Interventions and Exchanges*, Adelaide: University of Adelaide Press 2012.https://doi.org/10.1017/9780987171856

Bragadóttir, R., 'Legislation on the Offence of Rape in Icelandic Criminal Law', *Bergen Journal of Criminal Law & Criminal Justice*, 2020-8(2), p. 54-77. https://doi.org/10.15845/bjclcj.v9i2.3239.

De Minister van Justitie en Veiligheid, 'Memorie van toelichting bij voorontwerp wetsvoorstel seksuele misdrijven (Explanatory Memorandum Preliminary Bill), Ministerie van Algemene Zaken 2020a. https://www.rijksoverheid.nl/documenten/kamerstukken/2020/05/12/memorie-van-toelichting-bij-voorontwerp-wetsvoorstel-seksuele-misdrijven.

De Minister van Justitie en Veiligheid, 'Brief aan Amnesty International voorontwerp wetsvoorstel seksuele misdrijven', Ministerie van Algemene Zaken 2020b. https://www.rijksoverheid.nl/documenten/publicaties/2020/07/16/brief-aan-amnesty-international-voorontwerp-wetsvoorstel-seksuele-misdrijven.

De Minister van Justitie en Veiligheid, 'Wijziging van Het Wetboek van Strafrecht En Andere Wetten in Verband Met de Modernisering van de Strafbaarstelling van Verschillende Vormen van Seksueel Grensoverschrijdend Gedrag (Wet Seksuele Misdrijven) (Preliminary Bill)', Ministerie van Algemene Zaken 2020c. https://www.rijksoverheid.nl/documenten/kamerstukken/2020/05/12/voorontwerp-wetsvoorstel-seksuele-misdrijven.

De Minister van Justitie en Veiligheid, 'Wijziging van Het Wetboek van Strafrecht En Andere Wetten in Verband Met de Modernisering van de Strafbaarstelling van Verschillende Vormen van Seksueel Grensoverschrijdend Gedrag (Wet Seksuele Misdrijven) (Explanatory Memorandum Bill)', Ministerie van Algemene Zaken 2021. https://www.rijksoverheid.nl/documenten/kamerstukken/2020/05/12/voorontwerp-wetsvoorstel-seksuele-misdrijven.

Dekker, M., 'De strafbaarstelling van straatintimidatie en het risico van etnisch profileren',*Recht der Werkelijkheid* 2022a-43(1), p. 8-30. https://doi.org/10.5553/RdW/138064242022043001002.

Dekker, M., 'How apprehensions impact policy implementation: a comparison of Dutch and French campaigns on street harassment', *European Journal of Politics and Gender*, 2022b-6(2), p. 1-18.

Dougherty, T., 'Sex, Lies, and Consent', *Ethics*, 2013-123(4), p. 717–744. https://doi.org/10.1086/670249.

Dowds, E., 'Towards a Contextual Definition of Rape: Consent, Coercion and Constructive Force', *The Modern Law Review*, 2020-83(1), p. 35-63. https://doi.org/10.1111/1468-2230.12461.

Falk, P., 'Rape by Fraud and Rape by Coercion' *Brooklyn Law Review*, 1998-64(1), p. 39-180.

Faraldo-Cabana, P., 'The Wolf-Pack Case and the Reform of Sex Crimes in Spain', *German Law* Journa,l 2021-22(5), p. 847-859. https://doi.org/10.1017/glj.2021.38.

Foucault, M., *The History of Sexuality: An Introduction*, Knopf Doubleday Publishing Group 2012.

Haar, R., L. Kesteloo & N. Korthals, 'De Strafbaarstelling van Seks Tegen de Wil: Een Eerste Verkenning van Het Juridische Landschap', *Tijdschrift Praktijkwijzer Strafrecht*, 2019(37), p. 244-253.

Hörnle, T., 'The New German Law on Sexual Assault and Sexual Harassment', *German Law Journal*, 2017-18(6) p. 1309–1330. https://doi.org/10.1017/S2071832200022355.

Jackson, E., 'Catharine MacKinnon and Feminist Jurisprudence: A Critical Appraisal', *Journal of Law and Society*, 1992-19(2), p. 195-213. https://doi.org/10.2307/1410220.

Jacobsen, J. & M. Skilbrei, 'Reforming the Rape Offence in Norwegian Criminal Law', *Bergen Journal of Criminal Law & Criminal Justice*, 2020-8(2) p. 78-94. https://doi.org/10.15845/bjclcj.v8i2.3240.

Jeffreys, S., *The Idea of Prostitution*,. North Melbourne: Spinifex 1997.

Jokila, H. & J. Niemi, 'Rape Law and Coercive Circumstances', in: M.B. Heinskou, M. Skilbrei & K. Stefansen (ed.), *Rape in the Nordic Countries: Continuity and Change*, , Abingdon, Oxon; New York, NY: Routledge 2020, p. 120-136.

Kölbel, R., '"Progressive"' Criminalization? A Sociological and Criminological Analysis Based on the German "'No Means No' Provision"', *German Law Journal* 2021-22(5), p. 817-832. https://doi.org/10.1017/glj.2021.31.

Kool, R.S.B., & K.D. Lünnemann, 'Onze ergste zaak moet nog komen. Herijking van de strafrechtelijke moraal', *Nemesis - Tijdschrift voor Vrouwen en Recht*, 2003(5/6), p. 194-200.

Larcombe, W., *Compelling Engagements: Feminism, Rape Law and Romance Fiction*, Annandale, NSW: Federation Press 2005.

Lindenberg K., 'Verkrachting, Aanranding En de Bescherming van de Seksuele Integriteit: Moet Nederland Ook Naar Een "Nein Heißt Nein", in: E. Gritter (ed.), *Modern Strafrecht: Contributions to the National Criminal Law Day 2017*, Groningen 2019.

Lindenberg, K. & A. van Dijk, *Herziening van de Zedendelicten?: Een Analyse van Titel XIV, Tweede Boek, Wetboek van Strafrecht Met Het Oog Op Samenhang, Complexiteit En Normstelling*, Zuthen:Paris 2016.

MacKinnon, C.A., *Toward a Feminist Theory of the State*, Cambridge, Mass: Harvard University Press 1989.

MacKinnon, C.A., 'Defining rape internationally: A comment on Akayesu', *Columbia Journal of Transnational Law*, 2006-44(3), p. 940-958.

MacKinnon, C.A., 'Rape Redefined' *Harvard Law & Policy Review*, 2016-10(2), p. 431-477.

Mansour, F., 'La Définition Du Viol En Bonne Voie de Modernisation', *LE TEMP*, 18 February 2022, https://www.letemps.ch/suisse/definition-viol-bonne-voie-modernisation.

Nilsson, G., 'Towards Voluntariness in Swedish Rape Law', in: M.B. Heinskou, M. Skilbrei & K. Stefansen (ed.), *Rape in the Nordic Countries: Continuity and Change*, , Abingdon, Oxon;New York, NY: Routledge 2020, p. 101-119.

Pineau, L., 'Date Rape: A Feminist Analysis', *Law and Philosophy*, 1989-8(2), p. 217-243. https://doi.org/10.1007/bf00160012.

Powell, A., N. Henry, A. Flynn & E. Henderson, 'Meanings of "sex" and "Consent": The Persistence of Rape Myths in Victorian Rape Law', *Griffith Law Review*, 2013-22(2), p. 456-480.

Römkens, R., 'Bestemd voor binnenlands gebruik: De invloed van de vrouwen- en mensenrechtenbeweging op het debat en de aanpak van gendergerelateerd geweld', *Sociologie*, 2016-12(3), p. 295-319.

Schreurs, L., J. van der Ham & L. Hamers, 'Dwang Bij Misdrijven Tegen de Zeden in Het Afgelopen Decennium: Gezichtspunten Uit de Rechtspraak Met Het Oog Op Een Toekomstig Wetsvoorstel', *Delikt En Delinkwent*, 2019(9), p. 756-781.

Secretary General, 'Sex without Consent Is Rape: European Countries Must Change Their Laws to State That Clearly', Council of Europe, 3 June 2020. https://www.coe.int/en/web/portal/-/-sex-without-consent-is-rape-european-countries-must-change-their-laws-to-state-that-clearly-.

Vestergaard, J., 'The Rape Law Revision in Denmark: Consent or Voluntariness as the Key Criterion?', *Bergen Journal of Criminal Law & Criminal Justice*, 2020-8(2), p. 5-32. https://doi.org/10.15845/bjclcj.v8i2.3237.

Wegerstad, L., 'Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden', *German Law Journal*, 2021-22(5), p. 734-752. https://doi.org/10.1017/glj.2021.32.

Zeegers, N., 'Dwang En Vrijwilligheid in Heteroseksuele Relaties', Doctoral Thesis, University of Groningen 1999, https://research.rug.nl/en/publications/dwang-en-vrijwilligheid-in-heteroseksuele-relaties.

Zeegers, N., 'Taking Account of Male Dominance in Rape Law: Redefining Rape in the Netherlands and England and Wales', *European Journal of Women's Studies*, 2002-9(4), p. 447-458. https://doi.org/10.1177/1350506802090040501.