The Netherlands

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A. Background

I. General attitude in society towards sexual relations

The general attitude in society towards sexual relations in the Netherlands has largely followed the overall political climate in Western Europe. Very fundamental to the present sexual offences is the liberal rationale with which the chapter on sexual offences was originally introduced in 1886. This rationale can be summarized as "the protection of sexual integrity of persons who, at that time or in general, are not able to protect it themselves".[1] This seemingly honourable rationale also carries a flip-side: it implies that, as long as a person is able to protect his or her own sexual integrity, criminal law does not offer protection. In other words: the law implies a duty to resist or run away if one is reasonably able to do so. And up to this date, this rationale is manifestly present in the offences of rape and indecent assault, which require coercion. The high threshold for the applicability of these coercive offences is causing more and more societal disapproval, propelled by the #metoo-movement and the international obligation formulated in article 36 of the Istanbul Convention to criminalize intentionally engaging in non-consensual sexual acts. It is evident that the Dutch sexual offences are still not in compliance with this obligation, but a major reform has been planned, as will be discussed below. All in all, it is clear that a societal shift is taking place in the Netherlands with regard to sexual integrity. Not only is there growing support for a consent-based rape offence, but there is also growing attention for the responsibility to ascertain whether there is consent.

1 Cited from the relatively recent *Kamerstukken II* (Parliamentary Papers, Second Chamber) 1988/89, 20930, 5, p. 4. But this rationale is also visible in the preparatory papers of the DCC from 1886 and in the structure of the chapter on sexual offences. All translations in this chapter are by the author, unless stated otherwise.

II. Background of criminal laws on sexual conduct

The criminal provisions on sexual conduct have been incorporated in the general Dutch Criminal Code (*Wetboek van Strafrecht*; hereafter: DCC) ever since it came into force in 1886. The specific chapter is labelled "Offences against the Morals" (*Misdrijven tegen de Zeden*; articles 239–254a DCC) and has been amended many times. Although most provisions have a sexual context, there are some offences that have a broader reach. In that respect, the chapter title refers to public morals. Article 240a DCC, for example, criminalizes the act of showing harmful images to a minor, and is also applicable in cases of harmful violent images.

Unfortunately, a very conspicuous characteristic of the chapter on sexual offences is its lack of structure. Provisions that have a substantive connection to each other are scattered throughout the chapter, so that there is no thematically coherent order of offences. One can, however, discern six categories of protected interests of a sexual nature. There are offences against public sexual morals[2], sexual offences against persons with a mental or physical incapacity[3], sexual offences concerning relationships of dependency or subservience[4], sexual offences against children[5], sexual offences concerning animals[6], and finally sexual offences by use of coercion[7].

The general terms of these categories suggest that the underlying interests enjoy a broad protection. However, in a country where legality plays a pivotal role in criminal law, the relevant provisions have a specific wording. Additionally, the Dutch Supreme Court is generally hesitant to adopt an interpretation that clearly goes beyond the wording of the provision and beyond what the legislature had in mind. And as stated above, the Dutch legislature has had a predominantly reserved view on interfering in the sexual life of citizens: only those who cannot protect themselves are deemed to need protection by the criminal law. As a result, one could say that the sexual offences have a conservative scope. This is especially the case with regard to the coercion offences: rape and indecent assault.

2 Indecent exposure and pornography (articles 239 and 240 DCC).
3 Articles 243 and 247 DCC, of which article 247 also contains offences against children.
4 Article 249 para., 2 DCC.
5 Child-related offences can be found in articles 239, 240a, 240b, 244, 245, 247, 248a, 248b, 248c, 248d, 248e, 248f, 249, 250, 252 and 253 DCC.
6 Article 254 (bestiality) and article 254a (animal pornography) DCC.
7 Article 242 (rape) and article 246 (indecent assault) DCC.

Even in this day and age, the Supreme Court continues to interpret "coercion" as to require substantially more than just acting with knowledge of non-consent (see paragraph I.3 for more details). One exception to the conservative interpretation of sexual offences is the interpretation of offences against children. Lower courts and the Supreme Court have frequently given an extensive interpretation to the elements of these offences, apparently in order to offer a more robust and modernized protection. Although this is understandable, these interpretations also have led to significant overlaps between provisions, making it very hard to distinguish one provision from the other and therefore causing new problems of their own.

In the last few decades, the already unclear structure of the chapter on sexual offences was worsened by an increase of amendments. Many changes were made as a result of new international obligations and, to a lesser extent, of national discussions on criminal policy;[8] but these changes were never systematically thought through. Together with the growing overlap of sexual offences against children, the chapter on sexual offences was becoming more and more difficult to understand. In 2015, this was confirmed by an extensive report on Dutch sexual offences. The report had been commissioned by the government because of the growing concern about the functioning of the relevant chapter. According to the report, the chapter on sexual offences contained "a high degree of inconsistency, complex regulations and vague standards". The report substantiated that it was becoming too difficult to distinguish between provisions, even between those with a very high maximum penalty and those with a low maximum penalty. Furthermore, the report found that interpretations varied widely among courts, causing similar cases to be treated unequally, and that the provisions were not adequately formulated to clearly cover the various forms of "hands-off" sexual abuse and increasing digitization. The report concluded that a comprehensive revision of the chapter on sexual offences should be considered.[9] The government endorsed this conclusion and announced that a complete overhaul of the chapter on sexual offences would be drafted, adding that contemporary societal views on sexual in-

8 For example, the criminalization of sexual corruption and grooming of minors stem from the Council of Europe Lanzarote Convention, whereas the criminalization of bestiality and animal pornography are a direct result of a national debate.

9 K. Lindenberg and A.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*, WODC 2015, paragraph 4.7 (available online via the University of Groningen website www.rug.nl, including an English summary).

tegrity would also be taken into account, like the views connected with the #metoo-movement.[10]

In 2020, a predraft of the new chapter was published for consultation[11], and in 2021, the draft itself was made public.[12] At the time of writing the draft is awaiting its evaluation by the Council of State, after which it will be discussed in parliament.

Because the current legislation, the predraft, and the draft all differ fundamentally regarding many topics – especially the role of consent in the context of rape and sexual assault –, the drafts will be discussed frequently in the following paragraphs. The point of departure will however always be the present law.

III. Definition of sexual coercion offences: rape and indecent assault

As mentioned above, people with a certain vulnerability – for example: young age, a permanent or temporary incapacity, or a dependent relationship – are protected by specific provisions on sexual abuse. People who lack these specific vulnerabilities, however, primarily have to rely on the provisions on "rape" and "indecent assault" (*verkrachting* and *aanranding*) for the protection of their sexual integrity. These offences are defined as follows:

> Article 242 DCC (Rape)
> "Any person who by an act of violence or any other act, or by threat of violence or threat of any other act, compels a person to endure acts comprising or including sexual penetration of the body, shall be guilty of rape and shall be liable to a term of imprisonment not exceeding twelve years (…)."

> Article 246 DCC (Indecent assault)
> "Any person who by an act of violence or any other act, or by threat of violence or threat of any other act, compels a person to perform or to tolerate lewd acts, shall be guilty of indecent assault and shall be liable to a term of imprisonment not exceeding eight years (…)."

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10 *Kamerstukken II* (Parliamentary Papers, Second Chamber) 2015/16, 29279, 300.

11 The predraft and its explanatory memorandum are available at www.internetconsultatie.nl/wetseksuelemisdrijven.

12 The draft and its explanatory memorandum are available at www.internetconsultatie.nl/wetsvoorstelseksuelemisdrijven.

The main structure of these provisions dates back to 1886, when the DCC was introduced, but significant changes were made in 1991: (i) the provisions were made gender-neutral, (ii) the marital exception for rape was abolished, (iii) the crime of rape was broadened so as to encompass not only intercourse but also other forms of sexual penetration, and (iv) the means by which the victim is compelled were expanded from "violence" and "threat of violence" to basically all acts that have the potential of compelling someone (through the addition of "any other act" and "threat of any other act").[13]

The legislature never gave a clear definition of the element of coercion – "to compel" – but the central characteristics can be derived from the case law of the Dutch Supreme Court. In short, the verb "to compel" demands four components to be present:

(1) Non-consent on the part of the victim;
(2) Intent on the part of the defendant with regard to non-consent;
(3) Unavoidability for the victim;
(4) Intent on the part of the defendant with regard to unavoidability.[14]

The non-consent and *mens rea* aspects will be elaborated upon in paragraphs II and IV respectively. As for the third component, the word "unavoidability" represents the view of the Supreme Court that there can only be coercion (compulsion) if the victim could not reasonably do anything but comply with the perpetrator's wish or tolerate his act. The situation therefore must have been more or less unavoidable for the victim. The Supreme Court has strictly upheld this component, which can be demonstrated by the following case: A fifteen-year-old girl hesitantly accepted a body massage from her mother's male friend, who used to be a sports masseur. Lying down naked on a bed, the girl heard the man say that "she has a very nice pussy" and that he wanted to "rub oil on her pussy". She then expressly told him to stop. The man nevertheless put oil on his hand and started to touch her vagina. Once more the girl told him to stop. She then jumped off the bed and left the room. In the criminal case that followed, the Supreme Court eventually quashed the conviction for indecent assault, stating that the evidence did not sufficiently support the

13 See Lindenberg and Van Dijk 2015 (note 9), paragraph 2.7.1.
14 See K. Lindenberg, *Strafbare dwang*, Antwerpen/Apeldoorn, 2007, paragraph 3.3; Lindenberg and Van Dijk 2015 (note 9), paragraph 2.7.3.

conclusion that it had been so difficult for the victim to avert the acts by the defendant that his conduct could be characterized as coercion.[15]

This example illustrates that the aspect of unavoidability, together with the requirement of a corresponding intent (component 4), causes the Dutch system to remain a clear-cut coercion model with regard to rape and sexual assault, as opposed to coercion models that have moved towards a consent-model through interpretation.

The new draft on sexual offences aims to change the essence of rape and indecent assault into a model based on lack of consent. This was, however, not the initial plan. The predraft did not propose to alter the provisions on rape and indecent assault at all, but instead wanted to introduce lesser offences of "sex against the will":

> Article 239 of the Predraft on Sexual Offences
> ("Sex against the will")
> "1. Any person who commits sexual acts with another person (…) whilst he knows or he reasonably should assume that these acts take place against the will of the other person, shall be liable to a term of imprisonment not exceeding four years (…).
> 2. If the acts referred to in the first paragraph comprise or include sexual penetration of the body, the term of imprisonment shall not exceed six years."

This provision in the predraft was heavily criticized for different reasons. A frequent critique was that this provision carried an implied label of a "rape-*light*"-offence, and that this would cause more harm than good for victims of sexual abuse in search of justice.[16] Furthermore, there were objections from academia that the new provision would not only groundbreakingly introduce a lower *mens rea* threshold in this context – in the form of negligence ("reasonably should assume") – but that it would also not distinguish between intent ("knows") and negligence with regard to

15 Dutch Supreme Court (*Hoge Raad*), Judgment of June 2nd 2009, ECLI:NL:HR:2009:BH5725300. Although the conduct of the defendant cannot be characterized as coercion, it fits the provision on committing lewd acts with minors younger than sixteen years (article 247 DCC, carrying a term of imprisonment not exceeding six years).

16 This critique was also clearly present in the NGOs' reactions to the governmental online consultation on the predraft, available at www.internetconsultatie.nl/wetseksuelemisdrijven.

the label and severity of the offence.[17] Finally, legal scholars questioned the need for a new consent model, stating that there was room for expanding the coercion offences by way of interpretation.[18]

Without clearly stating why, the current draft has dropped the separate provision on "sex against the will" and now aims to redefine rape and indecent assault altogether. The proposed offences consist of three forms: a negligent, an intentional, and an aggravated form. For rape, the definitions are as follows (the proposed provisions for indecent assault are similar, but obviously lack the element of sexual penetration):

> Article 242 of the Draft on Sexual Offences ("Negligent rape")
> "Any person who commits sexual acts comprising or including sexual penetration of the body with another person, whilst he has serious reason to assume that the will of the other person is lacking thereto, shall be guilty of negligent rape and shall be liable to a term of imprisonment not exceeding four years (…)."

> Article 243 of the Draft on Sexual Offences
> ("Intentional rape" and "aggravated rape")
> "1. Any person who commits sexual acts comprising or including sexual penetration of the body with another person, whilst he knows that the will of the other person is lacking thereto, shall be guilty of intentional rape and shall be liable to a term of imprisonment not exceeding nine years (…).
> 2. Any person who is guilty of intentional rape that was preceded, accompanied, or followed by coercion, violence, or a threat, shall be liable to a term of imprisonment not exceeding twelve years (…)."

Looking at the previously mentioned criticism, it is noteworthy that now separate offences of negligence and intent are to be introduced and that all forms will carry the label of "rape". Other notable aspects are the changes in the phrasing of negligence (from "reasonably should assume" in the

17 See in greater detail K. Lindenberg, 'Onvrijwillige seksuele interactie', *Ars Aequi* 2020,1014. Although statutory equalization of intent and negligence is not uncommon in Dutch criminal law, the DCC at the same time strongly differentiates between intent and negligence in many areas. For example, intentional homicide carries a maximum sentence of fifteen years (article 287 DCC), whereas negligent homicide carries a maximum sentence of only two years (article 307 DCC). The legislature has yet to make clear what the systematic rationale is for choosing an equalization or a differentiation.

18 L.E.M. Schreurs, J. van der Ham and L.E.M. Hamers, 'Dwang bij misdrijven tegen de zeden in het afgelopen decennium', *Delikt en Delinkwent* 2019/59.

predraft to "serious reason to assume" in the draft) and of non-consent (from "against the will" in the predraft to a "lacking will" in the draft). These aspects will be discussed further below.

IV. General role of consent in criminal law

Before 1886, substantive criminal law in the Netherlands was based on the French *Code Pénal*, which predominantly carried offences against interests of the state. The DCC of 1886 introduced more offences concerning individual interests[19], and more have been introduced since then. This gradual development of offences against individual interests may explain why Dutch criminal law does not have a rich history of a consent doctrine and that the criminal law does not deal with consent systematically. The role of consent depends on the specific context.[20] There are offences that protect a private interest in some way but additionally serve a public interest. It is clear that in this hybrid context, the presence of consent does not necessarily negate the offence.[21] Various examples can be given: human trafficking, intentionally causing grievous bodily harm, killing someone on their request, and committing sexual acts with a minor.

On the other hand, there are criminal provisions that are principally in place to protect a private interest, making the absence of consent part of the essence of the offence. In other words, if there is consent, there is no crime (*volenti non fit iniuria*). However, the characteristics of this element of non-consent differ greatly between provisions.

A relatively narrow conception of (non-)consent exists in the context of the central theme of this book: rape and sexual assault. As will be described in more detail later on, the core element of these offences – coercion, "to compel" – not only implies non-consent on the part of the victim but also requires that this non-consent, this not-wanting something, is actively perceived as such by the victim at the time of the conduct.[22] This immediately rules out the existence of coercion (and therefore rape)

19 D. Simons, *Leerboek van het Nederlandsche strafrecht – eerste deel*, Groningen 1937, p. 49.

20 For an extensive analysis of these contexts, see A. Postma, 'The Netherlands', in: A. Reed and M. Bohlander (eds), *Consent – Domestic and Comparative Perspectives*, London 2017.

21 Comparable to the rationale in *Laskey, Jaggard and Brown v The United Kingdom*, ECtHR, Judgment of 19 February 1997, 09/1995/615/703–705.

22 Lindenberg and Van Dijk 2015 (note 9), paragraph 2.7.3.

if the victim, for example, is sleeping or positively complies due to deceit. In both cases there is no conscious negative experience, and therefore no non-consent in the way required.[23]

A broader, richer notion of consent can be found in crimes against property, like theft and fraud, that revolve around permission and its validity.[24] Furthermore, there are crimes that are linked more directly to the general interest of autonomy than to the issue of consent. Insult, defamation, and slander can be placed in this category. It is the existing or assumed infringement on an aspect of personal autonomy that is the gist of the crime. Consent still plays a role in this category, but in a broader sense, in the form of an attitude: if there is a clearly neutral or positive (assumed) attitude towards the conduct, then there is no reason to believe that there is an infringement. The crime of stalking (article 285b DCC) fits into this category. Central to that offence is an infringement on privacy, which requires that the victim has a negative attitude towards the offender's conduct. If the victim's attitude towards the conduct is completely neutral or even positive, one cannot say that the conduct constitutes an infringement on privacy.[25] However, in terms of consent, the Supreme Court treats this offence very differently than rape and sexual assault. A statutory element of stalking is that the offender acts for the purpose of coercing someone into doing, not doing, or tolerating something, or causing fear. In a case brought before the court, the defendant had shadowed the victim and taken pictures of her, without the victim noticing anything. According to the defence, these acts were not committed for the purpose of causing coercion or fear. On the contrary, the defence argued, it was the defendant's objective to have the victim not notice anything at all. The Supreme Court, however, decided that conduct could amount to stalking if it was the objective of the defendant to prevent the victim from being able to resist the acts, and *thereby* to coerce the victim to tolerate his acts.[26] It is evident from this case that the interpretation of coercion (and of "tolerate", for that matter) is completely different in this context from

23 See below for a discussion on the protection of persons who are asleep or deceived.

24 See extensively on Dutch property offences V.M.A. Sinnige, *De systematiek van de vermogensdelicten*, Deventer 2017.

25 *Kamerstukken II* (Parliamentary Papers, Second Chamber), 1997/98, 25768, 5, p. 16.

26 Dutch Supreme Court, Judgment of April 21 2020, ECLI:NL:HR:2020:673. See A.B. van der Velde, 'Over het oogmerkbestanddeel in artikel 285b Sr, dwang en heimelijke belaging', *NTS* 2020/104.

the interpretation of these terms in the context of rape. With regard to stalking, a victim can be coerced to tolerate something even if he or she is not aware of the perpetrator's activity. Supposedly on the basis of the legislature's preparatory papers on stalking, the Supreme Court wanted to make sure the offence of stalking would protect against acts that are not noticed at the time, or are not noticed at all, because these too can infringe on autonomy, and therefore the Supreme Court broadened the meaning of coercion in this context. These differences in defining coercion and consent make it apparent that the concept of consent is highly context-sensitive in Dutch criminal law.

B. Requirements for valid consent to sexual acts

I. General capacity to give consent

In Dutch criminal law, the capacity to give consent is not stipulated as such in the provisions of the Code but is implied by the choices made by the legislature in the statutory definition of offences. In connection to the protected interests mentioned in paragraph I.2, the capacity to give consent can be differentiated in the same manner. The capacity to consent to sexual acts relates to age, intellectual or physical capacity, and dependency or subservience.

As for age, the age of consent is considered to be sixteen years.[27] However, children below the age of sixteen can, under certain circumstances, have sexual relations without the other person being criminally liable. Sexual acts with a child between the age of twelve and fifteen only constitute a criminal offence if the acts can be characterized as "lewd acts".[28] In short, "lewd" means "contrary to socio-ethical norms", and sexual acts are not considered lewd if they are age-appropriate, taking into consideration the age difference, the genuineness of consent, and the nature of the acts. Thus, consensual sexual relations between, for instance, two fifteen-year-olds who are dating can be legal, but sexual relations between a fourteen- and a twenty-year-old are not, even if there is a consensual and affective relationship. Furthermore, any non-consensual sexual act will be considered lewd in this context, as will sexual acts that, by their nature, are not seen

27 Sexual offences concerning minors are discussed in detail in Lindenberg & Van Dijk 2015 (note 9), paragraph 2.4.

28 Articles 245 and 247 DCC.

as age-appropriate, such as group sex, even though there is full consent. If a child is below the age of twelve, sexual acts that do not include penetration follow the "lewd acts"-criteria, but sexual penetration of a person below that age is criminalized as such.[29] A child under the age of twelve can thus give valid consent to moderate sexual acts with a peer, but never to sexual penetration.

The "lewd acts" criteria are quite refined, which has the benefit of giving criminal judges the opportunity to make a case-by-case assessment. The disadvantage, however, is the limited foreseeability of such an assessment, as it contains many factors and is susceptible to subjective interpretation. There is indeed some disparity in case law.[30] In an attempt to improve foreseeability, the draft on the new sexual offences proposes to do away with the "lewd acts" element. The draft will introduce the neutral term "sexual acts" and starts from the assumption that sexual acts with a person below the age of sixteen are criminal. Additionally, the provision itself will contain an exception for acts involving twelve- to fifteen-year-olds. It reads, in rough translation: "A person is not liable when he commits these acts as a peer, in the context of an equal situation between him and the other person."[31] This might be considered a step forward for ordinary citizens wanting to know the limits of their sexual freedom, because they are now presented with more statutory clarity than merely the current phrase "lewd acts". But for legal professionals in criminal law, this change will not immediately bring an improvement. The change seems to be limited to a codification and rephrasing of what already was case law in relation to "lewd acts": for the meaning of the legal exception, the explanatory memorandum on the draft refers to factors that strongly resemble those presently describing "lewd acts".[32] All in all, it seems that the legislature still prefers to give the judges flexibility to take all the circumstances into account rather than to have relatively rigid legal certainty. The latter would be the case if, for example, the capacity to consent was limited to defined age differences.

Although the age of consent has been sixteen since the introduction of the DCC in 1886, there have always been exceptions. As was just discussed, the first exception is the fact that minors younger than sixteen can legally consent to sex under certain circumstances. A second exception concerns

29 Articles 247 and 244 DCC.
30 Lindenberg and Van Dijk 2015 (note 9), paragraphs 2.4 and 4.5.
31 Articles 248 and 249 of the Draft on Sexual Offences.
32 The explanatory memorandum is available at www.internetconsultatie.nl/wetsvoorstelseksuelemisdrijven.

minors who are sixteen and seventeen. There are specific provisions criminalizing sexual acts with minors in this age group. They relate to (i) sexual acts that were brought about by instrumental means, like offering money and presents[33], (ii) sexual acts that took place in a dependent relationship, e.g., sexual acts with a parent or teacher[34], and (iii) sexual acts in the context of prostitution[35]. The draft on the new sexual offences plans to keep these exceptions and add a new, general one for performing sexual acts with a sixteen- or seventeen-year-old who is in a vulnerable situation.[36]

Sexual acts with a person who is mentally, intellectually, or physically vulnerable are not criminalized categorically. Rather, the chapter on sexual offences targets a specific selection of these vulnerabilities:

> Article 243 DCC
> "Any person who commits acts comprising or including sexual penetration of the body with a person whom he knows to be unconscious, to have diminished consciousness or to be physically incapacitated, or to be suffering from such a degree of mental disease, psychogeriatric condition or intellectual disability that such person is incapable or not sufficiently capable of determining or expressing his will thereto or of offering resistance, shall be liable to a term of imprisonment not exceeding eight years (…)."[37]

Unconsciousness and physical incapacitation are absolute pathological situations in which the body is incapable to resist, including deep sleep. In 1991, the categories of mental disability were added ("suffering from…"). The phrasing tries to strike a balance between those who cannot sufficiently look after their own interests and those who can. The rationale is that the latter category should not be sexually untouchable and should be able to fulfil their sexual desires.[38] Finally, in 2002, the category of "diminished consciousness" was added to protect people in a vulnerable mental state that did not fit the existing categories. This new category

33 Article 248a DCC.
34 Article 249 DCC.
35 Article 248b DCC (and additionally article 273f DCC, human trafficking).
36 Article 247 para. 1 b, of the Draft on Sexual Offences.
37 Article 247 DCC targets committing 'lewd acts' (without penetration) with the same vulnerable persons and carries a maximum sentence of six years.
38 Lindenberg and Van Dijk 2015 (note 9), paragraph 2.5; Noyon/Langemeijer/Remmelink, *Wetboek van Strafrecht*, article 243 DCC, comments 1 and 2 (online, updated 1 April 2021). The phrasing of these categories has been slightly amended since the introduction in 2002.

concerns a state of mind that is between deep sleep and unconsciousness on the one hand and being fully aware on the other, like being half-asleep or in a daze due to intoxication caused by drugs, alcohol, or medication. It is important to mention that these are all quantitative states of diminished awareness. One could say that, in a way, deception as to the circumstances (e.g., posing as someone else) also causes a "diminished consciousness" on the part of the victim. But such qualitative impairments do not fall under this category. During the preparation of the amendment in 2002, the legislature considered criminalizing sexual deceit, but chose not to criminalize it, fearing an overreach of such a provision.[39]

Adults in a relationship of dependency or subservience are protected, but only to a limited extent. The relevant provision explicitly mentions some relationships, leaving others unprotected *e contrario*. In summary, the provision protects a person who, continuously or situationally, is under the authority of (i) a civil servant, (ii) an employee of a penitentiary, child-protection centre, orphanage, hospital, or charitable institution, or (iii) an employee in the area of health care or social care. Principally, a person who is dependent in one of these relationships does not have the capacity to validly consent to sexual acts with the person in authority. For example: even if a prisoner consents to engage in sexual acts with a prison guard, and this consent seems valid apart from the formal authoritative relationship, the guard will still be held criminally liable. There is a statutory exception, however, for situations in which this liability would clearly be misplaced. The sexual acts are termed "lewd acts" in the provision, leaving normative room for judges to come to the conclusion that, in a certain case, the relationship fits the standard and the acts were of a sexual nature, but the acts were not "contrary to social-ethical norms" and hence not "lewd acts". For instance, if a physician has his wife as a patient and their relationship did not start during the doctor-client relationship, sexual acts between them will not be considered lewd acts.[40]

For sexual offences in a relationship of dependency, the new draft on sexual offences intends to keep the definitions more or less unchanged.[41] It introduces some clarifications here and there, e.g., making explicit that situations in which the victim merely visits the mentioned institutions as an outpatient also fall under the scope of the provision. What is surprising,

39 See Lindenberg and Van Dijk 2015 (note 9), paragraph 2.5.

40 Dutch Supreme Court, Judgment of 18 February 1997, ECLI:NL:HR:1997:ZD0645 and Judgment of 22 March 2011, ECLI:NL:HR:2011:BP2630.

41 Article 244 of the Draft on Sexual Offences.

however, is the plan to change "lewd acts" to "sexual acts". The explanatory memorandum of the draft does not shed light on this change, raising the question whether the new provision will be able to offer a mechanism against over-inclusiveness, with reference to cases like the married couple in a doctor-client relationship. Apparently, the legislature is willing to leave this new problem to be solved by prosecutorial discretion.

II. The primary characteristics of (non-)consent

As was outlined in paragraph I.4, the Dutch coercive offences of rape and sexual assault carry a narrow concept of (non-)consent: coercion ("to compel") not only implies non-consent on the part of the victim, but also requires that this non-consent is actively perceived as such by the victim at the time of the conduct.[42] In other words: the victim has to be consciously unwilling; there has to be self-perceived involuntariness. This requirement rules out coercion if the victim is asleep, if the victim is awake but is not aware of the presumed coercive conduct (e.g., does not notice that the door is locked)[43], and if the victim is persuaded to comply by means of deceit.[44] Because of this requirement, instances of sexual fraud and deception normally cannot constitute rape or indecent assault. The only forms of fraud and deception that fall within the scope of these offences are those that cause psychological pressure, i.e., an active negative attitude towards the conduct and its consequence. An example would be that the perpetrator tells a vulnerable religious person that God will be very angry if she does not engage in the sexual acts that the perpetrator wishes to perform.[45]

The victim's active unwillingness is a necessary condition for non-consent, but it is also a sufficient condition; apart from this internal attitude, there are no other requirements for the essential component of non-consent in the definition of coercion (component 1 in paragraph I.3). In par-

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42 Lindenberg and Van Dijk 2015 (note 9), paragraph 2.7.3; Lindenberg 2007 (note 14), paragraph 3.3.4.

43 Dutch Supreme Court, Judgment of 13 June 1995, *Delikt en Delinkwent* 1995/387.

44 Dutch Supreme Court, Judgment of 24 March 1998, ECLI:NL:HR:1998:ZD0980. The requirement of active unwillingness has never been stated as a manifest, independent component by the Supreme Court. However, it can be clearly deduced from its case law, of which only a few examples have been shown here.

45 An example can be found in Dutch Supreme Court, Judgment of 27 August 2013, ECLI:NL:HR:2013:494.

ticular, non-consent does not have to be communicated in any way since it represents an internal situation. In court, the presence of non-consent will be assessed on the basis of all the evidence.

As a consequence of this one-dimensional definition of coercion, there is no need for a rich concept of "valid consent". Any consent given by a victim of coercion is invalid. But the question whether consent can be called valid beyond that minimal requirement of non-coercion has no bearing on the offence. However, this probably will change when the newly proposed offences in the draft come into force, as will now be discussed.

The intended provisions for the new crimes of rape and indecent assault were cited in paragraph I.3. The aim is to shift from a coercion model to a consent model, with only two main components: non-consent and *mens rea* as to non-consent. Where non-consent currently is implied in the verb "to compel", the draft will make the non-consent element explicit with the phrase "lacking will" ("… that the will of the other person is lacking thereto"). The explanatory memorandum, however, is very ambiguous with regard to the meaning of a "lacking will". The comments are vague and even contradict each other. They refer to clear external signs of unwillingness, but also to the absence of a manifestly responsive attitude.[46] The first seems quite a high threshold, apparently including a responsibility for the victim to communicate non-consent. The latter seems an extremely low threshold, resembling affirmative consent.

Furthermore, the unclarity in the explanatory memorandum leads to difficulties in distinguishing between the consent model offences (rape and indecent assault) and the specific provisions protecting vulnerable persons. For example, the explanatory memorandum states in the context of rape and indecent assault that a sexual act with a victim who is not capable of freely giving consent – e.g., because he or she is mentally or physically incapacitated – can "(also)" constitute the separate offence against mentally or physically incapacitated persons.[47] The addition *"also"* between brackets – which is cited from the explanatory memorandum – implies that the offences of rape and indecent assault are also applicable in these cases. In other words: it is implied that if a victim is not capable of freely giving consent because he or she is incapacitated, this too can constitute a "lacking will". This may not seem so farfetched from an isolat-

46 See the memorandum at www.internetconsultatie.nl/wetsvoorstelseksuelemisdrijven.

47 Article 245 of the Draft on Sexual Offences.

ed perspective but poses serious systematic problems. It causes immediate overlaps between sexual offences, including those that differ in maximum sentences. Additionally, for the new offence against mentally or physically incapacitated persons, only intentional conduct suffices, while the draft includes an alternative negligence offence for rape and sexual assault. Is the prosecution free to choose between them?

A separate issue that arises from such a broad definition of a "lacking will" is that it seemingly does not exclude sexual fraud and deceit. The explanatory memorandum, however, does not mention this at all, and it would be a surprising maiden introduction of that crime in Dutch law. Finally, all of this leads to the question why there should be numerous separate offences to protect carefully formulated vulnerabilities, if the law at the same time introduces such a broad definition of a "lacking will" for the consent offences that they become catch-all provisions. This creates the risk of making non-consent ("lacking will") unnecessarily multi-faceted and extremely complex, while also causing far-reaching systematic issues.

It is evident that the legislative process in parliament will have to provide more clarification, including distinct examples of (in)valid consent.

C. Reach of consent

For the current coercive offences, the requirement for non-consent to consist of active unwillingness influences the reach of consent and non-consent. The timing of non-consent must correspond with the sexual acts. If, for example, a woman indicates in the evening that she only wants to have protected sex, her partner nevertheless does not commit rape if he removes the condom during sexual intercourse ("stealthing") later that night if the woman is not aware of this. The temporal frame of reference is the sexual act, and the sexual act was not actively against her will *at that time*.

The decisive temporal scope of non-consent also makes it impossible for the victim or anyone else to retro-actively change the label of voluntariness. This means that the status of actual consent or non-consent at the time of the sexual acts remains unchanged by a differing future perspective. If the victim subsequently feels different about her lack of consent, this may lead to a decision not to prosecute, but that is certainly not obligatory. Furthermore, the described temporal scope of non-consent enables a person to withdraw consent at any time and also to give valid consent where there was an explicit previous refusal. Of course, this all relates to substantive criminal law. From an evidentiary standpoint (and obviously from an ethical one), it may be perilous for a person to rely on the other

person's consent after he or she has refused just moments before. In court, the refusal may be easy to prove while the subsequent consent may not.

The reach of consent with regard to the element "lacking will" in the proposed new offences of rape and indecent assault in the draft is still unclear. As was illustrated in paragraph II.2, the explanatory memorandum is highly ambiguous with respect to the meaning of a "lacking will".

D. Mens rea and consent

As was discussed in paragraph I.3, the current coercive offences of rape and indecent assault require four components:

(1) Non-consent on the part of the victim;
(2) Intent on the part of the defendant with regard to non-consent;
(3) Unavoidability for the victim;
(4) Intent on the part of the defendant with regard to unavoidability.

The *mens rea* of these offences consists of the intent mentioned in components 2 and 4, for which conditional intent (*dolus eventualis*) suffices. Generally speaking, the use of violence and threats will make it easy for judges to conclude that both forms of intent were present. A salient exception was a case from 1987, where a man and a woman had an on-again, off-again relationship, in which they also regularly engaged in intense sadomasochistic sexual acts. At one point, the woman told the man that she wanted to terminate the relationship definitively. The man did not believe her and dragged her onto the bed. Despite her scratching his arm and attempting to flee, the man did not stop and threatened to break her arm. She subsequently complied and they had intercourse. In the criminal case, the court of appeal acquitted the defendant because it did not find that the man had intent with regard to the woman's non-consent. The court found it believable that the defendant thought the situation very much resembled previous encounters of breaking-up and having consensual make-up SM sex. The Dutch Supreme Court upheld the decision, causing an uproar in Dutch media.[48]

There are also examples in case law that represent a relatively low threshold for the proof of intent. In an interesting recent case, the defendant secretly entered his wife's house after they had broken up and he had

48 Dutch Supreme Court, Judgment of 16 June 1987, *Nederlandse Jurisprudentie* 1988/156.

been formally prohibited from visiting her without permission. The victim was startled when she found her husband hiding behind her bedroom door at night. The man grabbed her cell phone and closed the door, visibly carrying duct tape. After that, the woman pre-emptively took the initiative in the situation. She acted friendly, started a calm conversation, and eventually engaged cooperatively in sexual acts. Although there was a relatively long period of time in which she seemingly consented, the Supreme Court upheld the conviction for rape, stating that under these circumstances it was clear that the victim had complied to prevent worse, and that the lower court's conclusion that the defendant had conditional intent regarding her non-consent was valid.[49]

Although criminal judges may be inclined to approach the proof of intent pragmatically, the two components of intent (regarding non-consent and unavoidability) still pose a significant hurdle in cases where the victim freezes as a result of tonic immobility. It is important to note that the coercive offences of rape and indecent assault do not imply an obligation to ascertain the other person's consent. It is therefore permissible to let oneself be guided by the impression of the situation. If the situation looks consensual – which it will in many cases of tonic immobility – it will be hard to prove intent with regard to non-consent, let alone with regard to unavoidability.

The only way for Dutch criminal law to effectively address the issue of tonic immobility is to introduce negligence offences, since these will impose a duty to examine the question whether the other person is actually consenting. And it is indeed the aim of the legislature to create separate negligence offences for rape and indecent assault (see paragraph I.3 for their structure). But unfortunately, the explanatory memorandum is as unclear about the meaning of negligence as it is about the requirement of "lacking will" (the actor is supposed to be negligent if he has *serious reason to assume* that the other person lacks the will to have sexual relations). Because a clear definition is still lacking, it is still impossible to say what facts the courts would have to establish to find that a negligent rape was committed.

49 Dutch Supreme Court, Judgment of 27 November 2018, ECLI:NL:HR:2018:2194.

E. Concluding remarks

The Netherlands still has a conservative coercion model with regard to the offences of rape and sexual assault. This model is based on the presumption that only those who are permanently or temporarily unable to defend themselves are in need of protection by the criminal law. The implication that one must (try to) defend one's own sexual integrity in order to benefit from the protection of the criminal law seems clearly out-dated. And more importantly from a legal standpoint, the current system falls short of the requirements of Art. 36 of the Istanbul Convention, which obliges member states to criminalize any intentional non-consensual sexual act. Because of this, the Netherlands is planning a shift from the coercion-based model to a consent model.

In implementing this international obligation, it is quite difficult to strike a balance between all relevant interests. It is a political question whether it is a fair to label sex without consent as rape even when the conduct was only negligent. However, the drafting on new sexual offences in a state of transition poses important legal issues. Regarding the principle of legality, it is alarming that essential elements of the new offences of rape and indecent assault (e.g., "lacking will" and the scope of negligence) have not been clarified in the important explanatory memorandum. Additionally, it appears that the new element "lacking will" will carry a broad concept of consent, which seems counterproductive. The broader this concept is, the more problems of complexity and overlap with other offences will arise. As has been discussed above, these problems were the reason for an overhaul of the sexual offences in the first place. A broad concept of consent is not necessary as long as the additional offences (concerning age, incapacity, dependence etc.) sufficiently serve to provide the desired protection. It is disconcerting that even the ECtHR in its case law seems to demand a highly context-sensitive definition of rape and thus implies a broad concept of consent, which makes it more difficult for states to resist creating a catch-all rape provision.[50]

50 See, among others, ECtHR, *I.C. v. Romania*, Judgment of 24 May 2016, no. 36934/08, paras. 55–58; *M.G.C. v. Romania*, Judgment of 15 March 2016, no. 61495/11, paras. 64–73.