

# Sweden

*Linnea Wegerstad*

## A. Background

### I. General attitude in society toward sexual relations

In Swedish policy as well as in criminal law, the emphasis is on individual autonomy rather than traditional values and morals. The current Government describes itself as a feminist government with the goal of ending men's violence against women.<sup>1</sup> Sexual and reproductive health and rights (SRHR) have a strong position in Swedish politics (e.g., access to safe and legal abortions, mandatory sexual education in teacher education and in schools). Since the beginning of the 1990s, sexual violence has been framed as related to gender inequality in society, although there have been, and still are, tensions surrounding the conceptualization of violence and to what extent the problem of violence is rooted in structural gender inequality.<sup>2</sup> Criminalization has been a crucial tool in Swedish policy for combatting men's violence against women.<sup>3</sup> However, the rather strong alliance between feminism and the state has been questioned across the Nordic countries.<sup>4</sup> Some activists have voiced concerns about feminism turning too much to criminalization as a way to stop sexual violence.<sup>5</sup>

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1 Fact sheet: A feminist government ensures that decisions promote gender equality [<https://www.government.se/information-material/2019/03/a-feminist-governm-ent/>] (accessed January 19, 2022).

2 E.g. SOU 1995:60 Kvinnofrid, Prop. 1997/98:55 Kvinnofrid; U. Andersson and S. Bengtson, 'Support to battered women in Sweden. Non-profits and public authorities collaborating, counteracting and competing' in: J. Niemi, L. Peroni and V. Stoyanova (eds), *International Law and Violence Against Women Europe and the Istanbul Convention* (2020).

3 M. Burman, 'The ability of criminal law to produce gender equality: Judicial discourses in the Swedish criminal legal system', 16 *Violence Against Women* 173 (2010).

4 M. Bruvik Heinskou, M.L. Skilbrei and K. Stefansen, *Rape in the Nordic Countries. Community and Change* (2019), 3.

5 L. Wegerstad, 'Theorising sexual harassment and criminalisation in the context of Sweden', 9 *BJCLCJ* 61, 62 (2021).

While reporting rape to the police is strongly encouraged in official discourse,<sup>6</sup> the criminal justice system has been criticized for its low prosecution rates.<sup>7</sup>

In 2017, a large nation-wide study on SRHR was conducted.<sup>8</sup> Regarding exposure to sexual violence, the study shows that 42 percent of women and 9 percent of men have been subjected to sexual harassment.<sup>9</sup> More than every third woman (39 percent) and almost every tenth man (9 percent) have been subjected to some form of sexual assault. Eleven percent of women and one percent of men have been the victims of attempted rape through physical violence or the threat of violence. LGBT people experience such victimization to a higher degree than heterosexuals: 30 percent of lesbians and 10 percent of gay men reported having been the victims of attempted rape. The results also show that the majority of the Swedish population are satisfied with their sex life, find sex important, and have had sex during the past year.<sup>10</sup> However, 63 percent of women and 34 percent of men have at least once engaged in sex although they did not really want to do so.<sup>11</sup> A total of 72 percent of men reported that they consumed pornography, while 68 percent of women reported never consuming pornography.<sup>12</sup> Almost 10 percent of men – but fewer than one percent of women – reported having paid for sexual favours at least once.<sup>13</sup>

Sweden's move to a consent-based rape law was a 20-year process that included several governmental inquiries taking place in parallel with a public discussion of consent in sexual relations, as well as social media initiatives regarding how to deal with gray zones in sexual encounters.<sup>14</sup>

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6 M. Hansen, K. Stefansen and M.-L. Skilbrei, 'Non-reporting of sexual violence as action: acts, selves, futures in the making', 2020 *Nordic Journal of Criminology* 1.

7 C. Diesen and E.F. Diesen, *Övergripen mot kvinnor och barn: den rättsliga hanteringen* (2013), ch. 1; 'Rape and sexual offences' *Brottsförebyggande rådet* [<https://bra.se/bra-in-english/home/crime-and-statistics/rape-and-sex-offences.html>] (accessed January 19, 2022).

8 *Folkhälsomyndigheten*, *Sexuell och reproduktiv hälsa och rättigheter i Sverige 2017* (2019).

9 *Id.* at 17.

10 *Id.* at 17–18.

11 *Id.* at 19.

12 *Id.* at 20.

13 *Id.* at 21.

14 SOU 2001:14 *Sexualbrotten, ett ökat skydd för den sexuella integriteten och angränsande frågor*; SOU 2010:71 *Sexualbrottslagstiftningen – utvärdering och reformförslag*; SOU 2016:60 *Ett starkare skydd för den sexuella integriteten*; M. Burman, 'Rethinking rape law in Sweden: coercion, consent or non-voluntariness?' in: V. Munro and C. McGlynn (eds), *Rethinking rape law: international and*

Nongovernmental organizations now offer tools and courses on how to communicate and express consent in sexual encounters. In addition, there is scholarly interest in researching consent. One indication of the pervasiveness of consent in public discourse is that, in 2022, the primary education curriculum on SRHR was amended to include instruction about the meaning of consent.<sup>15</sup>

## II. Background to criminal laws on sexual conduct

Between the nineteenth and the mid-twentieth century, the primary legal interest protected in Swedish criminal law with respect to sexual offences shifted gradually from public morality to individual integrity and sexual self-determination.<sup>16</sup> No clear distinction between sexual self-determination and sexual integrity exists in the preparatory works, and the two concepts are often used together to describe the primary interest in sexual offence cases, as in the statement that the point of departure for sexual offence legislation is that every person in every situation has the right to decide about his or her own body and sexuality and that his or her desire not to engage sexually must be respected unconditionally.<sup>17</sup>

Since 1962, when the current penal law was introduced, the definition of rape has been reformed and expanded several times. Briefly, the result of these amendments was a gradual lowering of the threshold for violence/threat, so that, in 2018, the lack of voluntariness became the decisive criterion for rape. In addition, the rape definition has expanded to encompass many kinds of sexual acts instead of only penile-vaginal intercourse.

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comparative perspectives (2010); G. Nilsson, 'Towards voluntariness in Swedish rape law: Hyper-medialised group rape cases and the shift in the legal discourse', in: M. Bruvik Heinskou, M.-L. Skilbrei and K. Stefansen (eds), *Rape in the Nordic Countries Community and Change* (2019); L. Karlsson, 'Towards a language of sexual gray zones: feminist collective knowledge building through autobiographical multimedia storytelling', 19 *Feminist Media Studies* 210 (2019).

- 15 *Skolverket*, Nytt i läroplanernas inledande delar 2022. [<https://www.skolverket.se/undervisning/grundskolan/aktuella-forandringar-pa-grundskoleniva/nytt-i-laroplanernas-inledande-delar-2022>] (accessed January 13, 2022).
- 16 L. Wegerstad, *Skyddsvärda intressen & straffvärda kränkningar. Om sexualbrotten i det straffrättsliga systemet med utgångspunkt i brottet sexuellt ofredande* (Lund University, 2015).
- 17 SOU 2016:60, 176–177; Prop. 2017/18:177 En ny sexualbrottslagstiftning byggd på frivillighet 15. See also Prop. 2004/05:45 En ny sexualbrottslagstiftning 21–22.

Only four years after the major revision of sexual offences was carried out, the law was amended again in August 2022.<sup>18</sup>

While the focus of this chapter is on sexual coercion offences, there are also sexual offences related to interests other than the integrity and self-determination of the individual. These include intercourse between adult relatives, the purchase of sexual services, and procuring.<sup>19</sup> Especially regarding the purchase of sexual services, the rationale for criminalization has been questioned.<sup>20</sup>

In Sweden, preparatory works are an important source for interpreting the meaning of legal texts, and especially so with new legislation. I therefore rely to a large extent on the preparatory works for the reformed rape law, such as the explanatory notes in the Bill, to describe the law.<sup>21</sup>

### *III. Definition of sexual coercion offenses (especially concerning the role of consent)*

Three types of sexual coercion offences exist: rape, sexual assault, and sexual molestation/harassment. While the last of these may not fit into the category of sexual coercion offences, I will mention it in this section; the remaining part of the paper focuses on rape and sexual assault. Sexual offences against minors are regulated separately (see chapter E below).

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18 SFS 2022:1043, Prop. 2021/22:231 Skärpt syn på våldtäkt och andra sexuella kränkningar, SOU 2021:43 Ett förstärkt skydd mot sexuella kränkningar. Most noteworthy is an increase in the minimum sentence for rape (from two years to three years imprisonment) and an expansion of the definition of rape. It now includes situations when the victim performs a sexual act on herself/himself without the perpetrator being present in real time, not even digitally, which was required before the amendment.

19 Criminal Code Chapter 6 Section 7 (SFS 2022:1043), 11 (SFS 2022:1043), 12 (SFS 2018:601).

20 C. Lernestedt and K. Hamdorf, *Sexköpskriminaliseringen – till skydd av vad? Del 1*, Juridisk tidskrift (2000); P.-O. Träskman, *Sexuella och andra (farliga) förbindelser samt försök därtill*. Legalitetsprincipen och köp av sexuella tjänster, in: Lars Heuman et al. (eds), *Festskrift till Suzanne Wennberg* (2009).

21 Prop. 2017/18:177.

*Rape*

Chapter 6, Section 1 of the Swedish Criminal Code reads:

A person who performs vaginal, anal or oral sexual intercourse, or some other sexual act that in view of the seriousness of the violation is comparable to sexual intercourse, with a person who is not participating voluntarily is guilty of rape and is sentenced to imprisonment for at least three and at most six years. The same applies to anyone who induces a person who is not participating voluntarily to undertake or tolerate such treatment. When assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way. A person can never be considered to be participating voluntarily if:

1. their participation is a result of assault, other violence or a threat of a criminal act, a threat to bring a prosecution against or report another person for an offence, or a threat to give detrimental information about another person;
2. the perpetrator improperly exploits the fact that the person is in a particularly vulnerable situation due to unconsciousness, sleep, grave fear, the influence of alcohol or drugs, illness, bodily injury, mental disturbance, or otherwise in view of the circumstances; or
3. the perpetrator induces the person to participate by seriously abusing the person's position of dependence on the perpetrator.

If, in view of the circumstances associated with the offence, the offence is considered less serious, the person is guilty of rape and is sentenced to imprisonment for at most four years.

If an offence referred to in the first paragraph is considered gross, the person is guilty of gross rape and is sentenced to imprisonment for at least five and at most ten years. When assessing whether the offence is gross, particular consideration is given to whether the perpetrator used violence or a threat of a particularly serious nature, or whether more than one person assaulted the victim or took part in the assault in some other way, or whether, in view of the method used or the young age of the victim or otherwise, the perpetrator exhibited particular ruthlessness or brutality.<sup>22</sup>

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22 Criminal Code Chapter 6 Section 1 (SFS 2022:1043). The Swedish Criminal Code translated by the Swedish Governmental Office, available at <https://www.government.se/government-policy/judicial-system/the-swedish-criminal-code/>.

Rape is thus defined as occurring when a person performs vaginal, anal or oral sexual intercourse, or some other sexual act that in view of the seriousness of the violation is comparable to sexual intercourse, with a person who is not participating voluntarily. Sexual acts comparable to sexual intercourse include, e.g., the penetration of the vagina or anus with objects or body parts other than the penis. The rape definition also includes situations when the complainant has been induced to perform sexual acts on themselves or with a third person, and it is not that the perpetrator is present in real time, not even through a webcam.

The law also specifies situations when participation may never be considered voluntary: (1) if participation is a result of an assault, other violence or a threat of a criminal act, a threat to bring a prosecution against or report another person for an offence, or a threat to give detrimental information about another person; (2) if the perpetrator improperly exploits the fact that the other person is in a particularly vulnerable situation due to unconsciousness, sleep, grave fear, the influence of alcohol or drugs, illness, bodily injury, mental disturbance or otherwise in view of the circumstances; or (3) if the perpetrator induces the other person to participate by seriously abusing their position of dependence on the perpetrator. As described below in section II, the Swedish law on rape does not operate in a straightforward way concerning the distinction between restrictions of the capacity to give consent and grounds for negating the validity of consent.

### *Sexual assault*

Chapter 6, Section 2 of the Swedish Criminal Code reads:

A person who performs a sexual act other than those referred to in Section 1 with a person who is not participating voluntarily is guilty of sexual assault and is sentenced to imprisonment for at least six months and at most two years. The same applies to anyone who induces a person who is not participating voluntarily to undertake or tolerate such treatment. When assessing whether participation was voluntary or not, Section 1, first paragraph, second and third sentences apply.<sup>23</sup>

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23 Criminal Code Chapter 6 Section 2 (SFS 2022:1043). The Swedish Criminal Code translated by the Swedish Governmental Office, available at <https://www.government.se/government-policy/judicial-system/the-swedish-criminal-code/>.

Sexual assault applies to sexual acts that are not comparable to sexual intercourse; in all other respects the definition of this crime is the same as for rape. The term 'sexual act' is not statutorily defined, but according to the preparatory works the point of departure should be a lasting contact between the perpetrator's body and the other person's genitals, or the other person's body and the perpetrator's genitals. Acts that do not involve such lasting physical contact may, however, also be covered. In such cases, the requirements are that the act had a sexual character and violated the victim's sexual integrity.

### *Sexual molestation/harassment*

Sexual molestation is a catchall provision for acts that cannot be prosecuted under the heading of more severe sexual offences, such as rape or sexual assault.<sup>24</sup> Flashing is explicitly mentioned in the provision. In addition, other types of behaviour (including physical and verbal intrusions) can amount to that crime if the behaviour violates a person's sexual integrity. The scope of the provision thus rests on whether the act is of such a nature that, from an objective standpoint, it violates the victim's sexual integrity. This objectivized assessment implies both that it is not necessary to prove that the conduct had this impact on the victim, and, conversely, that the victim's apprehension of the event does not matter.

## *IV. General role of consent in criminal law*

Until 2018, when rape was defined on the basis of coercion, consent negated the definition of rape/sexual assault in practice.<sup>25</sup> The complainant's lack of consent played a decisive role without being explicitly stated in the old rape definition, and it was used in court practice both as a defence of consent, claimed by the defendant, and as a hypothesis of consent, applied by the court.<sup>26</sup> Now this implicit use of consent has been replaced by the

24 Criminal Code Chapter 6, Section 10 (SFS 2022:1043).

25 For the wording of the provision in force at the time, see Criminal Code Chapter 6, Section 1 (SFS 2013:365).

26 U. Andersson, The unbounded body of the law of rape: the intrusive criterion of non-consent, in: Kevät Nousiainen et al. (eds), Responsible selves: women in the Nordic legal culture 337 (2001); P. Asp P and M. Ulväng, 'Sweden', in: A. Reed et al. (eds), Consent: domestic and comparative perspectives (2017), 431.

explicit criteria of ‘nonvoluntary participation’. The term ‘consent’ was not used in the new rape definition because it already existed as a general justificatory ground in the Criminal Code.<sup>27</sup> It was argued that consent had a meaning that did not fully correspond to the meaning the term should have when used in connection with sexual offenses.

The general provision on consent as a justificatory ground reads: ‘An act committed by a person with the consent of the person at whom it is directed only constitutes an offence if, in view of the damage, violation or danger that it results in, its purpose, and other circumstances, the act is unjustifiable.’<sup>28</sup> The rationale is that everyone has the right, within certain limits, to decide for themselves, and that the state should not protect an interest that the individual has given up.<sup>29</sup> Consent is a ground for justification only if it is valid, that is, if it is present during the whole act; given by someone who has the authority to dispose of the interest affected; given by someone who has the capacity to understand the meaning and consequences of consenting; given with ‘free will’ and with knowledge of the relevant circumstances; and meant as a serious expression of consent.<sup>30</sup>

Consent as a justificatory ground also encompasses a moral dimension: if the act is unjustifiable/indefensible, there is no ground for justification.<sup>31</sup> Society has an ethical interest in not allowing serious interference with the bodily integrity of the individual, and the provision aims at striking a balance between, on the one hand, the individual’s interests and, on the other hand, society’s demand that ethically indefensible acts should not go unsanctioned.<sup>32</sup> A guiding principle is that acts leading to more harm than what is considered the normal degree of assault cannot be defensible.

To sum up, the criteria of non-voluntariness in the rape definition has a different meaning than consent as a general justificatory ground, and therefore the latter does not apply in cases of sexual coercion.

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27 Prop. 2017/18:177 30–31.

28 Criminal Code Chapter 24 Section 7 (SFS 1994:458). The Swedish Criminal Code translated by the Swedish Governmental Office, available at <https://www.government.se/government-policy/judicial-system/the-swedish-criminal-code/>.

29 SOU 1988:7 Frihet från ansvar: om legalitetsprincipen och om allmänna grunder för ansvarsfrihet, 99.

30 Prop. 1993/94:130 Ändringar i brottsbalken mm, 40; *Asp and Ulväng*, 420. 2016.

31 Asp and Ulväng use the term ‘indefensible’, while the governmental translation uses the term ‘unjustifiable’.

32 SOU 1988:7, 119 – 123.



## *B. Requirements for valid consent to sexual acts*

While some jurisdictions provide a clear distinction between the capacity to give consent on the one hand, and grounds for negating validity of consent on the other hand, this is not the case in Swedish sexual coercion offences. There is one exception where this distinction is used, and that is age. In the first section below I will therefore address issues that in other jurisdictions may be categorized either as capacity to give consent or as grounds for negating consent. Briefly, states of unconsciousness, physical or psychological disability, or intoxication do not per se make a person legally unable to give valid consent, as there is an additional requirement of the exploitation of said situation in order to constitute rape. The existence of violence or a threat does, as a main rule, negate consent, but participation in the sexual act must be the result of violence or threat in order to constitute rape.

### *I. General capacity to give consent and grounds for negating validity of formal consent*

#### *Age*

The minimum age for capacity to give consent to sexual acts is 15 years.<sup>33</sup> However, and as described in section E, underage individuals can give valid consent under certain circumstances. If the victim is the perpetrator's descendant or is being brought up by or has a comparable relationship with the perpetrator, or is someone for whose care or supervision the perpetrator is responsible by decision of a public authority, the age of consent is 18 instead of 15 years.

#### *Consciousness, mental health, and intoxication*

According to the definition of rape, states of unconsciousness, mental disturbance, and intoxication can negate consent: 'Participation may never be considered voluntary if the perpetrator improperly exploits the fact that the other person is in a particularly vulnerable situation due to unconsciousness, sleep, grave fear, the influence of alcohol or drugs, illness, bodi-

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33 Criminal Code Chapter 6 Section 4 (SFS 2022:1043).

ly injury, mental disturbance, or otherwise in view of the circumstances'.<sup>34</sup> Even before the criterion of non-voluntariness was introduced, this kind of exploitation was included in the definition of rape.<sup>35</sup> It may be debated whether the mentioned situations should be considered as a matter of capacity to give consent or as grounds for vitiating consent. The legal definition uses the expression '...may never be considered voluntary...'. However, consent is not vitiated per se if the victim is in a particularly vulnerable situation, since the additional condition that the perpetrator 'improperly exploits' the situation is required. A particularly vulnerable situation exists when the victim has clearly limited opportunities to protect his or her sexual integrity.<sup>36</sup> Criminal responsibility does not require the victim to be completely unable to defend him-/herself or control his or her actions. For example, the requirement that the person was in a particularly vulnerable situation is fulfilled even if the person was not so intoxicated that he or she was completely unable to perceive the sexual assault. This assessment is based on the situation and its context.<sup>37</sup>

### *Position of dependence*

The definition of rape additionally includes situations where a person abuses a superior position: when the perpetrator 'induces the other person to participate by seriously abusing their position of dependence on the perpetrator'.<sup>38</sup> A relationship of dependency must exist between the offender and the person against whom the act is being perpetrated, as in, for example, the health worker/patient and prison guard/prisoner relationships. The employer-/employee relationship, as well as a drug addict's dependence on a drug dealer, are also covered by the provision.<sup>39</sup> 'Seriously abusing' means that the dependent person is under pressure of serious import to him or her, and that the act appears to be an abuse of power against a weaker person. Promises of financial assistance to a person in a difficult situation do not amount to such pressure.<sup>40</sup> Again, it may be debated whether the situations mentioned should be considered as a matter of

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34 Criminal Code Chapter 6 Section 1 (SFS 2022:1043).

35 Prop. 2012/13:111 En skärpt sexualbrottslagstiftning.

36 Prop. 2012/13:111, 112.

37 Id.

38 Criminal Code Chapter 6 Section 1 (SFS 2022:1043).

39 Prop. 1962 nr 10 Förslag till Brottsbalk. Del B, lagrådsremissen den 2 maj 1958.

40 Prop. 1983/84:105 Om ändring i brottsbalken m.m. (sexualbrotten) 52.

capacity to give consent or as grounds for vitiating consent. While the legal definition uses the expression ‘...may never be considered voluntary...’, consent is not vitiated per se if the victim is in a position of dependence, since the additional condition of ‘seriously abusing’ the position of dependence is required.

### *Constraint – violence, threat and grave fear*

The definition of rape specifies that participation may never be considered voluntary ‘if participation is a result of an assault, other violence or a threat of a criminal act, a threat to bring a prosecution against or report another person for an offense, or a threat to give detrimental information about another person’.<sup>41</sup> *Violence* includes the obstruction of someone's bodily movements, e.g., by spreading the victim's legs. Other milder forms of violence are also included, e.g., pulling or tearing another person's arm or clothes, pushing him or her away, or holding someone firm.<sup>42</sup> A *threat* to perform a criminal act includes not only threats against the life or health of the individual but also threats against property.<sup>43</sup> Threats to give detrimental information can include sharing nude pictures of the victim (so-called revenge porn).<sup>44</sup>

The prerequisite ‘participation is a result of’ – that is, the causal relationship between violence/threat and participation in a sexual act – can be difficult to apply in cases of intimate partner violence.<sup>45</sup> In addition, it has been debated to what extent so-called BDSM sex, where the individuals agree that violence should be included as part of the sex, can constitute rape. The answer is that if the choice to participate in the sexual act cannot be considered a result of the violence, the act does not qualify as rape.<sup>46</sup>

As mentioned above, participation may never be considered voluntary if the person is in a particularly vulnerable situation due to *grave fear*.<sup>47</sup> This fear must be of a severe kind, and it includes states of ‘frozen fright’, that is, situations in which the victim, due to the perpetrator's behaviour,

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41 Criminal Code Chapter 6 Section 1(SFS 2022:1043).

42 Prop. 2004/05:45 134.

43 Id.

44 Prop. 2017/18:177, 80.

45 Id. At, 39.

46 Id. At, 38.

47 Criminal Code Chapter 6 Section 1 (SFS 2022:1043).

for example suddenly locking the door or changing character, becomes paralyzed by fear and responds to the abuse with passivity.<sup>48</sup>

### *Fraud*

So-called *rape by deception* is generally not considered a crime. False claims about celebrity, age, employment, gender identity, or whether contraception has been or will be used do not vitiate consent, the bill states.<sup>49</sup> Deception regarding a person's identity, however (pretending to be someone else in a dark room or in the presence of a blind person, for example), can amount to a particularly vulnerable situation and thereby negate voluntariness.<sup>50</sup>

## *II. Ways of giving valid consent*

There are no formal restrictions on how voluntariness must be expressed to be legally valid, but to demarcate the area of criminalized behaviour more clearly, the rape definition states: 'When assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way.'<sup>51</sup> Non-consent is implied in situations where a person suddenly performs a sexual act against another person, who due to the suddenness cannot express their lack of consent (so called 'surprise rape').<sup>52</sup> Examples of situations where this presumption applies might be a physician who during a medical examination performs a sexual act, or sexual assaults that occur in crowds during festivals, concerts, and the like.

The complainant's inner volition (wanting sex, or positive consent) is not decisive for criminal responsibility. Instead, what matters is the complainant's choice to participate, or not to participate.<sup>53</sup> This is motivated by the right to self-determination – one has the right to choose to have sex that one does not want – and the notion that a person who has sex with someone who has expressed that he or she wants to participate should

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48 Prop. 2012/13:111, 113.

49 Prop. 2017/18:177, 79.

50 *Id.*, 42.

51 Criminal Code Chapter 6 Section 1 (SFS 2022:1043).

52 Prop. 2017/18:177, 78–79.

53 *Id.*, 33, 78.

be able to rely on that expression.<sup>54</sup> The assessment of non-voluntariness is based on the situation and its context. A study of court judgments in rape cases concluded that inclusion of the context becomes more significant when the victim's external expression of voluntariness was deemed unclear.<sup>55</sup> In one case, the Supreme Court of Sweden ruled that the fact that the parties agreed to sleep in the same bed in only their underwear did not necessarily entail that the complainant voluntarily participated in sexual acts.<sup>56</sup>

According to the bill, the assumption is that persons who participate voluntarily in a sexual act will express their desire to do so, and the lack of such expression should normally be interpreted as nonvoluntary participation.<sup>57</sup> In exceptional cases, tacit consent to sexual interaction may be enough to indicate voluntariness, but if the complainant denies voluntary participation, the existence of some evidence to suggest consent should be required for the defendant to avoid conviction.<sup>58</sup> The Supreme Court has stated that there is 'limited room for assessing pure passivity as an expression of a choice to participate in a sexual act'.<sup>59</sup>

Asp offers a useful summing-up of non-voluntariness under the definition of rape.<sup>60</sup> Firstly, there is the situation where no choice to participate has been expressed at all. This situation may include cases where there is no voluntariness as well as cases where voluntariness is nevertheless considered to exist. Secondly, there is the situation where a choice to participate has been expressed, but this choice is not considered to be voluntary. This situation includes two types of cases: on the one hand, cases falling into one of the categories addressed in points 1–3, which means that the choice to participate cannot be considered voluntary; and on the other hand, cases not covered by points 1 to 3, but where the choice to participate can

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54 *Id.*, 33.

55 *L. Wallin et al.*, Capricious credibility – legal assessments of voluntariness in Swedish negligent rape judgements, 22 *Nordic Journal of Criminology* 3, 13 (2021).

56 NJA 2019 s. 668 para. 33.

57 Prop. 2017/18:177, 80.

58 *Id.*

59 NJA 2019 s. 668 para. 15. Author's translation.

60 *P. Asp*, *Brottsbalken (1962:700) 6 kap. 1 §* Lexino 19 august 2019, at 2.2.1, available at JUNO, Nordstedts Juridik/Karnov group.

nevertheless not be considered voluntary (since, according to the bill, there is scope to consider involuntariness even outside of points 1–3).

### C. Reach of consent

#### I. Timing of consent

Voluntariness must exist when the sexual act is performed and throughout the sexual act.<sup>61</sup> If a person has stated in advance that he or she wants to participate in a sexual act, this does not necessarily mean that the act if performed later is to be considered voluntary.<sup>62</sup> Consent can be withdrawn *in actu*.

#### II. Scope of consent

Whether consent must be specific to each sexual act – and, relatedly, whether voluntary participation in one sexual act can be seen as valid consent to participate in other sexual activities – was a matter of dispute in the legislative process.<sup>63</sup> The official Commission of Inquiry, whose work laid the ground for the government bill, offered the example that moving a hand from a person’s breast to her other breast does not constitute a new sexual act that requires a specific expression of voluntariness, while the opposite is true when moving from vaginal intercourse to anal intercourse.<sup>64</sup> The bill, however, does not provide any clear answer.<sup>65</sup> Asp argues that it would be unrealistic to assume that in a sexual situation new consent is required in advance for each individual act.<sup>66</sup> Instead, after sexual activity has been initiated, consent can be given gradually and through reactions to new initiatives. Asp also states that there must be limits to what can be accepted regarding ‘new’ sexual acts without prior consent and that, ul-

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61 Prop. 2017/18:177, 78.

62 *Id.* at 79.

63 For a short summary, see *L. Wegerstad, Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden*, 22 *German Law Journal* 740 (2021).

64 SOU 2016:60, 200.

65 Prop. 2017/18:177, 32.

66 *P. Asp, Brottsbalken (1962:700) 6 kap. 1 § Lexino 19 August 2019*, at 2.2.3, available at JUNO, Nordstedts Juridik/Karnov group.

timately, it must be a matter for the courts to decide where the boundaries are.

It is difficult to provide a clear answer as to what general consent to sexual relations includes; this issue must be assessed on a case-to-case basis. Nonetheless, there is some support for the view that a sexual act which amounts to a qualified sexual act as defined in the rape provision should constitute a new act in relation to the previous one, such that voluntary participation in vaginal intercourse, for example, cannot be considered as agreeing to anal penetration.

Also of note, the bill states that persons who know each other well may make sexual approaches to wake one another, and, therefore, in some instances sexual acts towards a person who is asleep may be considered to be permitted.<sup>67</sup>

As mentioned in section II, stealthing, or non-consensual condom removal (NCCR), has been conceptualised in preparatory works as a form of deception that does not vitiate consent. Following up on Brodsky's 'literal approach', however, which proposes that consent to penetration with condom use is distinct from consent to penetration without condom use, in Swedish law NCCR can also be understood as a sexual act different from the one that the parties agreed on.<sup>68</sup> This means that NCCR could potentially be equated with so-called 'surprise rape' and covered by the definition of rape. However, no such cases have yet been tried by the courts. NCCR is often associated with the case in which a pre-trial investigation was launched against Wikileaks founder Julian Assange regarding rape and sexual molestation.<sup>69</sup> But since the preliminary investigation was dropped, the suspicion regarding Assange's condom use was never heard by a court.

Participation can be non-voluntary also in situations where the victim actively performs or initiates a sexual act, which follows from the broad definition of the term 'performs'.<sup>70</sup>

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67 Prop 2017/18:177,83.

68 A. Brodsky, Rape-Adjacent: Imagining Legal Responses to Nonconsensual Condom Removal, 32 Columbia Journal of Gender and Law 183 (2017).

69 *Åklagarmyndigheten*, Kronologi i Assangeärendet, [www.aklagare.se/nyheter-press/for-media/assangearendet/kronologi/](http://www.aklagare.se/nyheter-press/for-media/assangearendet/kronologi/) (accessed January 19, 2022).

70 Prop. 2017/18:177, 79.

### III. Finality of consent

As mentioned in section II, what matters for valid consent is the complainant's choice to participate. A consequence is that so-called 'tjatsex', or 'sex that one is nagged into having', i.e., when a person makes the choice to participate in a sexual act only after much persuasion, does not constitute rape.<sup>71</sup>

#### D. Intent as to lack of consent

##### I. For a conviction of intentional sexual coercion, is it necessary to prove that the perpetrator knew that the victim did not consent?

Intent is the standard form of mens rea, and the other type of mens rea in Swedish law – negligence – can only be applied if explicitly stated, which is the case with negligent rape and negligent sexual assault.<sup>72</sup> There is no legal provision that defines intent; instead, the different forms of intent and their meaning have been developed in the case law of the Swedish Supreme Court, and, to some extent, doctrinal literature. There are three forms of intent: direct intent (*avsiktssuppsåt*), indirect intent (*in-siktssuppsåt*), and reckless intent (also described as indifference intent, *likgiltighetsuppsåt*). The latter two are used in relation to circumstances, e.g., nonvoluntary participation by the complainant.

Regarding rape cases and the question of voluntary participation, the intent requirement is fulfilled if the defendant was certain – in practice, practically knew – that the complainant's participation was nonvoluntary. This means that the defendant knew, e.g., that the complainant did not participate voluntarily, was heavily intoxicated, or participated in the sexual act due to violence – the circumstances, in other words, that are required for criminal responsibility for rape. The intent requirement is also fulfilled if the defendant has reckless intent. In brief, this means that the defendant 1) appreciates that there is a risk that the complainant does not participate voluntarily (a cognitive status), and 2) is indifferent as to whether that

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71 Id. at 33.

72 Criminal Code Chapter 1 Section 2 para. 1 (SFS 1994:458); S. Wennberg, Criminal law, in: Michael Bogdan (ed) Swedish legal system 164–165, (2010). For a short description and comparison, see D. Martinsson and E. Lekvall, The Mens Rea Element of Intent in the Context of International Criminal Trials in Sweden (2020), 101–108.



is true (a volitional status). The latter means that the defendant does not perceive the circumstance or the risk of the circumstance – nonvoluntary participation – as a reason for refraining from performing the act; the defendant accepts the circumstance in the sense that it does not have an impact on his/her acting. If the perpetrator perceives the likelihood of the circumstance occurring as very high, this provides significant evidence of indifference.

## II. *Are there lesser requirements for mens rea?*

If the person honestly was mistaken, intent cannot be established. Lesser requirements for mens rea used in common law systems, such as exculpation only in case of a reasonable mistake or requirements to affirmatively establish non-consent, are not applicable. Instead, Sweden has introduced negligence as a sufficient fault element for rape liability, which is described below. There is no evidentiary presumption of non-consent, which means that the evidence standard “beyond a reasonable doubt” applies.

## III. *Are there offenses of reckless or negligent sexual coercion, dispensing with the requirement of intent?*

Negligent rape and negligent sexual assault were introduced as offences in 2018. They cover situations where the defendant did not have criminal intent but showed gross negligence regarding the circumstance that the other person was not participating voluntarily.<sup>73</sup>

Gross negligence includes situations where the defendant appreciates that there is a risk – i.e., suspected – that the complainant does not participate voluntarily, but nevertheless goes through with the sexual act.<sup>74</sup> This form of culpa is usually referred to as advertent negligence (*medveten oakt-samhet*). In both cases of reckless intent and cases of advertent negligence, the defendant appreciates that there is a risk that the complainant does not participate voluntarily. The distinction between the two appears in the second step – was the defendant indifferent as to whether the complainant’s participation was not voluntary? If yes, reckless intent is established; if no,

73 Criminal Code Chapter 6 Section 1a and 3 (SFS 2018:618).

74 Prop. 2017/18:177 85.

the defendant was negligent. So, negligence means that the defendant is indifferent to the risk, but not to its realization.<sup>75</sup>

However, gross negligence also includes situations where the defendant did not actually appreciate such a risk but should and could have done so. This form of culpa is usually referred to as inadvertent negligence (*omedveten oaktsambet*). To be held criminally liable for negligent rape requires that what the defendant could do is something that he or she also ought to do. Negligence leaves room for considering what in other jurisdictions is referred to as reasonable mistakes and requirements to affirmatively establish consent. For example, if the defendant did not make any effort to make sure that the complainant participated voluntarily, when there were strong reasons to do so, the defendant can be held liable.<sup>76</sup> Reasons to take steps to ensure consent could be that the complainant appeared to be intoxicated or asleep.

The term *gross* sets a limit and means that the defendant's negligence must be 'clearly reprehensible' ('klart klandervärd').<sup>77</sup> If the act is less serious, the provision states that the person should not be held responsible.

#### E. Are there sexual offenses that do not require lack of consent?

Sexual offences against children under the age of 15 years, or in some cases, as described in section B.1, under 18 years, are regulated separately, as rape of a child, sexual exploitation of a child, and sexual assault of a child.<sup>78</sup> As a general rule, consent of the underage person is of no relevance. However, if it is obvious that the act did not involve an assault on the child due to a minor difference in age and development between the person who committed the act and the child (e.g., if the two were aged 16–17 and 13–14 respectively), the defendant is not held responsible.<sup>79</sup> In assessing whether the act involved an assault on the child, it is important whether the child consented or not. Negligence regarding the fact that

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75 A. Bäcklund *et al.*, *Brottsbalken. En kommentar*. JUNO, version 18, 1 January 2021, Norstedts Juridik, Chapter 1 Section 1 Para. 1. See also NJA 2019 s. 668.

76 Prop. 2017/18:177 85.

77 *Id.* See also Supreme Court decision 2022–04–07 in case number B 779–21.

78 Criminal Code Chapter 6 Section 4 (SFS 2022:1043), Section 5 (SFS 2018:618) and Section 6 (SFS 2022:1043).

79 Criminal Code Chapter 6 Section 14 (SFS 2022:1043).

the victim was underage is sufficient for the defendant to be held responsible.<sup>80</sup>

There are additional sexual offences covering the sexual exploitation of underage persons. The crime of exploitation of a child for sexual posing covers situations where a person promotes or exploits the performance of or participation in sexual posing by a child under the age of 15 years, and, if the posing is liable to damage the child's health or development this section also applies to a child who has reached 15 but not 18 years of age.<sup>81</sup> The crime of sexual molestation makes it illegal for a person to sexually touch a child under 15 years, or to induce the child to undertake or participate in an act with sexual implications.<sup>82</sup> So-called grooming, i.e., proposing or agreeing to a meeting with a child under 15 years with the aim of committing a sexual offence against the child, has also been made a crime.<sup>83</sup> Lastly, inducing a child under eighteen years to undertake or submit to a sexual act in return for payment has been criminalised.<sup>84</sup>

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80 Criminal Code Chapter 6 Section 13 (SFS 2018:618).

81 Criminal Code Chapter 6 Section 8 (SFS 2022:1043).

82 Criminal Code Chapter 6 Section 10 paragraph 1 (SFS 2022:1043).

83 Criminal Code Chapter 6 Section 10a (SFS 2017:1068).

84 Criminal Code Chapter 6 Section 9 (SFS 2019:806).

