Sexual assault and rape in the new Dutch Sexual Offences Act
On perpetration, intent, and negligence

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The Sexual Offences Act introduces new provisions for intentional and negligent rape and sexual assault in the Dutch Penal Code. This contribution provides an in-depth analysis of these offences. It will first analyze who can be considered a perpetrator of both criminal offences. It then considers the question when the acts are committed against the will of the victim and examines when, according to the legislator, there is intent or negligence. Since duties of care and typologies may be used to deter-mine intent, it is concluded that the conscious negligence variant of both rape and sexual assault mainly has a symbolic value.

I. Introduction

On 10 March 2024, the Dutch Parliament's First Chamber passed a bill on a new regulation of sexual offences.[1] This Sexual Offences Act will enter into force on 1 July 2024 and provides for a comprehensive revision of offences in the Dutch Penal Code (Wetboek van Strafrecht, hereafter abbreviated as DPC) related to the protection of one person's sexual integrity.[2] The desire to create a new legal framework was almost universally felt in Dutch politics. Various societal organizations had also been advocating for a revision of the existing framework for some time.[3] The current legal framework, despite numerous amendments, still fundamentally dates back to the last quarter of the nineteenth century.[4] Its age, coupled with the many non-systematic changes which have taken place over time,[5] has created a sense of urgency for many in the Netherlands to establish a new comprehensive legal framework.

The age of the legislation as it stands is particularly evident in the criminal offences of rape and sexual assault (as stipulated in the Art. 242 and 246 DPC). To establish criminal liability in cases of rape and sexual assault, it is crucial that the sexual acts result from coercion, which includes the use of force or the threat of force. While case law acknowledges that coercion can be understood as a situation in which the victim's will is absent,[6] this absence of will must be the result of factors such as force or threat of force. As such, Dutch law and case law, therefore still essentially operate under a coercion model.[7] In this regard, the Dutch legislation differs from legislation in neighboring countries, including Belgium (see Art. 417/7 and 417/11 Strafwetboek), Germany (§ 177 Strafgezetzbuch), and Sweden (Chapter 6, Sections 1, 1a and 2 Brottsbalken). Present-day Dutch law also does not align with Art. 36 of the Istanbul Convention, to which the Netherlands is a party and, therefore, must adhere.[8] Art. 36 defines rape as occurring when various non-consensual sexual acts of different natures are intentionally committed (Art. 36 para. 1). Consent must be given voluntarily, which is determined by the circumstances (Art. 36 para. 2). The Convention and legislation of neighboring countries operate under a consent model,[9] which better aligns with societal developments that call for increased protection against sexually

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[1] Proceedings of the First Chamber of the States-General (Handelingen II) v. 19.3.2024, p. 24-10-1.

[2] Act of 27 March 2024, Official Journal (Staatsblad) 2024, 59.

[3] Parliamentary Documents of the Second Chamber of the States General 2022/23, 36222, 3, p. 50–61 for an overview of opinions of societal and governmental organizations, including the police and Public Prosecution Service, on the legislative proposal.

[4] *Lindenberg*, in: Hoven/Wiegend (eds.), Consent and Sexual Offences, 2020, p. 211.

[5] See *Lindenberg/Van Dijk*, Herziening van de zedendelicten?, 2016.

[6] See, among others, Dutch Supreme Court (Hoge Raad der Nederlanden), 27.11.2018, ECLI:NL:HR:2018:2194; Dutch Supreme Court, 5.11.2019, ECLI:NL:HR:2019:1701. This and other case law mentioned in this article can be found on the website of the Dutch judiciary, available at www.uitspraken.rechtspraak.nl (this one isn´t working, please update).

[7] *Lindenberg*, in: Gritter (ed.), Modern Strafrecht, 2019, p. 10–13; *Kool*, in: Franken/De Langen/Moerings (eds.), Constante warden, 2008, p. 223–232.

[8] Baseline Evaluation Report the Netherlands, GREVIO/Inf(2019)19, para. 224; *Kool/Jongenotter*, Nederlands Juristenblad 2021, p. 90–97. At first, Lindenberg disagreed with this proposition (*Lindenberg/Van Dijk* [fn. 5], p. 227–228). However, he revised his position a few years later. See *Lindenberg* (fn. 7), p. 25–28.

[9] See also Art. 5 of the Proposal of a Directive of the European Parliament and the Council on combating violence against women and domestic violence, COM (2022) 105 final. The text of proposed Art. 5 clearly differs from Art. 36 of the Istanbul Convention. However, both articles have in common that rape should be penalized solely on the condition that the (female) victim has not consented with the penetrating sexual acts. See also *Picchi*, Athens Law Journal 2022, 397. The Dutch draft bill did not refer to the proposed directive. The Dutch government does not support the introduction of the crime of rape in the proposed directive (Reply to Questions posed by Members of Parliament Warmerdam/Van der Werf v. 15.9.2023, 2023Z13729), arguing that the European Union lacks the competence to criminalize rape. Eventually, Art. 5 was removed from the draft and does therefore not appear in Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, OJ L, 24.5.2024.

invasive behavior while at the same time giving more room for the victim's narratives.[10]

International obligations, societal developments and criticism of the existing legislation have compelled the Dutch legislator to propose a bill in which the consent model serves as the foundation for the crimes (misdrijven) of sexual assault and rape involving adult victims, i.e. individuals aged sixteen and older.[11] The act retains the distinction between sexual assault and rape (proposed Art. 240 to 243). The act of sexual assault consists of sexual acts. Rape is defined as engaging in sexual acts with another person that involve the sexual penetration of this person's body, against the will of that person. In case of sexual assault, there is no reference to sexual penetration of the body; only sexual acts are mentioned. Both offences have an intentional and a negligent variant.[12] In the intentional variant (referred to as intentional sexual assault [opzetaanranding] and intentional rape [opzetverkrachting]), the criminal act is constituted by performing sexual acts while the offender knew they were against the victim's will. Negligence is described as having a substantial reason to suspect that the sexual acts were against the victim's will. When negligence is an element of the crime, the offences are called negligent sexual assault (schuldaanranding) and negligent rape (schuldverkrachting).

The law also specifies certain circumstances under which sexual acts are deemed to be against the victim's will, including instances where she suffered from physical or mental incapacity or a psychological disorder at the time of the sexual acts (proposed Art. 244).

The proposed (translated) text of the aforementioned articles reads as follows:[13]

> Article 240
> A person who engages in sexual acts with another person while having substantial reason to suspect that the other person lacks the will to do so, shall, as being guilty of negligent sexual assault, be sentenced to a maximum term of imprisonment of two years or a fine in the fourth category.
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> Article 241
> 1. A person who engages in sexual acts with another person while knowing that the other person lacks the will to do so, shall, as being guilty of intentional sexual assault, be sentenced to a maximum term of imprisonment of six years or a fine in the fourth category.
> 2. A person who commits the offence described in the first paragraph, preceded, accompanied by, or followed by coercion, violence, or threat, shall as being guilty of aggravated intentional sexual assault, be sentenced to a maximum term of imprisonment of eight years or a fine in the fifth category.
>
> Article 242
> A person who engages in sexual acts with another person involving or including the sexual penetration of the body, while having substantial reason to suspect that other person lacks the will to do so, shall, as being guilty of intentional rape, be sentenced to a maximum term of imprisonment of four years or a fine in the fifth category.
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> Article 243
> 1. A person who engages in sexual acts with another person involving or including the sexual penetration of the body, while knowing that other person lacks the will to do so, shall, as being guilty of intentional rape, be sentenced to a maximum term of imprisonment of nine years or a fine in the fifth category.
> 2. A person who commits the offence described in the first paragraph, preceded, accompanied by, or followed by coercion, violence, or threat, shall be, as being guilty of aggravated intentional rape, sentenced to a maximum term of imprisonment of eight years or a twelve in the fifth category.
>
> Article 244
> For the application of the offences described in Articles 240 to 243, a person shall be deemed to lack the will to engage in sexual acts if that person is, in any case, in a state of unconsciousness, reduced unconsciousness, physical incapacity, or has a psychological disorder, psychogeriatric condition, or intellectual disability to such an extent that this person is unable or only partially able to determine a will regarding sexual acts or to resist them.

The new criminal provisions raise several legal questions. What is meant by sexual acts, when are they considered to have been committed against the will of the other person, and what does intent or negligence mean in these offences? Does the description of intent give any room to criminalize conscious negligent sexual assault and conscious negligent rape, and if so, on what grounds? This article begins with an analysis of the meaning of the *actus reus* part of both offences, namely sexual acts and sexual penetration (II.). It will then examine the meaning of intent and negligence in both rape

[10] Parliamentary Documents (fn. 3), p. 5–8. See among other *Pitea*, Journal of International Criminal Justice 2005, 447; *Murray*, in: Franklin/Piercy/Thampuran/White (eds.), Consent, Legacies, Representations, and Frameworks for the Future, 2023, p. 188–202; *Hörnle*, Bergen Journal of Criminal Law and Criminal Justice 2018, 116.

[11] Parliamentary Documents (fn. 3), p. 15–18; Parliamentary Documents of the Second Chamber of the States General 2015/16, 29279, 3, p. 8–9. These obligations not only refer to Art. 36 Istanbul Convention, but can also be derived from case law of the European Court of Human Rights, Judgment v. 4.12.2003 – 39272/98 (M.C. v. Bulgaria). See *Kool* (fn. 7).

[12] Both offences also have a qualified version, namely when intentional sexual assault or rape is preceded by, accompanied by, or followed by coercion, violence, or threats. In these cases, the maximum penalty set for intentional sexual assault and intentional rape is higher (Art. 241 para. 2 and Art. 243 para. 2 respectively).

[13] All translations in this article are by the *author*.

and sexual assault (III. and IV.). This article aims to demonstrate that proving intent relies heavily on certain duties of care and typologies which will also make clear that this leaves little room for the use of the crimes of conscious negligent sexual assault and conscious negligent rape. I will conclude this article with a summary of findings.

II. Sexual acts and sexual penetration

1 Sexual acts

As mentioned before, the new legal framework for sexual offences is placed in the Dutch Penal Code. This code is divided into three books: the First Book, called General provisions (Algemene bepalingen), the Second Book, called Crimes (Misdrijven) and the Third Book, called Misdemeanors (Overtredingen). The new legal framework for sexual offences is placed in the Second Book (Title XIV). This title is to be comprehensively revised by the Sexual Offences Act.[14] Not only are all criminal offences within the title being revised, the title itself is given a new heading: 'Sexual offences'.[15]

The revised title begins with a definition. Proposed Art. 239 para. 1 reads as follows:

> In this title, the term 'person who engages in sexual acts with another person' also includes: a person who makes another person perform sexual acts with the first person, with themselves, or with a third party, or a person who makes another person undergo sexual acts by a third party.

The definition of the first paragraph is intended to be non-exhaustive. The provision explains what is included in the phrase 'engaging in sexual acts with a person'.[16] The meaning of 'sexual acts', however, remains unspecified in Article 239, but will be discussed below.

a) Engaging in sexual acts with another person

The law determines that engaging 'in sexual acts with another person' can be understood in various ways. The classical engagement, sexual acts performed by the offender with the victim, is not explicitly mentioned in Art. 239, but is encompassed in this article. Art. 239, however, explicitly refers to other forms of engagement, which can be performed by the offender (and the victim) both offline and online. Sexual acts can be performed with the involvement of the offender (hands-on), the offender can also remain passive (hands-off). The victim can also engage in sexual acts with him- or herself or with a third party. The offender can also compel the victim to undergo sexual acts with a third person. In these cases, the offender is not directly engaging in sexual acts. However, the text of the law, formulated with the terms 'with' (met) and 'engage' (verrichten), means that not every passive offender is necessarily guilty of engaging in sexual acts. There must be a so-called 'relevant interaction.'[17] This criterion was developed in case law to bring online offenders within the scope of the crime of so-called actual indecent assault (feitelijke aanranding van de eerbaarheid) (present-day Art. 246 DPC) and, at the same time, set limits to criminal liability for hands-off (online and offline) sexual behavior.

For relevant interaction, the initiative to engage in sexual acts must lie with the offender, and there must be some sort of communication between the offender and the victim at the time of the victim's actions.[18] Secretly filming a naked person therefore does not qualify as relevant interaction because the actions of the offender do not elicit a response from the victim.[19] As part of the Sexual Offences Act, the legislator has adopted the 'interaction criterion' and determined that engaging in sexual acts remotely 'with or involving the victim's body, directly resulting from or directly related to the remote interaction between the offender and the victim,'[20] is considered criminal behavior. There must therefore be a causal link between what the offender intends or does and the victim's actions.

The new Art. 239 makes clear that sexual acts can be performed in various ways and that different ways of performing sexual acts fall within the definitions of the new provisions. The offender is not required to perform any physical act. However, the various acts mentioned in Art. 239 para. 1, cannot be understood as omissions, because criminal liability in these cases does not consist in failing to do something that should have been done.[21] The concept of perpetration seems to include some sort of 'functionally committing' an act. The question is what counts as functionally committing. This calls for clarification of the required communication between perpetrator, victim and/or third party. The parliamentary documents offer little guidance and the case law of the Su-

[14] In the Third Book, a title seems to be related to sexual offences (Title VI). However, the only criminal provision in that title does not aim to protect sexual integrity and will therefore be moved to another part of the Criminal Code (Title II of the Third Book). Title VI will be removed from the Penal Code (Article I, P of the Sexual offences bill: Parliamentary Documents of the First Chamber of the States General 2022/23, 36222, A).

[15] The name of the current Titel XIV is Offences against morals (Misdrijven tegen de zeden).

[16] This technique is used in the DPC elsewhere. Art. 81 DPC, for example, describes committing violence as to include bringing a person into a state of unconsciousness or inability.

[17] Parliamentary Documents (fn. 3), p. 73.

[18] Dutch Supreme Court, Decision of 27.10.2010, ECLI:NL:HR:2020:1675.

[19] Dutch Supreme Court, Decision of 14.2.2012, ECLI:NL:HR:2012:BU5254; Dutch Supreme Court, Decision of 8.5.2012, ECLI:NL:HR:2012:BW5000; Dutch Supreme Court, Decision of 3.5.2013, ECLI:NL:HR:2013:BZ9286; Dutch Supreme Court, Decision of 24.6.2014, ECLI:NL:HR:2014:1499. See *Ten Voorde*, Proces 2017, p. 359–369; *Kelk*, in: Groenhuijsen/Kooijmans/Ouwerkerk (eds.), Roosachtig strafrecht, 2013, p. 323–339.

[20] Parliamentary Documents (fn. 3), p. 73.

[21] On omissions, see *De Hullu*, Materieel strafrecht, 2021, p. 75.

preme Court is also not uniform on this point.[22] Two interpretations seem possible. The first focuses on the question whether the perpetrator himself did something *sexual* towards the victim. In these cases, the victim must be aware of the perpetrator's behavior. In the second interpretation, the question is who initiated and further stimulated the victim's and/or third party's acts.[23] Relevant interaction will exist if the perpetrator initiated and/or stimulated the acts. In this interpretation, the perpetrator did not commit *sexual* acts himself, but without his initiating and stimulating acts, those acts would not have occurred.

Both interpretations suppose a certain control of the perpetrator over the (actions of the) victim. Without her (sexual) acts there would have been no sexual acts by the victim and/or third party. Without that control, 'engaging in sexual acts with another person' cannot be established.

b) What counts as sexual acts

The legislator distinguishes three categories of sexual acts: penetration of the body with a sexual organ or another body part or object or involving an animal, touching of sexual body parts, and touching of other body parts which takes on a sexual nature in the context in which it occurs.[24] It is especially the third category that allows for a wide range of actions to be considered as sexual acts. Based on a comparison with the new misdemeanor of sexual intimidation (proposed Art. 429ter), which requires intrusive public sexual approaches, it can be argued that sexual acts must involve less than minor physical contact.[25] Sexual approaches constituting sexual harassment include minor sexual touching of the body.[26] The location where the actions took place and the circumstances under which these approaches occur will also be relevant in distinguishing sexual approaches from sexual acts. This makes a detailed assessment of the specific circumstances in which the acts took place relevant. At the same time, the legislator does not want the offender's or victim's perspective on what has happed to be decisive in determining whether the acts can count as sexual.[27] The circumstances to be assessed are presented in such a way that an average 'third party' who is aware of all the relevant circumstances of the case should be able to designate the actions in the given circumstances as sexual. It is therefore up to the courts to determine case by case whether an act counts as sexual or not. There is no obligation to draw a strict line between sexual harassment and sexual assault. The legislator recognizes that there can be an overlap between both criminal offences.[28] Given the difference in maximum sentences (two years for negligent sexual assault, and three months for sexual intimidation), one can question whether this overlap, and subsequent relative unforseeability which criminal offence is applicable, is acceptable.

2 Sexual penetration

Rape consists of sexual acts which include or involve sexual penetration (seksueel binnendringen) of the body (proposed Art. 242 para. 1 and Art. 243 para. 1). The term sexual penetration needs to be distinguished from penetration. The latter concept refers to any entry into another person's body with a sexual connotation,[29] while sexual penetration has a more limited meaning. It occurs through sexual intercourse (vaginal penetration), though an act similar in seriousness and intrusion of the victim's sexual integrity, or through an act which is reasonably equivalent to the former. The second and third category include anal penetration, as well as vaginal penetration with a finger or object or oral penetration with a sexual organ. Oral penetration with another body part does not fall under sexual penetration and therefore cannot count as rape.[30] This passage in the parliamentary documents refers to a debate in case law on whether a forced French kiss could be classified as rape. The Dutch Supreme Court ruled in the positive on this matter in a notorious ruling from 1998.[31] In 2013, however, the court reversed its position. A French kiss can be considered as penetration and, for that reason, a sexual act.[32] However, it cannot be understood as sexual penetration. Common language use, as well as the fact that a French kiss cannot reasonably be equated with sexual intercourse, led the Supreme Court to reconsider its earlier case law on the matter.[33] The legislator saw no reason to reopen the discussion and follows the line set by the Supreme Court in 2013. An unwanted French kiss can be qualified as sexual assault but not as rape.

[22] *Lindenberg/Van Dijk* (fn. 5), p. 62–77.

[23] Dutch Supreme Court, Decision of 27.10.2010, ECLI:NL:HR:2010:1675.

[24] Parliamentary Documents (fn. 3), p. 70–71.

[25] Parliamentary Documents (fn. 3), p. 79. See on Art. 429ter *Lindenberg*, in: Van der Vorm (ed.), Strafrechtelijke criminologie II, 2024, p. 213–235.

[26] In this the proposed misdemeanor will differ from the sexual harassment clause in Dutch labour law, in which a certain duration of the acts can help to establish whether or not the acts can count as sexual harassment, which can be ground for dismissal. *Zwager*, Nieuwsbrief bedrijfsjuridische berichten 2018/79.

[27] Parliamentary Documents (fn. 3), p. 117–118; *Vegter*, in: Krans/Stolker/Valk, Burgerlijk Wetboek, Tekst en Commentaar, 2023, Art. 7:246, para. 9.

[28] Parliamentary Documents (fn. 3), p. 115.

[29] In its verdict the Dutch Supreme Court, Judgement v. 22.2.1994, ECLI:NL:HR:1994:ZC9650, used this description for sexual penetration. See also *Van der Neut/Wedzinga*, Nederlands Juristenblad 1994, p. 149–153. Nowadays, this phrase is only used for penetration. Parliamentary Documents (fn. 3), p. 71.

[30] Parliamentary Documents (fn. 3), p. 71.

[31] Dutch Supreme Court, Decision of 21.4.1998, ECLI:NL:HR:1998:ZD1026. See *Kool*, in: Moerings/Pelser/Brants (eds.), Morele kwesties in het strafrecht, 1999, p. 157–171; *Kelk*, Ars Aequi 2015, 520.

[32] Parliamentary Documents (fn. 3), p. 71.

[33] Dutch Supreme Court, Decision of 12.3.2013, ECLI:NL:HR:2013:BZ2653; Dutch Supreme Court, Decision of 26.11.2013, ECLI:NL:HR:2013:1431; *Rozemond*, Ars Aequi 2013, 839.

III. Intent and negligence

1 Lack of will

Intent or negligence must relate to the lack or absence of will in the other person to engage in sexual acts. The absence of will is a new element in Dutch criminal law and is a translation of Art. 36 of the Istanbul Convention.[34] The new regulation's starting point is that sexual acts should occur voluntarily, meaning that the individuals involved have consented and continue to agree with the sexual acts. Thus, consent is the primary focus of the new legislation, although as such the term appears only infrequently in the parliamentary documents. For consent to exist, a positive expression of one's will is required. If that will is absent, consent is lacking, and the sexual acts may be subject to criminal liability, provided that the offender knew or had substantial reason to suspect (the terms used for intent and negligence, respectively) that the absence of consent or a positive will was absent in the other person (the victim).

The question arises as to when there is no positive expression of will on the part of the victim. For criminal liability, the absence of a positive expression of will must be present (before and) during the sexual acts, either because the other person (the victim) never consented to the sexual acts, no longer wants to pursue or because does not to yield into certain sexual acts. The legislator distinguishes six categories of circumstances or cases on the basis of which a lack of a positive expression will can be established. It depends on the category on how strong the legislator formulates this presumption: sometimes it seems to be very strong, in other categories the legislator takes a more cautious position.

First, the lack of a positive expression of will is considered to be present when verbal or non-verbal signals are expressed by the victim before or during the sexual acts.[35] Such signals can range from very explicit to more implicit ones. Criminal liability can be established more quickly in sexual acts where the lack of a positive will is undisputable than when the signals were expressed more implicitly. This does not say that more implicit signals cannot lead to criminal liability. Below, we will see in the distinction between intent and negligence that the manner in which signals are expressed by the victim is relevant for assessing the presence of intent or negligence (next section).

Second, the positively expressed of will may be absent if the victim remains passive, and thus, there is no response to the sexual acts by the perpetrator.[36] Victims may refrain from reacting, among other reasons, when they freeze due to the perpetrator's actions.[37] The legislator does not exclude the possibility that passivity may have other explanations. In any event, passivity forms a signal for the perpetrator to check whether the other person consents to the sexual acts. Passivity can be both verbal and non-verbal: in the former case, it can be accompanied by a so-called 'genital response', a physical response that may lead the perpetrator to believe that the victim consents to the sexual acts.[38] This impression can be misleading but does not necessarily preclude criminal liability when this physical response is accompanied by a clear verbal and otherwise non-verbal passivity. Passivity as an expression of a negative will indicates that a clear 'no' is not required for criminal liability. Under the new legislation, criminal liability can arise in the absence of an explicit and implicit 'yes'.

This also becomes evident in the third category. Therein, sexual acts are presumed to have been taken place against the will of the other party in cases of sudden actions (compare § 177 Abs. 2 S. 3 dStGB). A positive expression of will can be assumed in such cases, because the other party cannot be held to have been able to determine their will.[39]

These three categories indicate a duty of verification. In the situation where the verbal expressions of the victim is less clear, in cases of passivity or in sudden actions, a lack of positive will can generally be assumed. To avoid criminal liability, the person initiating or continuing sexual acts needs to ask beforehand whether or not the other person wants the sexual acts to pursue or to continue.[40] When the person refrains from verifying whether the other person wants to pursue or to continue the sexual acts, the legislator seems to consider this lack of verification as an argument for criminal liability. From this, under Dutch law the duty of verification could be understood as a duty of care (Garantenstellung).

The first three categories are not explicitly mentioned in the proposed text of the new statutory provisions. However, they are explicitly referred to in the parliamentary documents. The fourth, fifth and sixth categories are explicitly mentioned in the new provisions. The fourth category concerns situations where the individuals are in an unequal relationship. This may include sexual acts between a superior and a subordinate, a teacher and a student, a coach and a pupil, etc. In each of these cases, the inequality lies in the fact that the victim is in a subordinate or dependent position relative to the perpetrator. The perpetrator can exert power over the victim in various ways: formally, but especially substantially. In these situations, the legislator noted that there is generally a hazard that the sexual acts occur involuntarily.[41] This situation is covered in proposed Art. 244, which provides a non-exhaustive list of cases in which a positive will may generally be held to be lacking.[42] Proposed Art. 244 also includes the

[34] Parliamentary Documents of the Second Chamber of the States General 2022/23, 36222, 12, p. 6–7.
[35] Parliamentary Documents (fn. 3), p. 20, 77, 82.
[36] Parliamentary Documents (fn. 3), p. 79, 82.
[37] On this so-called 'tonic immobility' as non-consensual behavior, see *de la Torre Laso*, Trauma, Violence, & Abuse 2023, 1630; *de Heer/Jones*, Violence Against Women 2023 (https://journals.sagepub.com/doi/full/10.1177/10778012231174347).
[38] *Suschinsky/Lalumière*, Psychological Science 2010, 159; *Bicanic/Terra*, EMDR magazine 2023, 26.
[39] Parliamentary Documents (fn. 3), p. 82.
[40] Parliamentary Documents (fn. 3), p. 19; Parliamentary Documents of the Second Chamber of the States General 2022/23, 36222, 7, p. 36–37.
[41] Parliamentary Documents (fn. 3), p. 83; Parliamentary Documents (fn. 41), p. 41–42.
[42] Parliamentary Documents (fn. 3), p. 88.

fifth category, in which sexual acts occur with someone who is in a state of physical or mental incapacity at the time of the sexual acts.

The sixth category, finally, pertains to situations in which the sexual acts are preceded by, accompanied by, or followed by coercion, violence, or threat. This category is mentioned in proposed Art. 241 para. 2 and Art. 243 para. 2.

In these three categories, the legislator formulates a duty to generally avoid sexual acts in the case of an unequal relationship between the perpetrator and the victim can be derived from the new statutory provisions. I will return to these categories under IV. 3.

2 Intent and negligence in relation to the lack of will

a) Some general remarks on intent and negligence in the context of Dutch criminal law

Dutch criminal law distinguishes between intent and negligence (culpa). The Dutch Penal Code does not provide for specific rules regarding the meaning of these concepts. Neither are they hierarchically ranked.[43] The distinction between intent and negligence received some attention in the explanatory memorandum of the Dutch Penal Code at the end of the 19th century, but ultimately, the interpretation of these terms was left to legal scholarship and case law.[44] In all crimes (misdrijven), intent or negligence is a constituent element, and explicitly mentioned therein in various ways. One of the forms of intent is 'knowing that' (wetende dat). While this may seem to focus primarily on one aspect of intent (the cognitive aspect), it actually encompasses both the cognitive and volitional aspects of intent.[45] In the form of 'knowing that', intent is specifically directed at objective elements of an offense that follow the element denoting intent in the description of an offence.[46]

In Dutch criminal law, it is recognized that conditional intent (voorwaardelijk opzet) may suffice to establish intent.[47] Conditional intent is described as consciously accepting of a substantial risk (bewust aanvaarden van de aanmerkelijke kans) that a certain consequence will take place.[48]

Negligence or culpa as element of a crime is also presented in various ways within Dutch legislation. Establishing negligence involves defining the relevant objective norm against which the defendant's conduct should be assessed. Negligence exists when the norm underlying the offense has been violated, and, given the other relevant circumstances, there is a substantial violation of that norm, generally called 'substantial carelessness' (aanmerkelijke onvoorzichtigheid).[49] This reflects the idea that criminal liability for negligence should be understood as 'culpa lata'.[50] After establishing 'substantial carelessness', the next step is to determine whether the perpetrator can be (objectively) blamed for violating that norm. The key question here is whether the perpetrator could and should have avoided the committed act. Here, the issue is not whether the defendant displayed a state of mind in which she wrongly misunderstood the possible risks of a certain act and of violating a norm.[51] Case law has established that, when there is a substantial norm violation, it is generally assumed that the defendant could and should have avoided it. Invoking an excuse, however, remains possible.[52]

Dutch criminal law recognizes two forms of negligence. In case of conscious negligence (bewuste schuld) at the time of the act the defendant knew that she took a risk of violating the norm that could lead to a certain consequence described in the statutory provision; in case of unconscious negligence (onbewuste schuld) while committing the act the defendant was not aware of trespassing the underlying norm, but should have known that this norm could be violated and could lead to a certain consequence described in the statutory provision.[53]

b) Some preliminary remarks on intent and negligence in the Sexual Offences Act

Intent is explicitly mentioned in two of the new provisions cited at the end of Paragraph I. Art. 241 and Art. 243 refer to intent as 'knowing that'. As for intentional sexual assault and intentional rape, intent must be directed at the absence of the will of the other person. For intent to be established, it is required that the perpetrator before or at the time of the sexual acts knew that the other person lacked the will to engage in the sexual acts that took place and, despite that knowledge, nevertheless decided to initiate or continue the sexual acts.[54] Conditional intent suffices to establish intent in both crimes.[55]

[43] *Kelk/De Jong*, Studieboek materieel strafrecht, 2023, p. 291 et seq.

[44] *Smidt*, Geschiedenis van het Wetboek van Strafrecht, 1881, p. 66–82.

[45] *Kelk/De Jong* (fn. 44), p. 245–247; *Lindenberg/Wolswijk* Het materiële strafrecht, 2021, p. 132–134.

[46] *Kelk/De Jong* (fn. 44), p. 251–253; *Lindenberg/Wolswijk* (fn. 46), p. 109–110.

[47] *De Hullu* (fn. 22), p. 225–232; *Kelk/De Jong* (fn. 43), p. 260–280; *Lindenberg/Wolswijk* (fn. 46), p. 118–132.

[48] Dutch Supreme Court, Decision of 25.3.2003, ECLI:NL:HR:2003:AF9049; Dutch Supreme Court, Decision of 29.5.2018, ECLI:NL:HR:2018:718. See *Blomsma*, Mens rea and defences in European criminal law, 2012, p. 103 et seq.

[49] *De Hullu* (fn. 22), p. 251–252.

[50] Parliamentary Documents (fn. 41), p. 22–23. '*Culpa levis*', or minor negligence, is not subject to the criminal law. See *Lindenberg/Wolswijk* (fn. 46), p. 157; *Kelk/De Jong* (fn. 44), p. 298–299.

[51] Parliamentary Documents (fn. 3), p. 20; Parliamentary Documents (fn. 41), p. 22–23, 26

[52] Dutch Supreme Court, Decision of 19.2.1963, ECLI:NL:HR:1963:2; Dutch Supreme Court, Decision of 1.6.2004, ECLI:NL:HR:2004:AO5822; *De Hullu* (fn. 22), p. 257–258; *Kelk/De Jong* (fn. 44), p. 298–304; *Lindenberg/Wolswijk* (fn. 46), p. 151–163.

[53] *Kesteloo/Ter Haar/Korthals*, Nederlands Tijdschrift voor Strafrecht 2022, 129.

[54] Parliamentary Documents (fn. 3), p. 16, 76–77.

[55] Parliamentary Documents (fn. 3), p. 16, 76.

Here, the issue would be whether, from an objective standpoint, there is a substantial risk or realistic change[56] that the other person's will to engage in sexual acts is absent, whether the perpetrator at the time of the acts was aware of that risk, and whether the perpetrator, with that knowledge, accepted the substantial risk or realistic change of the absence of that will. In the context of intentional rape and intentional sexual assault, conditional intent is described as a 'profoundly indifferent mental attitude' toward the will of the other person.[57] We will delve into intent more deeply in the next section.

In the context of negligent rape and negligent sexual assault, culpa is described as a 'substantial reason to suspect' (proposed Art. 240 and 242). This terminology is also used elsewhere in the DPC, for example in Art. 273g, which makes it a crime to perform sexual acts with another person while knowing or having a substantial reason to suspect that that other person is, in short, a victim of human trafficking. A substantial reason to suspect aims to make clear that not all forms of negligence fall under the scope of the criminal provision. However, the question becomes to what form of negligence do the words 'serious reason to suspect' refer to. There is no straight answer to this question. Some have argued that the phrase refers to a specific form of negligence, namely unconscious negligence. Having serious reasons to suspect means a person does not suspect certain specific objective elements in a criminal provision to occur (for example an absence of will), but he should have suspected these. If the legislator makes clear that a substantial reason to suspect is necessary to establish criminal liability, this would mean that the situation in which the defendant placed himself would make it clear for anyone, and thus for the defendant, that there is a risk that certain specific objective elements in a criminal provision could occur.[58] On the other hand, a 'substantial reason to suspect' could (also) imply conscious negligence.[59] Then the situation would be that the defendant knew that he took a risk, but still pursues his acts because he believes the risk will not unfold. We will return to this issue below.

c) Establishing intent

The parliamentary documents on the Sexual Offenses Act reveal a graduated relationship between the categories or situations from which the lack of will can be assumed and their potential for establishing intent. The legislator's aim here is to optimize the protection of victims of sexual acts against their will.[60] For some categories, the legislator considers that knowledge of the lack of will is more or less self-evident, while in other categories, this may be less apparent. This means that more information is necessary to establish intent. In the absence of intent, the prosecution for the negligent variant of rape or sexual assault remains possible.

As mentioned above, intent is readily deemed to be present in cases involving coercion, violence, threats, and unexpected actions.[61] In such situations, it seems that no matter what the sexual acts are, they occurred to be conducted against the will of the victim and that the offender is aware of this. In general, or 'in principle', intent may exist in case of clear or non-disputable verbal or non-verbal signals indicating that the other person does not want to engage in the sexual acts the offender is initiating or continuing.[62] Unlike in cases involving coercion, violence, threats, and unexpected actions, there may be exceptions rebutting knowledge of the lack of a positive will in cases where the signals are less clear as to whether sexual acts can be performed or what kind of sexual acts can be performed. Contrarily, the less disputable the signals, the more likely knowledge of the lack of a positive will may be considered present at the time of the sexual acts. Here knowledge also depends on the actions of the victim, and it is assumed that signals that are not open to different interpretations will generally lead to proof of intent when the offender ignored these clear signals of resistance.[63]

The legislator accepts that sexual acts are generally performed intentionally with someone who at the time of the acts was in a 'state in which a free positive expression of will is not possible'.[64] This especially pertains to situations as specified in proposed Art. 244. According to the legislator, intent can also be assumed where an unequal relationship between the individuals is involved. Here, the legislator refers to a 'hierarchical or trust relationship' of the perpetrator towards the victim.[65] As mentioned before, this category is implied in proposed Art. 244.[66] These categories will be discussed further section IV.

When it comes to passive behavior, for intent to be established, the passivity must be so clear that there is no doubt the other person did not want to engage in the sexual acts.[67] This, again, makes the establishment of intent dependent at least somewhat dependent on the actions (or better: the lack of actions) of the victim. The passivity of the victim requires the perpetrator to verify whether the other person wishes to continue with the sexual acts. If the perpetrator fails to do so, this would make it acceptable for the legislator to conclude that the perpetrator intentionally performed sexual acts against the will of the other person. In this case, it would again be the responsibility of the defendant to present counterarguments that could raise a reasonable doubt about this assumption.

[56] *Van Kempen*, Delikt en Delinkwent, 2023, p. 437–448.
[57] Parliamentary Documents (fn. 3), p. 16–17, 77, 78, 81–82.
[58] *Kesteloo/Ter Haar/Korthals*, Nederlands Tijdschrift voor Strafrecht 2022, 129 (133, 135, 136).
[59] Parliamentary Documents of the First Chamber of the States General 2023/24, 36222, C, p. 9–10.
[60] *Kool*, Nederlands Juristenblad 2023, 2379.
[61] Parliamentary Documents (fn. 3), p. 18, 82.
[62] Parliamentary Documents (fn. 41), p. 25.
[63] Parliamentary Documents (fn. 3), p. 82.
[64] Parliamentary Documents (fn. 3), p. 82; Parliamentary Documents (fn. 41), p. 25–26.
[65] Parliamentary Documents (fn. 3), p. 18, 83. See *Ten Voorde*, Justitiële Verkenningen 4/2022, 60.
[66] Parliamentary Documents (fn. 41), p. 41–42.
[67] Parliamentary Documents (fn. 3), p. 18, 82; Parliamentary Documents (fn. 41), p. 37.

d) Negligence in negligent sexual assault and negligent rape

With regard to negligence, the main issue to be determined is whether or not the norm that sexual acts must be voluntary and equitable has not been followed. It is expected of everyone that they are sufficiently alert to clear signals that voluntariness during sexual acts might be lacking. If a person was aware of these signals, but mistakenly believed the other person wanted to pursue the sexual acts, this could count as conscious negligence. If a person was not aware of these signals, then the question becomes whether in the given circumstances it could be expected that an average person was aware of those signals. If this is the case, than it can be expected that the defendant must have been aware of those signals. This would count as unconscious negligence.[68]

However, being attentive or inattentive to clear signals does not necessarily imply 'having substantial reason to suspect that the other person lacks the will' of getting involved in sexual actions.[69] In case of conscious negligence, the determination thereof depends on various factors, such as the behavior of the other person. A wavering, uncertain, or changing attitude of the other person makes it reasonable to verify of whether (further) sexual acts may proceed. Failing to do so is considered a mistake, and this mistake becomes a gross mistake if the signals were clear enough (for any objective bystander)[70] that it warranted further inquiry as to whether the other person wanted to continue with the sexual acts. Also, the circumstances in which the behavior occurred can contribute to establishing whether there was 'substantial carelessness'. Unlike in cases of intent, the legislator does not specify categories where this substantial carelessness is evident or can be inferred. Instead, it lists factors or indications that may play a role in assessing whether such carelessness occurs. These factors include 'the location where the people present during which sexual contact takes place, the manner in which the contact occurs, and the relationship between the parties'.[71] An unequal starting position, evidenced by differences in age, sexual experience, or numerical advantage, can also be helpful to establish for a substantive reason to suspect that a positive expression of will is absent.[72] These circumstances must be weighed against the norm that sexual acts should take place voluntarily and under equitable circumstances. The central question to answer is whether, under the given circumstances, the conduct was not in accordance with that norm, and how serious the mistake made by the perpetrator was in light of the relevant circumstances, and whether the serious transgression could and should have been avoided by the perpetrator. With this, a generally normative approach to establishing negligence becomes clear.[73] Next to this, the examples mentioned before do not make entirely clear why the defendant was aware of a (possible) absence of a positive will. Various examples could very well refer to an absence of such a knowledge. This point is also explicitly mentioned in literature where it is stated that the examples generally refer to unconscious negligence, but not to conscious negligence.[74]

IV A clear distinction between intent and negligence?

1 Some general remarks

The difference between intent and negligence in the context of the Sexual Offenses Act initially seems clear. Intentional action can be explained as acting willingly and knowingly, whereas negligence focuses on whether there was 'substantial carelessness'. However, subtle differences can exist between intentional sexual assault and intentional rape on the one hand, and negligent sexual assault and negligent rape on the other. These differences can, for example, depend on the negative response from the victim. The more unambiguous this negative response, the more likely intent can be established if this response is ignored. The difference can also depend on the actions of the defendant. In cases of unexpected actions or those involving coercion, violence, or threats, intent is more or less presumed. In a situation where it should have been clear to the defendant that the other person was in a state where a free positive expression of will was not possible, establishing intent does also not seem problematic. However, when it is less evident that the other person was in such a state, negligence may still be established.[75] The fact that the parliamentary documents mention factors that can be helpful to establish both intent and negligence further makes it difficult to distinguish between intent and negligence. Sexual acts involving more than one person, in a location not traditionally associated with such acts (such as an unheated garage, inside a car while driving, or similar situations), are mentioned as factors that can help in establishing negligence.[76] However, these circumstances could very well be relevant in establishing intent. Committing sexual acts in an unheated garage with a sexually less experienced victim could show a 'profoundly indifferent mental attitude' towards the positive expression of the will of the defendant and therefore be an argument to establish intent.

The legislator recognizes this, but apart from referring to a different mental state of mind, does not really provide other arguments as to what would count as intent and what as negligence. This also complicates the matter. To establish negligence, only a substantial violation of a norm that could and should have been avoided qualifies as negligence. This substantial carelessness is determined not only on the circumstances of the case (with clear signals of the absence of a positive expression of will as a starting point) but in case of conscious negligence typically also by the duty of care applicable to those circumstances.[77] It is notable that the relevant parliamentary documents do not explicitly connect this duty

[68] Parliamentary Documents of the First Chamber of the States General 2023/24, 36222, E, p. 4.
[69] Parliamentary Documents (fn. 69), p. 6.
[70] Parliamentary Documents (fn. 69), p. 3–4.
[71] Parliamentary Documents (fn. 3), p. 19.
[72] Parliamentary Documents (fn. 3), p. 79.
[73] *Kool*, Nederlands Juristenblad 2023, 2379 (2382).
[74] *Kesteloo/Ter Haar/Korthals*, Nederlands Tijdschrift voor Strafrecht 2022, 129 (133–136).
[75] Parliamentary Documents (fn. 69), p. 3.
[76] Parliamentary Documents (fn. 3), p. 79.
[77] *De Hullu* (fn. 22), p. 257–258; *Kelk/De Jong* (fn. 44), p. 298–304; *Lindenberg/Wolswijk* (fn. 46), p. 154–155.

of care to conscious negligence. The establishment of intent seems highly dependent on a concept commonly associated with conscious negligence.[78] This shifts the focus away from the defendant's mental state at the time of the sexual acts and towards the objective circumstances described in the categories discussed above, the purpose of which is to aid in establishing whether there was a lack of will. In this scenario, what room then remains for negligent sexual assault and negligent rape are only certain 'exceptional situations'.[79] This question is particularly relevant for conscious negligence, for here the starting point is that the defendant knew the positive expression of will was lacking. As the parliamentary proceedings progressed, the legislator tried to make the distinction between conditional intent and conscious negligence more clear, by stating that the latter also includes the situation where the defendant knew of the possibility of a lack of positive expression of will.[80] But this generally can also be the starting point for establishing conditional intent. As a result, the explanation by the legislator does not really provide clarity on the matter.

2 Intent and the duty of verification

It should first be noted that some of the various categories in which the legislator considers the positive expression of will is lacking seem to refer to a duty of verification. Verification is required when undisputable signals that a positive expression of will is absent, as signaled by verbal or non-verbal expressions, of which the latter includes passivity. Not adhering to this duty of care leads generally to some sort of presumption of intent. Conscious and unconscious negligence may come into play when there is no verification, despite 'clear indications' of the absence of a positive expression of will,[81] while the defendant was aware of or should have been aware of these indications. However, with clear indications of which the defendant was aware, the duty of verification comes into play, leading the actions into the path of intent. It is only in situations where signals were multi-interpretable or vague that conscious negligence might apply.[82] At the same time, however, it is stated that negligence should still involve clear signals of a lacking will. Only when these signals are ignored can conscious negligence be established. However, with the duty of verification as an important starting point for establishing criminal liability, it seems that most situations fall under the scope of (conditional) intent. As mentioned above, this leaves little room for conscious negligence. If this type of negligence requires the signals to be clear, what are these signals when they can already place the actions in the realm of intent?

The issue can be resolved by taking a step away from the duty of verification. However, this might significantly complicate the determination of intent, potentially undermining the proposed legislator's aim to lower the threshold for criminal liability in order to better protect victims against unwanted sexual acts and hoping for serious prison sentences for perpetrators of sexual crimes. This path is thus not a very plausible one to follow. That would imply that the crimes of sexual assault and rape through conscious negligence hold a high symbolic value. To prevent that from happening, three reactions are possible. This first reaction could be to accept that conscious negligence becomes part of the crimes in which 'knowing' is an element. This is highly unlikely, for it would be in contradiction to a longstanding legal doctrine. The second reaction could be raising the threshold for establishing intent. However, that is not to be foreseen based on the parliamentary documents. The third reaction could consist of lowering the threshold for establishing conscious negligence. This could, however, as a form of a balancing act, lead to increasing the importance of the subjective element of blameworthiness in negligence, perhaps for the protection of (the right of) sexual autonomy, which also applies to the perpetrator. Present-day case law and doctrine, however, formulate arguments that would not make this development illusional,[83] although the likeliness of this shift in thinking about negligence is yet to be seen. It therefore seems that the only form of negligence that will be of relevance in the Sexual Offences Act is unconscious negligence.

3 Intent and the duty to generally avoid sexual acts in the case of an unequal relationship

There is no question that in cases involving coercion, violence, or threats, intent is presumed. The law explicitly places these accompanying circumstances under intentional sexual assault and intentional rape, not under their negligent sisters. This arrangement makes more sense because coercion, violence, or threats inherently involve intentional acts, and for an offense to occur, these must be connected to the core acts of intentional sexual assault or intentional rape.[84] However, for the other categories such as involving physical or psychological incapacity and functional dependency, the law does not exclude that negligent sexual assault or rape may also apply (proposed Art. 244). The parliamentary documents primarily emphasize intent with respect to these categories. Although the connection with (un)conscious negligence is less explicitly made, she cannot be ignored.

Proposed Art. 244 also illustrates where room may exist for the application of negligent sexual assault and negligent rape. Incapacity or functional dependency can result in the victim's inability to determine or express their will or resist sexual acts, but also in a situation where they can only do so imperfectly. In the former case, it seems logical that intent

[78] This development is not new, and has caused some debate among Dutch scholars: *Blomsma* (fn. 49), p. 130–131; *De Jong*, Daad-schuld, 2009; *Van Dijk*, Strafrechtelijke aansprakelijkheid heroverwogen, 2008, p. 233 et seq.; *De Hullu*, in: Borgers/Koopmans/Kristen (eds.), Strafbare uitholling van schuld?, 1998, p. 181–182.

[79] Parliamentary Documents (fn. 69), p. S. 3.

[80] Parliamentary Documents (fn. 60), p. 9.

[81] Parliamentary Documents (fn. 3), p. 79.

[82] Parliamentary Documents (fn. 3), p. 19, 20; Parliamentary Documents (fn. 41), p. 22, 26.

[83] Dutch Supreme Court, Decision of 1.6.2004, ECLI:NL:HR:2004:AO5822; *De Jong* (fn. 79), p. 394–399.

[84] Parliamentary Documents (fn. 3), p. 84–85.

will be present, and as such that resisting the sexual acts was impossible. When the offender at the time of the sexual acts was aware of the victim's incapacity or psychological disorder, the intent required for intentional sexual assault and intentional rape will be readily established. If the offender was not aware of this, particularly when the victim is only able to express their will imperfectly, awareness of the absence of a positive expression of will is much more challenging to establish.

In those cases, it cannot be ruled out that conditional intent can still be established. Knowledge of any state of a certain kind of incapacity creates a substantial risk or realistic chance that the victim does not desire the sexual acts, which, in light of the duty of care, the offender must have been aware of. By proceeding with the sexual acts despite this knowledge, the offender may be held to have accepted the substantial risk that the sexual acts occur against the will of the victim, thus fulfilling the required intent for intentional sexual assault or intentional rape. Negligence can come into play when the threshold for conditional intent is out of reach.

On what grounds can negligence then be established? Perhaps one can think of cases where the offender is also no longer fully capable of determining her will, for example, due to the consumption of alcohol or the use of drugs. These situations do not preclude liability,[85] but it is conceivable that in those situations the awareness of the incapacitated situation may be absent. The same could apply to situations where initial explicit consent was given to sexual acts, but at the moment of the sexual acts, the victim transitioned into a state of no longer being capable of determining her will.[86] Then, there would be no knowledge of a missing will, but the offender should not have assumed that under the circumstances in which the other person found themselves, she had consented to the sexual acts. This would also count as unconscious negligence.

V. Closing remarks

The Dutch Sexual Offences Act introduces new offenses aimed at protecting (the right of) sexual autonomy of a person. The most significant change of present-day law is the reform of the crimes of rape and sexual assault. Like many neighboring countries, the Netherlands is moving away from a force-based model and opting for a consent-based model. As of 1 July 2024, criminal offenses will revolve around engaging in sexual acts against the will of the other person. The legislator chose an approach that requires knowledge (intent) in relation to the absence of will on the part of the victim, or a substantial reason to suspect the absence thereof (negligence). As a result, four new offenses are created: intentional sexual assault and negligent sexual assault, as well as intentional rape and negligent rape.

These new crimes have a broad description. Firstly, the Act defines sexual acts expansively so that they can occur in various ways. In addition to the classic interactions between an offender and a victim, the legislator has also introduced a form of functional perpetration, in the situation that sexual acts take place with a third party, if relevant interaction takes place between the offender and victim, including the situation the sexual acts take place with a third party. The criterion of relevant interaction, already developed in case law, will lead to the criminalization of hands-off (offline and online) sexual assault and rape, although at the same time limits the types of action which could count as sexual acts.

Secondly, the legislator decided to provide a detailed explanation of the 'against the will' element in the offences by describing six situations. These cases are partly mentioned in the new statutory provisions, and are partly elaborated in the parliamentary documents. They reveal two duties of care that are relevant to determining intent. The use of duty of care as a concept to determine intent is generally not as straightforward as the legislator seem to suggest it to be. In present-day Dutch criminal law, a duty of care primarily plays a role in determining conscious negligence. Using a duty of care to determine intent could lead to intent being rather quickly assumed, with little room for arguments on the side of the defense. Based on the parliamentary documents, there does not seem to be not much room left for conscious negligent sexual assault and conscious negligent rape, although much attention has been paid to explain these offences. Even when there might be a function for them in certain cases, those may be of a kind that it may be doubtful whether the behaviors involved therein would be severe enough to warrant criminal liability. It is in any way clear that the courts will have their work cut out for them in the years to come to establish what can count as criminally liable behavior and on what grounds such a liability might be established.

[85] Parliamentary Documents (fn. 3), p. 77; Dutch Supreme Court, Decision of 9.12.2008, ECLI:NL:HR:2008:BD2775; Dutch Supreme Court, Decision of 27.3.2010, ECLI:NL:HR:2010:BK9223; *Van Dijk* (fn. 79), p. 206–303.
[86] Parliamentary Documents (fn. 69), p. 3.