

Reforming the rape offence in Norwegian criminal law

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1. Introduction

The last few years have seen ongoing discussions about whether to revise the legal definition of the offence of rape in the Nordic countries, as has occurred in other regions as well. Sweden and Iceland have already carried out reforms, Denmark appears to be on the verge of reform, while the issue continues to be debated in Norway and Finland.¹ While the many similarities between the Nordic countries' legal orders and criminal law might suggest a common Nordic approach to reform of the rape offence,² beyond the surface, several differences suggest that a more cautious approach should be taken.³ Important differences exist in the historical developments that have led up to the contemporary, diverging national laws of sexual offences, and punishment levels vary considerably across the region; Norway, for instance, has a comparatively high sanctioning level for rape. The role of victims in procedural law and policy debate also diverges greatly throughout the region. While these differences may suggest a variety of starting points for the reform debate in the different countries, debates across the region also have a history of affecting each other, as we will return to below.

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¹ See other contributions in this volume.

² On the 'Nordic family' from a comparative law point of view, see e.g., Husa, Nuotio, Pihlajamäki, eds., *Nordic Law – Between tradition and dynamism* (Intersentia 2007).

³ Skilbrei, Stefansen and Heinskou, A Nordic research agenda on rape and sexual violence, in *Rape in the Nordic Countries: Continuity and Change*, eds. Heinskou, Skilbrei and Stefansen (Routledge 2020) pp. 1-17.

In this article we explore the content, context, and development of the Norwegian rape offence in order to frame the particular background and features of the country's reform discussions. As we will describe below, the legal definition of rape has changed several times, but there is still considerable criticism towards both the definition of the offence and how the current offence is implemented. The article aims to explain and contextualise contemporary discussions on change of the rape offence. While there exists literature that addresses Norwegian rape offence, this has typically represented either legal or socio-legal perspectives. This article bridges different perspectives, past and present, to bring forward our understanding of the drivers of and challenges to reform of rape offence. Further, most of what has been written about Norwegian rape offence has been published in Norwegian, and this article aims to communicate information about and insights into the Norwegian case to an international audience.

The background for the debate over the rape offence is that while many forms of crime are decreasing in Norway, as is the case throughout most of Europe,⁴ reported cases of rape are on a rise.⁵ It is likely that important reasons for this rise are the higher propensity to report due to increasing awareness of victimisation and the legitimacy of victims, as well as how lower legal thresholds have been established as legislation has changed over time. Increasing levels of reporting challenge policy makers, as conviction rates are argued to be too low. Many cases of rape go unreported, but even when they are reported, few cases result in convictions: a discrepancy in the literature discussed in terms of the 'justice gap'.⁶ In general, there appears to be a broad consensus, both within the criminal justice system, in politics and in the public debate, about sexual offences being a significant social problem and that the criminal justice system today does not provide victims of rape justice and sufficient protection. However, opinions are divided as to whether reform of the rape offence is the solution.

The remainder of this article is organised as follows. Section 2 includes a description of the (mainly recent) history of the rape offence in Norway, with section 3 describing how the current rape offence is constructed. After the presentation of the current state of the law, we provide some reflections on recent and ongoing reform discussions in Norway in light of the broader political and societal perspectives on rape (section 4). We first discuss how the debate on the rape offence has developed in the criminal-policy context before presenting how the same questions are debated in the broader societal context. We end the article with a few viewpoints on the way forward for

⁴ Gruszczyńska and Heiskanen, Trends in police-recorded offenses at the beginning of the twenty-first century in Europe, 24 *Eur J Crim Policy Res* (2018) pp. 37–53 <<https://doi.org/10.1007/s10610-018-9370-9>>

⁵ Police statistics show a marked increase in police-reported rapes in Norway in the last few years. A total of 1,758 rapes were reported in 2018, which represents an increase of 44.5% since 2014. See the Ministry of Justice and Public Security - Handlingsplan mot voldtekt [2019–2022] [Action plan against rape].

⁶ Temkin and Krahe, *Sexual assault and the justice gap: a question of attitude* (Hart Publishing 2008) p. 1.

Norwegian law in the case of rape (sect. 5).

2. The history of Norwegian rape law

One starting point for understanding the contemporary rape offence and its related debates is the historical development of sexual offences in Norwegian criminal law.⁷ The idea of considering sexual offences as specific forms of crimes can be traced back to King Christian V's Norwegian law from 1678, not least influenced by canon law. Sexual offences later became separate parts of the codes of 1842 and 1902, with the latter in force until it was replaced by the code of 2005 on 1 October 2015.⁸ The code of 1902 is the key to our subject. Chapter 19 of that code was concerned with sexual *crimes*, while chapter 38 was concerned with sexual *misdemeanour*, which reflects a general distinction that was applied to differentiate between serious and less serious crimes.⁹ Chapter 19 contained a broad set of offences, including the rape offence. When enacted in 1902, this offence was limited to cases where the offender had 'forced' the victim, which required the use of violence and/or that the offender had threatened the victim, leading to fear for his or her life or serious damage to health. While this approach was in line with the previous legislation, the code of 1902 represented the starting point of a slow but steady expansion of the rape offence that has led to the current situation.

The code of 1902 implied several significant changes compared to the previous legislation. Whereas previous legislation only considered women as victims of rape, sect. 192 of the 1902-code was gender-neutral and did not discriminate between men and women in the wording of the offence, even if the preparatory works still considered wrongdoings against women as clearly more serious than against men.¹⁰ This was in a sense the beginning of a long process to make the criminal law gender

⁷ On the historical development of the rape offence, see Frøberg, Til det rettslige voldtektsbegrepets genealogi [On the genealogy of the legal concept of rape] in *Rettsikker radikaler: Festskrift til Ståle Eskeland*, eds. Torgersen, Schea and Høgberg (Cappelen Akademisk forlag 2013) pp. 31–56.

⁸ The fact that the code did not take effect before in 2015, ten years after the code was enacted raises eyebrows. Several factors contributed to this unusual timespan. The code that was enacted in 2005 included the general part of the code, but few offences, which were added to the code in 2010. After that it was apparently a conflict over police IT-systems that prevented the code from taking effect, see further Jacobsen and Sandvik, An Outline of the New Norwegian Criminal Code, 3 *Bergen Journal of Criminal Law & Criminal Justice* (2015) pp 162–183, at. pp. 165–166.

⁹ This outlook relates to the rejection of the idea of 'police offences' in favour of a distinction between major and minor crimes within the criminal law; see Jacobsen, Gjensyn med kriminalretten? [The return of criminal law?] in *Rettslige overgangsformer: politi- og kriminalrett i nordisk rettsutvikling*, eds. Heivoll and Flaatten (Akademisk publ. 2017) pp. 284–325.

¹⁰ See e.g. Straffelovkomisjonens innstilling av 1896 (law committee report). Udkast til Almindelig borgerlig Straffelov for Kongeriget Norge. II. Motiver, p. 176 and also Frøberg 2013 pp. 36–37.

neutral.

As for which kind of sexual activity constituted rape, to earlier legislation (prior to 1902) only vaginal intercourse could constitute rape. The commission preparing the 1902 code emphasised that this definition meant that indictment in many cases had to be limited to attempted rape, even if ‘the offender achieved what he sought’.¹¹ Cases where the offender had acted in a sexual manner comparable to vaginal intercourse – what would later often be referred to as ‘substitutes for intercourse’ – were therefore considered to be rape, including anal or oral intercourse, masturbation, and rubbing the penis against the victim’s back or between her thighs, as well as cases where the offender masturbates and ejaculates in the victim’s face or over her breasts. Generally, all cases involving more than the very brief and light touching of genitals were now to be considered rape. This change also initiated an important change in the terminology. Intercourse and substitutes for intercourse were termed *utuktig omgang*, later *seksuell omgang*, a direct translation of which is *sexual interaction*; the English translation of the 2005 code is *sexual activity*.¹² While the offences themselves lacked individual labels, the most common term was *voldtekt* (rape).

For rape to be committed, the offence required that the perpetrator acted with intent (*forsett*). Here it should however be noted that the Norwegian doctrine of intent differs from for instance intent in Anglo-American criminal law. Compared to the general Anglo-American distinction between intent, recklessness and negligence, the Norwegian doctrine is split in two – intent and negligence – whereof the former may include instances of recklessness: In addition to intentional acts in a strict sense, i.e., where the offender uses force *in order to* achieve sexual intercourse against the victim’s will, Norwegian criminal law also treats cases where the offender considers the relevant facts as probable (more likely than not, i.e. more than 50%) as intentional. For instance, a man and a woman are in bed, naked and kissing. The man wants to have intercourse and, using his body weight (and hence uses force according to the low threshold applied here, which we will return to), he spreads her thighs and penetrates her vagina. Now, if she does not want to have intercourse and he is aware of that, this is a clear-cut case of rape according to Norwegian criminal law. But he is also guilty of rape if he considers it more probable than not (more than 50 % likely) that she does not want to have intercourse with him. In addition to intent (in a strict sense) and probability, a third option for intent was established during the life span of the 1902-code in Supreme court practice: Even if the offender in the example above (wrongly) believed that the woman wanted to have sex, he would be guilty of rape if

¹¹ Udkast til almindelig borgerlig Straffelov for Kongeriget Norge. II: Motiver. Utarbeidet af den ved kgl. Resolution af 14de November 1885 nedsatte Kommission (Kristiania 1896) p. 175. (draft of the Penal code 1885)

¹² The term ‘sexual’ replaced in 2000 the term ‘utugtig’, the latter corresponding to the English term ‘lewd’, see further Ertzeid, Straffeloven § 192 om voldtekt: et supplement til pensum i spesiell strafferett [Penal code § 192 on rape: an addition to the syllabus on the offences in criminal law], 41 *Jussens Venner* (2007) pp. 337–371, p. 341.

he considered the possibility that she did not, and decided for himself to carry out the intercourse *even if this was the case* (often called ‘*positive dolus eventualis*’).¹³ Later on, as we will return to, criminalisation also of negligent rape was to be introduced.

When enacted in 1902, the rape offence in sect. 192 was supplemented by a series of other offences, including a separate offence for cases where the victim of the unwanted sexual activity lacked the capacity to oppose the sexual activity performed by the offender.¹⁴ This concerned e.g. cases where the victim was mentally ill or for similar reasons had mental deficits. Covered were also for instance cases of deception. Both were considered less serious crimes than rape. Another offence targeted acts that were of a sexual nature but were not serious enough to qualify as ‘sexual activity’. The use of force was not a requirement for this offence: required was only that the act had been carried out without the victim’s consent. Another awkward term was later used for the acts covered by this offence: *seksuell handling* (sexual acts), which we will return to later. It is not the word itself that is odd but rather that such a broad term was used for such a narrow subject, i.e., the least serious cases of physical sexual contact. Thus, strictly speaking, intercourse, oral sex and masturbation were (and are still) *not* ‘sexual acts’ in Norwegian criminal law.

The original chapter on sexual offences was to become subject to several reforms during the 20th century, the first of which occurred in 1927 when for instance the minimum punishment for rape was raised from one to three years’ imprisonment. The wording of the offence remained however the same until the turn of the millennium. The process leading to the new criminal code was initiated in 1978, although the new criminal code would have to travel a long and winding road before its implementation. This slow process came to affect sexual offences, which for political reasons in a sense ‘jumped the queue’. The Penal Code Commission (henceforth PCC) submitted general white papers both in 1983 and in 1992, with more to follow, but without significant progress. But because sexual offences were prominent on the political agenda in the 1990s, the Norwegian Parliament called for reform of such offences.¹⁵ The Sexual Offences Commission (SOC) was therefore appointed as a sub-commission of the PCC, resulting in a new white paper.¹⁶ A distinct feature of the SOC was its composition, with a female leader and

¹³ These three forms of intent are now codified in the criminal code of 2005, sect. 22, see further Gröning, Husabø and Jacobsen, *Frihet, forbrytelse og straff – En systematisk framstilling av norsk strafferett* [‘Freedom, crime and punishment – A systematic outline of Norwegian criminal law’] 2nd ed. (Bergen 2019) pp. 226-236.

¹⁴ See Hagerup, *Almindelig borgerlig straffelov af 22 Mai 1902 og lov om dens ikrafttræden af samme dato – udgivet med oplysende anmærkninger og henvisninger* [‘General penal code of 22nd of May and law on effectuation – published with comments and references’] (H. Aschehoug & Co. 1903) p. 166 ff.

¹⁵ See Parliamentary decision of 12 June 1995, calling for effectuating a revision of the sexual offences, in line with Innst. S. nr. 106 (1994–95).

¹⁶ NOU 1997: 23: Seksuallovbrudd (preparatory work on sexual offences).

a total of four female and two male members. In contrast, the PCC was led by a man when it delivered NOU 1992: 2, and only one of the six members was female.

A broader and more nuanced take on these offences was suggested in the SOC's white paper. The members of the SOC considered different alternatives, but the majority proposed neither a reform of the rape offence, a specific offence for sexual activity without consent, nor the criminalisation of grossly negligent rape; a minority did have different views. But the Ministry of Justice and the Police had its own view on these issues and delivered a proposal for reform in the government proposal Ot.prp. nr. 28 (1999–2000). Prior to 2000, the rape offence still required that the offender had threatened the victim, leading to fear for his or her life or serious damage to health, while other less serious threats was covered by (the less serious offence in) sect. 191 first paragraph. This requirement of a fear for life or serious damage to health was removed in the 2000 reform, which meant that the rape offence now would include cases previously regulated by sect. 191 first paragraph.¹⁷ With this change, virtually any kind of threatening behaviour could be sufficient for an act to be considered as rape. At the same time, the general requirement of the victim being 'forced' was removed, as the Ministry of Justice and the Police considered that the requirement added nothing to the 'violence or threatening behaviour' criterion. A particularly important change for our subject was that cases where the victim fully lacked the capacity to resist the offender's sexual activity was moved into the rape offence category, this time from the previous sect. 193 first paragraph, and was thereby considered to be as serious as other kinds of rape. Finally, the Ministry of Justice and the Police proposed, in line with the minority of the SOC, the criminalisation of grossly negligent rape in a separate offence.

Later in the legislative process, the Supreme Court decided on a case that gained a great deal of attention. In this case, referred in Rt. 1999.1718, a girl was forced to penetrate herself with objects, albeit without having been physically touched by the offenders.¹⁸ The majority considered that the current rape offence could not be interpreted to cover cases where victims were forced to perform sexual activity on themselves. This judgement initiated a process which resulted in a new alternative being added to the rape offence to cover such cases.¹⁹

The more specific implications of these changes will be clarified in the next section: the 2000 reform took place several years before the new criminal code entered into force, so changes were made in the 1902 code. These changes also provided the starting point for the new code. In addition to this development of the wording of the offence, the level of punishment has also developed, with the minimum punishment for rape involving intercourse being a central issue. It was first reduced, before it in

¹⁷ For more on the law of rape after the 2000 reform, see Ertzeid 2007 pp. 337–371.

¹⁸ "Rt." is an abbreviation for *Retstidende*, the journal for Supreme Court judgements.

¹⁹ See further Ertzeid 2007 pp. 352-353.

2010 again was increased, then from two to three years.²⁰

To summarise what we have covered so far, the trend has been step-by-step expansion of the rape offence.²¹ The Norwegian rape offence has thus been subjected to a series of changes that have reflected and created shifts in how the act of rape is defined, but the changes also reflect evolving ideas about the harm that rape causes to victims. When viewed together, these changes imply a broad reform of the rape offence, although that was not the general plan of the reformers who took these different steps along the way.

3. The current rape offence outlined

The current rape offence, now explicitly titled rape - *voldtekt*, is covered in the 2005 code sect. 291.²² The offence contains three subsections, (a), (b) and (c), where subsection (a) contains two alternatives: sexual activity achieved by the use of violence or threatening behaviour. Subsection (b) contains the alternative mentioned above for cases where the victim fully lacks the capacity to resist the sexual activity. While sexual activity is required in all situations, subsection (c) was specifically designed as an extension to subsection (a) for cases where victims are forced to perform such acts on themselves or with a third person, meaning that the offender is not (physically) involved in the sexual activity.

The violence requirement in subsection (a) is extensive and covers all forms of the use of physical force against the victim. The requirement includes acts such as beating and/or strangling the victim, as well as such acts as lying on top of somebody and using one's body to control the victim's body or holding the victim around the waist and tearing off the victim's clothes. What counts as violence is also relative to the victim's age and character. Less use of force against a young person is required for an act to constitute rape, but because a separate rape offence now covers all cases of sexual activity involving children under the age of 14 (sect. 299, see further below), this 'relative' character of the violence criterion is less important

²⁰ Cfr. Ot.prp. nr. 22 (2008-2009) p. 228 (preparatory work).

²¹ For a discussion, see Høgberg and Salomonsen, *Voldtektslovgivning på ville veier? Straffeloven § 192* ['The legislation on rape on the wrong track? The criminal code § 192'], 10 *Tidsskrift for strafferett* (2010) pp. 210–252.

²² The following outline is based on the discussions in Jacobsen, *Valdtektsstraffebudet: gjeldande rett og spørsmålet om reform* ['The rape offence: Current law and the question of reform'] (Fagbokforlaget, 2019) and Jacobsen, *Seksualforbrytelsene* [The law of sexual offences] in *Forbrytelser i utvalg – straffelovens regler om voldsforbrytelser, seksualforbrytelser, formuesforbrytelser og narkotikaforbrytelser*, eds. Jacobsen, Husabø, Grønning and Strandbakken (Fagbokforlaget 2020) pp. 95-157, see in particular pp. 112-128. See also Matningsdal, *Straffeloven: lov 20 mai 2005 nr. 28 om straff: de straffbare handlingene, kapittel 17–31: kommentarutgave* ['The Penal Law: Law of 20th May 2005 nr. 28 on punishment: the criminal acts, chapter 17-31, commentary'] (Universitetsforlaget 2017) pp. 665–738.

than before. The ‘threatening behaviour’ criterion includes such acts as threatening to kill or to use other severe violence against the victim; threats against third persons, such as the victim’s children, also fulfil this criterion. As already mentioned, threatening behaviours of all kinds are now included, following the reform in 2000, which means that acts such as threatening to smash furniture or to falsely report someone to the police also count, as does threatening to perform acts that are legal in themselves (such as reporting someone to the police for an offence) if used as a means to achieve sexual activity against the other person’s will. It is however not required that the person using violence or threats against the victim is the same person that performs the sexual activity. For this reason, if someone purchases sexual services from someone, knowing that he or she is subject to human trafficking and thereby forced into prostitution, this constitutes rape according to sect. 291.

In particular, the threatening behaviour alternative raises many demarcation issues, although the most unclear alternative may be claimed to be alternative (b), which contains the criterion ‘lack of ability to resist’ the sexual activity. The wording of this part of the offence is abstract and says little about why the victim was in this situation.²³ The wording of the alternative does specifically mention ‘unconsciousness’, which covers the most typical situations of being asleep or intoxicated (by one’s own means or from being drugged), but the wording includes the generally formed alternative ‘or for other reasons’. In addition to the typical cases mentioned above, the victim may be unconscious due to an accident or a severe physical or mental disability; there is no requirement for a permanent disability. As covered in Rt. 1993.963, a woman had become drunk at a Christmas party and followed a man to his hotel room. As she lay on the bed vomiting, the man took advantage of the situation and penetrated her vagina as she was becoming ill. The Supreme Court considered her to have been unable to resist his sexual activity in this situation. The criterion also covers cases in which the victim has not had time to register the offender’s sexual approach. In one case, Rt. 2012.60, the victim was a teenage girl who stood in the bathroom, naked. The offender (her stepfather) approached her from behind and inserted a finger into her vagina, which she did not expect. For that reason, she had been unable to resist the sexual activity. The criterion is also considered to be fulfilled in cases where several elements are present, although none in themselves are sufficiently strong to fulfil the criterion. For instance, as covered in Rt. 2004.32, a victim had fallen asleep during a car trip due to heavy intoxication. She woke up after the driver of the car had pulled over and put his fingers under her underwear. She was afraid and confused from having just woken up, with the result that the court considered the ‘unable to resist’ criterion to have been fulfilled.

One central question in current debates on the rape offence is how the Norwegian regulation relates to instances of so-called freeze situations, where victims lose control of themselves. Even though research has helped somewhat to illuminate

²³ See further Jacobsen 2019 pp. 151-230 for a detailed discussion of this alternative in sect. 291.

this phenomenon,²⁴ we still seem to lack thorough knowledge about it, and the relevant criterion in the code is unclear. But given that such reactions do indeed occur, we argue that these cases are covered by the 'lack of ability to resist' criterion.²⁵ The challenges related to proving that the victim was in this kind of state, and in particular that the offender knew this, are evident. Generally, the already-existing extensions of the rape offence imply that further extensions – more or less regardless of by which criteria – will easily be haunted by such evidence problems in practice. This recognition has influenced the discussions.

The Norwegian rape offence in sect. 291 requires intent (cfr. sect. 21). As elaborated above, intent in Norwegian law is a quite extensive concept. According to sect. 22 letters a-c, it is required for conviction for rape that the offender acted either a) with the *purpose* of raping the victim, i.e. forced the victim to take part in the sexual activity despite being aware of a lack of consent, b) considered it as *most likely* that the circumstances are of the kind that constitutes rape, e.g. that victim did not consent to the violent intercourse, or c) considered it possible that the victim did not consent, or was sleeping etc. and chose to act even if that should be the case. As the examples illustrate, cases where the issue of (lack of) intent is raised, often concern whether there was a lack of consent from the victim.

Should there be a lack of intent in this regard, however, the separate offence in sect. 294 on gross negligent rape, enacted in 2000 (see above), supplements the rape offence in sect. 291. If for instance the offender believes that the victim consents to the sexual activity, but thereby ignores clear indications of her being forced by others to do so, intent will be lacking, preventing conviction for rape according to sect. 291. However, conviction for gross negligent rape will provide an alternative in such a case. Gross negligence according to sect. 23 second paragraph requires however that the offender is clearly to be blamed for his misjudgement.

As a starting point, rape is punishable with imprisonment between 14 days and 10 years. Sect. 291, however, raises this frame significantly for the most common kinds of sexual activity, such as vaginal, oral or anal intercourse and penetration by the use of objects. In such instances, the punishment is three years at a minimum, with a maximum of 15 years. In addition, sect. 293 increases the maximum punishment to 21 years (the same level as murder in Norwegian law) in particularly serious cases of rape, for instance cases where more than one offender carries out the sexual activity. Repeat offenders may also be given 21 years imprisonment. We should also mention that rape cases where the offender either has previously been convicted of rape or is now being convicted of rape on more than one occasion

²⁴ See e.g., Möller, Söndergaard, and Helström, Tonic immobility during sexual assault – a common reaction predicting posttraumatic stress disorder and severe depression, 96 *Acta Obstetricia et Gynecologica Scandinavica* (2017) pp. 932–938.

²⁵ See also Jacobsen 2019 pp. 214–218.

are strong candidates for preventive detention, which can be prolonged as long as the offender is considered dangerous (possibly for life).²⁶ Generally, serious sexual offences represent a significant part of cases where preventive detention has been the outcome. Gross negligent rape can be punished with imprisonment between 14 days and six years, or even 10 years in serious cases as mentioned in sect. 293.

The expansion of the rape offence that took place prior to the code of 2005 was mainly a process where other less serious offences were moved into the expanded rape offence. Several important complementary offences exist however also today, including the offence of the 'abuse of unequal power relationships' found in sect. 295 of the code, which covers cases where offenders gain sexual activity for themselves or someone else by exploiting the vulnerability of the victim or by misusing a special position, such as being the victim's teacher. Another important offence is sect. 297, which covers all cases of sexual acts without consent. This offence can also be used in cases of unconsented sexual activity, if for instance the use of violence cannot be proved.

A separate rape offence that applies to children below the age of 14, covered in sect. 299, is broader than the general rape offence described above. This offence covers all instances of performing sexual activity with children under 14, regardless of whether the offender uses force or threats, and considers as rape also certain acts that would not qualify as 'sexual activity', such as the light touching of a child's genitals.

4. Rape and lack of consent: The debates

4.1 The formation of fronts in criminal policy

Despite these developments and today's rather extensive definition of the rape offence compared to earlier in history, rape remains a high-profile subject in Norway. Key concerns are barriers to reporting, delays in police investigations and few prosecutions and convictions. As mentioned, a broad consensus on the seriousness of rape seems to exist, as does the view that Norwegian society should improve its capacity to prevent and address rape. Contributions to discussion has been offered from a wide range of perspectives.²⁷ The need to combat rape has been addressed in a series of action plans and other policy documents and is a key topic in policy areas such as health, welfare, gender equality, and family and youth

²⁶ One recent example is HR-2020-976-A.

²⁷ See e.g., Bitsch/Kruse, *Bak lukkede dører – en bok om voldtekt* ['Behind closed doors – a book on rape'] (Cappelen 2012) and Sveen, '*Det var ikke voldtekt*' – *Ti menn forsvarer seg i retten* ['It was not rape' – Ten men defend themselves in court'] (Spartacus 2019).

issues.²⁸ The 2008 white paper ‘From words to action’ is an example, with its explicit dedication to preventing and prosecuting rape.²⁹ The rape offence and the question of whether lack of consent should be sufficient to label an act as rape continue to be debated, and this debate is at this point in a deadlock, as we will discuss below.

Reforming the rape offence was discussed during several stages in the process that led to the code of 2005. The first time such reform was considered was in the white paper delivered by the SOC in 1997. As touched upon already, the commission considered emphasising the lack of consent in the existing rape offence but also adding a separate offence for sexual activity without consent.³⁰ The majority rejected both options, fearing in particular that this kind of offence would imply that attention would be turned to the victim and his or her behaviour in an unwanted way. The Ministry of Justice and the Police then considered the issue in Ot.prp. nr. 28 (1999–2000), as a response to the discussion in NOU 1997: 23, and agreed with the majority of the SOC.³¹ The question of the role of consent in the offence was raised once more in Ot.prp. nr. 22 (2008–2009), related to the code of 2005.³² At this point, the Ministry of Justice and the Police noted that the *MC vs Bulgaria* judgement from the European Court of Human Rights (ECtHR), in addition to the fact that Sweden had initiated a reform process, called for the issue to be considered anew. While emphasising the ‘self-evident and foundational idea that all sexual relations should be consensual’ and deserving of protection by criminal law, the Ministry of Justice and the Police underlined that doing so was not the same as describing all violations of this type as rape.³³ At the same time, the Ministry of Justice and the Police did not see a practical need to emphasise consent in the offence, since it took into account the evidence problems that would occur.

These considerations essentially contain the rudiments of two distinct positions in the debate over the rape offence, both of which contain markedly different views on the promise and purpose of criminal law. While the last two decades have seen a gradual and extensive expansion of the rape offence, the thresholds for labelling an

²⁸ For a description of how questions of gender and violence in which rape is included have increasingly become prioritised policy areas, see Stefansen, Smette and Dullum, ‘The ‘psychological turn’ in self-help services for sexual abuse victims: drivers and dilemmas’, 27 *International Review of Victimology* (2021) pp. 80-93. <<https://doi.org/10.1177/0269758020918797>>

²⁹ NOU 2008: 4 *Fra ord til handling – Bekjempelse av voldtekt krever handling* [‘From words to action – fighting rape needs action’].

³⁰ Also see NOU 1997: 23 pp. 22–23.

³¹ Cfr. Ot.prp. nr. 28 (1999–2000) pp. 25–48.

³² Cfr. Ot.prp. nr. 22 (2008–2009) pp. 219–222.

³³ Quotation from Ot.prp. nr. 22 (2008–2009) p. 219 (our translation).

act as rape remain high in society.³⁴ The existing changes in the offence have also not significantly improved the situation regarding the few convictions for rape that have occurred. Evidence-related problems remain a central issue and are expected to increase with any further extension of the rape offence, which has led to a general viewpoint that might best be described as the ‘practical’ legal point of view.³⁵

According to this view, changing the law in this way would not change practice. Even today it is claimed, that the difficult thing for the prosecutor is typically to prove whether the sexual activity was consensual or not, and, if it is proved that the victim did not consent, that the other party understood this. This will not change by removing the current additional criteria for rape. Instead, there is a fear that such changes might put more emphasis on the victim’s behaviour and also cause new problems from a rule-of-law point of view, as these criteria today contribute to demarcate the rape offence. Given for instance that cases of intercourse and other forms of penetration according to sect. 292 shall be punished by at least 3 years imprisonment (and at most 21 years cfr. sect. 293), relying on an unclear consent- or voluntariness-requirement is particularly problematic. This position has dominated the responses to the different proposals and viewpoints concerning reform and has become a recurring theme.

Correspondingly, a different perspective has gradually taken shape in opposition to that position that we may call the ‘symbolic’ point of view. While proponents of this perspective may agree that a law revision will not necessarily (but may) change practice much, their position is that undertaking a consent reform would still serve a symbolic function, thus sending a signal about sexual norms in society.³⁶ This position emphasises the expressive potential of law, even in situations in which the law as a practical tool has proven weak, as well as the symbolic importance of a ‘consent reform’ to signal progress and internationalism. International conventions (in particular the

³⁴ Interestingly enough, many individuals hesitate to apply the label ‘rape’ to their own experiences. Experimental studies have shown that when people are asked if they have been subjected to acts listed in the rape offence, more people respond yes than when they are asked whether they have experienced rape. Stefansen, Løvgren and Frøyland, Making the case for ‘good enough’ rape-prevalence estimates: insights from a school-based survey experiment among Norwegian youths in *Rape in the Nordic countries: continuity and change*, eds. Heinskou, Stefansen and Skilbrei (Routledge 2020) pp. 66–82.

³⁵ For an example of the presentation of a ‘practical’ legal point of view in public debate, see *Aftenposten*, Høyre sier nei til samtykkeparagraf. Høyres svenske søsterparti sier ja. (aftenposten.no) [‘The conservative party rejects a consent-based offence. Its Swedish sister party, says yes’] 18th December 2017 <<https://www.aftenposten.no/norge/politikk/i/G1aA44/hoeyre-sier-nei-til-samtykkeparagraf-hoeyres-svenske-soesterparti-sier-j>>(accessed 15th December 2020).

³⁶ For an example of the argument that the symbolic importance of the law is an independent argument for a law revision, see Nordlie, Fynh, Prohic, Zeinalzadeh, Hassan, Torbo and Thom, En samtykkelov kunne dømt ham som voldtok meg ‘A consent law could have convicted he who raped me’. *Agenda Magasin* 17th September 2020 <<https://agendamagasinet.no/debatt/ensamtykkelov-kunne-domt-ham-som-voldtok-meg/>> (accessed 14th December 2020).

Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul Convention), critique of the Norwegian rape offence from international bodies,³⁷ and not least developments in Swedish criminal law³⁸ have spurred a call for a consent-based offence in Norwegian law as well. This call builds on an argument that a disjunction exists between how rape is defined and discussed in public discourse and how the law is defined, interpreted and applied in the criminal justice system, an understanding that has led to the claim that a law revision should be undertaken in order to align the social and legal definitions of rape.³⁹

As these fronts have become established, they have also gradually become politicised, in the sense that the different viewpoints are attached to different political groups. The practical point of view has become related to the right/conservative/liberals, while the symbolic approach to the issue has become particularly related to the left. The issue came to a head when a representative proposal was submitted in 2017 by four representatives from the Socialist Left Party, who called for a change in the wording of the rape offence to lack of *oppriktig samtykke*: 'a genuine consent'.⁴⁰ The government, then consisting of the Conservative Party and the populist right-wing Progress Party, rejected this call, while other factions had less resolute rejections.⁴¹ The left's proposal was surprisingly specific and seemingly without much 'intentional depth'. The proposers, for example, seemed to be unaware that the Swedish reform rejected applying lack of 'consent' and instead had opted for a voluntariness alternative. (The proposers were not alone in their lack of knowledge: the Norwegian debates generally reflected little insight into the Swedish reform, despite the topic arising on several occasions.) The firm rejection from the Progress Party and the Conservative Party, on its hand, cannot be described as being particularly openminded, even if criticising the left's alternative was easy to do.

As mentioned above, at no point have the various parties disagreed over the principled view that sexual contact should be voluntary; the disagreement has only been concerned with what implication that outlook should have for the rape offence. The criminal justice system seems firmly embedded in a practice point of view, strongly embraced

³⁷ See e.g., Hennum, Den rettslige behandlingen av voldtekt - hvorfor har Norge fått kritikk fra FN? ['The legal handling of rape - Why has Norway been criticised by the UN?'], available at www.krisesenter.com (accessed 15th January 2021).

³⁸ Dir: 2008: 94, which initiated the Swedish reform, was already noted in Ot.prp. nr. 22 (2008–2009) p. 219.

³⁹ Amnesty International, Europe: time for change: justice for rape survivors in the Nordic countries (Amnesty International 2019), available at www.amnesty.org/en/documents/eur01/0089/2019/en/ (accessed 14th July 2020).

⁴⁰ Dokument 8:96 S (2017–2018), Representantforslag fra stortingsrepresentantene Petter Eide, Kari Elisabeth Kaski, Nicholas Wilkinson og Karin Andersen om endringer i straffeloven med sikte på at voldtekt blir definert som seksuell omgang uten oppriktig samtykke (proposal for changes in the definition of rape in the Penal code).

⁴¹ Innst. 188 S 2017–2018 (preparatory work).

also by some politicians, while the reformers are clearly settled in a simplified symbolic point of view. How does this difference reflect the public discussions in Norway?

4.2 The larger context: Norwegian society, the women's movement and the rape issue

The background to these more distinctly legal discussions is that broader debates about how Norwegian society should define and approach rape have been ongoing for the last four decades and have been a priority politically for the last two.⁴² In this case, the broader context for understanding the trajectory and outcome of debates about rape law is the history and strength of the women's movement in Norway and how the movement has turned to the state to seek redress for harms that may be considered gendered, including asking for stronger legal protection of sexual integrity. This state of affairs has been made possible by how the Norwegian state typically takes an interventionist approach to issues that are generally considered private in other empirical contexts.⁴³ This influence also goes in the other direction: the contemporary Norwegian state and its priorities are also a result of how social movements such as the women's movement have pushed and entered into allegiances with the state to further their agenda and to secure state protection and involvement, creating what Helga Hernes famously termed 'state feminism' in 1987.⁴⁴ The women's movement in Norway firmly placed the issue of rape on the agenda, and civil society actors within the movement organised to promote preventive measures, victims' assistance and criminal justice from the mid-1970s on.⁴⁵ In Norway, as elsewhere, this was an attempt to reformulate gendered and sexualised harms to be public concerns in need of public solutions, not private problems that people settle amongst themselves.⁴⁶ While it is neither novel nor exclusive to Norway that interest groups have turned to the law to achieve their goals of societal change,⁴⁷ what is special to Norway is that

⁴² Skjørten, Bakketeig, Bjørnholt and Mossige, *Vold i nære relasjoner: et felt i bevegelse* ['Domestic violence: a field in motion'] in *Vold i nære relasjoner: forståelser, konsekvenser og tiltak*, eds. Skjørten, Bakketeig, Bjørnholt and Mossige (Universitetsforlaget 2019) pp. 13–29.

⁴³ For an analysis of the relationship between feminism, law and the state in the Nordic countries, see Gunnarsson, Svensson and Davies, *Reflecting the epistemology of law – exploring boundaries in Exploiting the limits of law: Swedish feminism and the challenge to pessimism*, eds. Gunnarsson, Svensson and Davis (Ashgate 2007) pp. 1–16.

⁴⁴ Hernes, *Welfare state and woman power: essays in state feminism* (Norwegian University Press 1987).

⁴⁵ Skjørten, *Kvinnemishandling – kunnskap og politikk* ['Abuse of women – knowledge and politics'], 28 *Kvinneforskning* (2004) pp. 63–75. A central legal theoretical work is Stang Dahl, *Pene piker haiker ikke: artikler om kvinneverett, strafferett og velferdsstat* ['Nice girls do not hitchhike: Articles on women's law, criminal law and the welfare state'] (Universitetsforlaget 1994).

⁴⁶ Carmody and Carrington, *Preventing sexual violence?*, 33 *Australian and New Zealand Journal of Criminology* (2000) pp. 341–361.

⁴⁷ Sutton, *Law/society: origins, interactions, and change* (Pine Forge Press/SAGE 2001).

the women's movement was so successful in the juridification of gender relations and the protection of sexual integrity.⁴⁸ Taken together, the interventions of the women's movement in Norway have taken part in changing how rape and victimisation are understood. Legal definitions of rape have changed considerably in many countries in the last few decades and this is due to how first the women's movement and later mainstream politics have debated how best to take the offence of rape seriously. Norway thus serves as an example of a country where legislators are involved in what McGlynn and Munro describe as 'an almost incessant process of consultation and legislative "tinkering" as new initiatives are developed to address old problems, often with disappointing, limited or unintended counter-productive results'.⁴⁹

As mentioned above, several strands of concerns or debates over rape have occurred over the last few decades. The strength of the various debates varies, something which should be seen in relation to the development of welfare and criminal justice approaches. Debates in the 1970s were generally oriented towards understanding the kinds of acts that rape and other forms of sexual crimes are. The feminist movement demonstrated the harms of rape for victims but also moved contemporary understandings of rape away from hegemonic biological and pathological perspectives, instead bringing to the fore sociological explanations that emphasised how rape does not necessarily mean a break from sexuality and gender norms but instead builds on them.⁵⁰ As the cause of rape came to be considered sociological more than biological or psychological, the need for individual rehabilitation became less self-evident.⁵¹ The women's movement expanded the scope of what politicians and the criminal justice system were expected to address. If the reason that rape takes place lies in how gender, power and sexuality are linked on a societal level, then the solution is to change society, not the individual. We must understand this aspect of the trajectory of the debates and definitions in order to understand the role and potential of the criminal justice system and the heightened importance of the definition of rape, and hence the strength of the position that the symbolic function of law alone warrants law revisions in debates.

⁴⁸ Gunnarsson, Svensson and Davies 2007 pp. 1–16.

⁴⁹ McGlynn and Munro, Rethinking rape law: an introduction in *Rethinking rape law: international and comparative perspectives*, eds. McGlynn and Munro (Routledge 2019) pp. 1–14, p. 1.

⁵⁰ McKinnon, *Toward a feminist theory of the state* (Harvard University Press 1989). For an overview of feminist perspectives on sexual violence in Scandinavia research, see Bjørnholt, Theorising sexual violence in intimate relations in Scandinavia: a literature review in *Rape in the Nordic Countries: Continuity and Change*, eds. Heinskou, Skilbrei and Stefansen (Routledge 2020) pp. 18–32.

⁵¹ For a description and analysis of the trajectory of theorising sexual offending, see Kruse, *The Why, the Who and the Wherefore. Explanations, self-change and social friction in men's narratives of sexual violations* (University of Oslo 2020).

5. Analysis and outlook

The act of rape have received extraordinary attention in recent years. Most other acts in the criminal code are not debated as often, nor as broadly or as heatedly. Other aspects of how society approaches rape receive very little debate, such as preventive measures directed at convicted persons or the provision of health services and support for victims. As mentioned in the introduction, the legal definition has received a great deal of attention in the Norwegian context, which must be seen in connection to how the formulation of the penal code holds such an important symbolic function and is generally considered key to solving normative and practical problems for the prosecution and victims.⁵²

At the same time, the case of Norway illustrates some particular features of more general interest. The gradual reform steps taken, leading to a quite extensive rape offence, considering rape as highly serious in terms of sentences, have so to speak made the issue of further reform appear as symbolic *only*. The current offence, even if fundamentally of the violence or force kind, has been broadened to the extent that it can be hard to identify many practical instances which are not already considered as rape today, but which should be included. As a consent reform most likely would not solve the evidence problems often faced in such cases, these reasons have, in a context dominated by pragmatic perspectives, left the case for reform wanting for sufficient good reasons to be convincing – leaving the entire debate in deadlock for some time now.

The previous reform addressing many of the objections to the law that today are at the apex of other countries' reforms, implies that the Norwegian discussion now appears to require more detailed premises on the current regulation and reform alternatives and their implications, to move forward. As an example, it is clear to us that the current rape offence is a result of several reform processes that in turn have resulted in a somewhat unbalanced 'division of labour' between the rape offence and other sexual offences and terminology that has not necessarily been well thought through. Instead of further 'tinkering'⁵³ with the rape offence, we argue that it should be subjected to a more thorough reform. For instance, there appears to be a too significant gap and a 'make or break'-effect between sect. 291 and sect. 297: Where the prosecutor cannot prove that the criteria in sect. 291 is fulfilled, sect. 297 is in many cases the alternative. If the case concerns for instance intercourse, this implies that the sentencing frame is reduced from 3-15 years of imprisonment, to imprisonment for maximum 1 year. Even if sect. 295 in some instances is an alternative, a more systematically designed set

⁵² For a discussion of this subject, see Walklate, Fitz-Gibbon and McCulloch, Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories, 18 *Criminology & Criminal Justice* (2017) pp. 115–131.

⁵³ McGlynn and Munro 2019 pp. 1–14. p. 1.

of offences would make the law more coherent, allowing for more nuanced solutions.⁵⁴

The key to overcome the polarisation of the debate is to acknowledge that law has both a practical side – which means that acts must be formulated in a way that will make police investigations and legal reasoning and decision-making possible – and a symbolic side, which communicates societal values and draws boundaries. While some have argued that feminists and others who emphasise the symbolic power of the law are naive,⁵⁵ other possible effects of such a signal also warrant consideration. Furthermore, both the practical and symbolic side of the offence relate to broader questions such as what should count as rape in the first place, how important is it to differentiate between different forms of violations of an individual's sexual autonomy, how can we ensure that young people develop respect for their own and others' sexuality, how should we punish rape, and generally; how can we promote sexual autonomy?

The above-mentioned questions are big and complex. But they offer an opportunity for Norwegian law, politics, and society at large to rethink, gain more knowledge of, and significantly advance our ideas and understanding of such issues, and perhaps change cultures too. Simple messages can be powerful, but so too can nuances. They can help us to implement important principles and values into different contexts and thereby also lead to more sound judgements of how to act, which this after all in the end is all about. In this way, instead of the dichotomy reform or not, which dominates the discussion today, we should enter a more open-minded process, considering different alternatives and their strength and weaknesses, in view of the deeper issues of principles and challenges for sexual ethics for our time. Questions relating for instance to youth sexuality, as for example the challenges they face in a highly sexualised social context, should be given strong attention. So should the fact that the rape offence in criminal law should not be the sole reference point and standard for sexual ethics and wrongs in general.

While the existence of Norway's two opposing fronts might have caused deadlock over the issue, the situation shows signs of a loosening. The voting over the 2017 proposal showed some politicians taking a more nuanced approach. The recent Government action plan has also acknowledged the need for such a broader reform.⁵⁶ That means that there along the political spectrum today are a much broader case for reform – of some kind. In this regard, analysis of the strengths and weaknesses of the reforms already carried out in other countries, including our Nordic neighbours, as well as our own extensive history of reforms in this area, can be utilised.