

Special Issue of Bergen Journal of Criminal Law and Criminal Justice

Rape laws in the Nordic Countries – Definitions, Development and Discussions

Introduction

MOA BLADINI (GUEST EDITOR) / JØRN JACOBSEN (EDITOR-IN-CHIEF)

In this special issue of Bergen Journal of Criminal Law and Criminal Justice we scrutinise the criminal regulation of rape in the Nordic countries. Each contribution gives an introduction and overview of the legal definitions, developments of and discussions on the rape offence from a national perspective. All of the contributions address present debates and reforms but also includes historical developments.

The criminal legislation of rape laws in the Nordic countries has been subject to debate and reform for decades. Gender equality is one of the cornerstones in the Nordic countries and one important part of the work towards that goal is to defeat sexual violence. Women's movement and the gender equality policies have had a strong impact on the legislative work to protect sexual integrity and sexual self-determination.¹

The debates and reforms have dealt with questions that targets the effects of the legal construction of rape on a discursive, material and political level. On a discursive level, the critique relates to normative perceptions of male and female sexuality, and the ideal rape victim, the real rape and the real rapist. The debates have also concerned the low rates of both prosecutions and convictions. Today, more attention is given to sexual violence within close relations and towards youths. Additionally, a strong argument for rethinking rape law today is the symbolic value of renewed legislation.

¹ It could be noted that the Swedish shift from a use of force-based into a consent-based construction of rape followed quickly on the #metoo-movement in the autumn of 2017, also the Icelandic amendment of the wordings consent was made at the same time as the #metoo movement was at its peak and the Danish legislation changed closely after the second wave of #metoo in the autumn of 2019, which was the strongest #metoo wave in Denmark.

Finally, on a normative level, the central issue has been how to best construct the offence of rape to offer proper legal protection of personal and sexual integrity and of the right to sexual self-determination.

Despite the similarities within the Nordic region, with closely linked legal orders, the developments of the rape offence in each of the Nordic countries has varied, in terms of how the offence has been defined and the severity of the crime. Insight into previous reforms, or lack of such, the political climate and its dynamic, legal cultural aspects and the development within the academic discourse, is essential to grasp the current situation in each of the Nordic countries. Even if there is still good reason to think of the Nordic countries as a family, each family member has as known its individual characteristics. We hope that this special issues of Bergen Journal of Criminal Law and Criminal Justice will shed light on the similarities as well as differences within the Nordic family.

It is in any regard clear that the ongoing debates and reforms throughout history within each country have had an impact across the region. Recently, most of the Nordic countries have reformed their rape offences, and a shift from use of force to a consent-based legislation has been introduced in Sweden, Iceland and Denmark, and in Finland, the legislation is undergoing a full revision at the moment, with a draft definition presented in July 2020. Norway has made several gradually and extensive changes of the offence of rape, but the debate on whether it should be based on use of force or lack of consent is still ongoing.

This issue includes five articles that describes and discusses the rape laws and reform debates in each Nordic country.

The first contribution is the article *The rape law revision in Denmark: Consent or voluntariness as the key criterion?* which is written by Jørn Vestergaard, Professor Emeritus of Criminal Law, University of Copenhagen. The article reviews the previous discussions on Danish legislation of rape that resulted in a new draft law which was adopted in December 2020. The reform was preceded by a polarised debate on whether the consent-based provision should be formulated as 'consent' or 'voluntariness'. Vestergaard examines and compares the potential impacts of the debated models. He demonstrates that the two choices of wording have been in focus of the debate, and notes that the scope of the offence will merely not depend on the wording but on the clarifications made in the preparatory works. In this regard, he points out that the explanatory notes are slightly brief, in particular concerning an individual's passivity in a sexual relation and that it is now left to the courts to clarify the doctrine of rape law jurisprudence.

The second article is *Rape in Finnish criminal law and process – A discussion on, and beyond, consent*, written by Daniela Alaattinoğlu, Senior researcher, Faculty of Law at the University of Turku, Heini Kainulainen, Senior lecturer, Docent, Faculty of

Law at the University of Turku and Johanna Niemi, Professor, Faculty of Law at the University of Turku. The focus of the article is the suggested amendments from July 2020 of the offence of rape with the current legislation, legal practice, international criminal law developments and societal change as a backdrop for the analysis. The authors draw on experience from a recent research project and scrutinise the legal definition of current law and the implementation of the law in practice and address the draft definition. The suggested amendment highlights voluntariness, context, power imbalances and communication, which is considered as a welcomed leap forward due to critique of the previous legislation. Yet, there are some challenges and demerits left, theoretical as well as practical, which are pointed out by the authors. One of them being the failure to handle intimate-partner violence, and another the relation to sexual abuse. The normative move towards a voluntary-based rape offence also needs educational changes and efforts for legal actors within the legal system.

The third contribution to this special issue is the article *Legislation on the offence of rape in Icelandic criminal law*, written by Ragnheiður Bragadóttir, Professor of Law, Faculty of Law, University of Iceland. The criminal regulation of rape in Iceland has been revised in its entirety twice, 1992 and 2007. In 2018 new amendments were made and the wording consent was included in the rape offence, albeit the former offence implicitly built on the will of the victim. The article scrutinises the new consent-based provision of rape from 2018 in the light of the previous reforms, discusses possible needs for further amendments and targets the academic and public debate and the feminist movement that has preceded the legal reforms. Experiences and insights from the legislative reform of 2007 are presented, as the author drafted the bill. The reform made the offence clearly more extensive than before in order to better meet the conceptions of rape in society with less emphasis on the means used but instead a focus on whether the sexual intercourse had been carried out without the victim consenting to it. Despite the fact that such a criterion was not explicitly included, court cases acknowledged such situations as rape. The amendment in 2018 was a response to the societal debate and aimed at strengthening the criterion of consent and clarifying the meaning of consent. The author states that even if the latest revision does not imply any comprehensive changes, which is so far confirmed in practice, the critics have quietened and the legislation is now up to date with the conception of rape in society, an important part of their sense of justice.

The fourth article is *Reforming the rape offence in Norwegian criminal law*, written by Jørn Jacobsen, Professor at the Department of Law, University of Bergen and May-Len Skilbrei, Professor and Head at the Department of Criminology and Sociology of Law, at the Faculty of Law, University of Oslo. The article addresses the content, context and development in the Norwegian rape offence to capture the reform discussions. In the article the authors describe how the offence has gradually expanded over time, which reflects the normative shifts in the view of rape and the harm that such acts causes the victims. The authors explain how the offence has gone through a comprehensive

reform through the years, even though this was not the intention. In the article the feminist movement and changes in society are addressed as important factors to understand this development in Norwegian law. There is today broad consensus on the severity of the crime and the need to prevent and address rape, but not on whether to change the offence into a consent-based rape offence. This discussion has developed into a clash of views calling for nuanced approaches to move the debate forwards.

The fifth and last contribution *Swedish rape legislation from use of force to voluntariness – critical reflections from an everyday life perspective* is written by Moa Bladini, LL.D. and senior lecturer at the Department of Law, Gothenburg University and Wanna Svedberg, LL.D. and senior lecturer at the Department of Law, Gothenburg University. In this contribution the authors set the Swedish rape legislation in a historical context and discusses the previous and current rape legislation in relation to some of the main arguments from feminist legal scholars and the feminist movement. The authors point out that the new consent-based offence is offering an important shift in which the responsibility of the act is moved from the victim and placed at the offender. Additionally, the new construction of rape sends a clear message that a woman's body is no longer available until she says 'no', but unavailable until she says 'yes'. Yet, there are some problems that still remain. The authors also scrutinise parts of the preparatory works and show that men's knowledge and experiences permeate the preparatory work. In this regard it is pointed out that one effect of the male rationale within the legislation is that women as a group, at least not all women, get access to the protection that the new rape legislation is supposed to offer them.

As we can see, the turn towards a consent-based rape legislation has now had an impact in the whole Nordic region, even if the choice of wordings, the scope of the offence and the perceived paths forward vary between the countries. By a close cooperation and exchange of knowledge, experience and best practice between the countries and beyond, the Nordic region can keep up its important work on sexual violence.