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How to Criminalize Rape? The Use of Offense Construction Principles in Relation to the Criminal Provision of Rape

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Abstract

This Article explores how rape is criminalized through the design of criminal provisions, with particular attention to offense-construction principles. While criminalization theory typically asks whether conduct should be criminalized, this study examines the equally important question of how a criminal provision should be structured. Using a comparative legal and empirical analysis of legislative materials from Belgium, Germany, the Netherlands, and Sweden, the article identifies the principles that guide legislators in shaping the prohibition, legal classification, and sanction of rape. The analysis shows that legality, coherence, internal subsidiarity, effectiveness, guilt, retrospective proportionality, and legitimating principles such as harm, wrong, and legal interest play central roles, though their relative importance differs across jurisdictions. The actus reus receives the most detailed legislative attention, especially where consent-based models replace coercive ones. The study also finds that explanatory memoranda are most effective when principles are used in combination rather than in isolation. Overall, the article argues that offense-construction principles can improve the clarity, accessibility, and internal consistency of rape legislation, while also ensuring that legal labels and penalties better reflect the seriousness of the offense.

Keywords: Criminalization; offence construction; rape; criminalization principles; comparative legal research

A. Introduction

Society's view of what constitutes as sexually transgressive behavior is constantly changing. For example, at the beginning of the 20th century the offense of rape in the Netherlands, and many other European countries, covered only the unlawful sexual penetration of a woman by a man. If a woman was married, criminal law would not protect her from rape by her own husband.¹ As a result of changing attitudes, in the 1980s–1990s rape provisions were expanded to include marital rape within the scope of criminal law, and in many cases a more gender-neutral provision was adopted, recognizing that both women and men could be victims of rape.² In many cases,

¹Nicoll Zeegers, *Taking Account of Male Dominance in Rape Law: Redefining Rape in the Netherlands and England and Wales*, 9 EUR. J. WOMEN'S STUD. 447, 448–49 (2002).

²*Id.* at 448–49.

however, the so-called coercive model was still maintained.³ Under the influence of inter alia the #metoo-movement and the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter: Istanbul Convention), many European countries are now further modernizing their sexual assault laws by abolishing the coercive model and opting for a consent-based model instead.⁴ This latest modernization of the offense of rape has confronted national legislators with the important question of *how* to construct the new criminal provisions on rape.

Within the criminalization process, an important question is whether and under which circumstances criminalization is legitimate and justified. To answer that question, many legal scholars have attempted to develop sets of criminalization principles.⁵ Criminalization principles provide an argumentative framework that facilitates the criminalization process by balancing arguments for and against criminalization and by structuring the criminalization debate.⁶ However, these sets of principles are often confined to the question of whether certain conduct should be criminalized.⁷ If this question is answered affirmatively, they do not answer the question of *how* criminalization should subsequently take place, even though the manner in which criminalization takes place, that is, the structure and design of the criminal provision, has a major impact on the functioning of the criminal law. After all, criminal provisions should communicate what conduct is punishable and, consequently, is subject to criminal prosecution.

In practice, legislative proposals are regularly criticized for the way in which criminal provisions are drafted. In the Netherlands, for example, the proposal to have a separate criminal provision of sex against the will alongside the criminal provision of rape met resistance. According to stakeholders and victims, a separate provision on sex against the will did not do justice to the seriousness of the offense, even if there is no coercion, but only involuntary participation in the sexual intercourse—he conduct—should qualify as rape.⁸ In addition, the Council for the

³See Jonathan Herring, *The Sexual Offences Act 2003 England and Wales*, in *SEXUAL ASSAULT* 117, 117–40 (Tatjana Hörnle ed., 2023) (showing that exceptions within Europe were the United Kingdom, Ireland and Belgium that introduced consent-based models as early as the 1970s and 1980s in their legislation).

⁴See generally TATJANA HÖRNLE, *SEXUAL ASSAULT: LAW REFORM IN A COMPARATIVE PERSPECTIVE* (Tatjana Hörnle ed., 2023).

⁵See, e.g., Louk Hulsman, *Kriteria voor strafbaarstelling [Criteria for Criminalization]*, in *STRAFRECHT TE-RECHT? OVER DEKRIMINALISERING EN DEPENALISERING [IS CRIMINAL LAW TOO RIGHT? ON DECRIMINALIZATION AND DEPENALIZATION]* 80, 80–92 (Eric de la Porte ed., 1972); Gerardus J.M. Corstens, *Civielrechtelijke, administratiefrechtelijke of strafrechtelijke rechtshandhaving? En politieke en justie delikten. Preadviezen [Civil, Administrative or Criminal Law Enforcement? And police and criminal offenses. Preliminary Advice]*, in 114 *HANDELINGEN DER NEDERLANDSE JURISTEN-VERENIGING [PROCEEDINGS OF THE DUTCH LAWYERS' ASSOCIATION]* 1, 1–126 (1984); JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* (1987); THEODORUS A. DE ROOS, *STRAFBAARSTELLING VAN ECONOMISCHE DELICTEN: EEN CRIMINEEL-POLITIEKE STUDIE [CRIMINALIZATION OF ECONOMIC OFFENSES: A CRIMINAL-POLITICAL STUDY]* (1987); ROELOF HAVEMAN, *VOORWAARDEN VOOR STRAFBAARSTELLING VAN VROUWENHANDEL [CONDITIONS FOR CRIMINALIZATION OF TRAFFICKING IN HUMANS]* (1998); IRIS HAENEN, *FORCE & MARRIAGE: THE CRIMINALISATION OF FORCED MARRIAGE IN DUTCH, ENGLISH, AND INTERNATIONAL CRIMINAL LAW* (2014); Sanne S. Buisman, *Criteria voor strafbaarstelling: De integratie tussen theorie en wetgevingsbeleid [Criteria for Criminalization: The Integration of Theory and Legislative Policy]*, 1 *BOOM STRAFBLAD* 64, 64–72 (2020) (Neth.); Sanne S. Buisman, *De criteria voor strafbaarstelling [Criteria for Criminalization]*, in *STRAFRECHTELIJKE CRIMINOLOGIE: EEN THEMATISCHE INLEIDING IN DE RELATIE TUSSEN CRIMINOLOGIE EN STRAFRECHT [CRIMINAL CRIMINOLOGY: A THEMATIC INTRODUCTION TO THE RELATIONSHIP BETWEEN CRIMINOLOGY AND CRIMINAL LAW]* 55, 55–100 (Benny van der Vorm, ed. 2021).

⁶Sanne S. Buisman, *The Future of EU Substantive Criminal Law: Towards a Uniform Set of Criminalisation Principles at the EU Level*, 30 *EUR. J. CRIME CRIM. L. & CRIM. JUST.* 161, 165 (2022).

⁷See, e.g., DE ROOS, *supra* note 5; HAVEMAN, *supra* note 5; HAENEN, *supra* note 5.

⁸See, e.g., *Seks tegen de wil? Ik heb toch echt geen seks gehad met mijn verkrachter [Sex Against My Will? I Definitely Didn't Have Sex with My Rapist]*, AMNESTY INTERNATIONAL BLOG (July 3, 2020), <https://www.amnesty.nl/actueel/seks-tegen-de-wil>; FONDS SLACHTOFFERHULP [VICTIM SUPPORT FUND], ADVIES VOORONTWERP WET SEKSUELE MISDRIJVEN [ADVICE ON THE PRELIMINARY DRAFT OF THE SEXUAL OFFENSES ACT] (August 12, 2020), <https://fondsslachtofferhulp.nl/files/uploads/2020/01/Advies-voorontwerp-Wet-seksuele-misdrijven.pdf>; see also KAMERSTUKKEN [PARLIAMENTARY DOCUMENTS] II 2022/23, 36222, no. 3, 51 (explanatory memorandum) (Neth.).

Judiciary (*Raad voor de rechtspraak*) stated that some concepts and provisions are unnecessarily vague and that the provisions are difficult to apply.⁹

The forgoing touches on a broader question of how conduct is criminalized and requires further research into the principles underlying the design of a criminal provision or offense construction. The purpose of this Article is to conduct an initial exploratory study to identify which offense construction principles are at play in the offense construction of rape at the national level, to which part of the provision these principles apply, that is, prohibition, legal classification, or sanction, and how these principles interact with each other. In this way, the principles underlying the design of our criminal law can be clarified.

To answer these questions, legal comparison research is combined with a legal empirical analysis. These research methods are explained in detail in Section B. The results of the comparative legal empirical study are then presented in Section C. The objective of Section C is not to provide an exhaustive description of the scope or meaning of the rape provision in selected countries. Instead, the objective is to illustrate which offense construction principles can be identified in the various legislative procedures. In addition, the section will identify and explain the main differences and similarities in the use of offense construction principles. Section D combines the results of the comparative legal empirical research to provide an initial picture of which principles play a role in the construction of criminalization, and how this may improve the quality of law. The Article ends with some concluding remarks in Section E.

B. Methodology

This first explanatory study of offense construction principles is part of a larger research project on offense construction principles in the national and EU legal orders. This first phase of the project identifies the categories of arguments that underpin the construction and design of criminal law. To this end, various national and EU criminal provisions are systematically analyzed in a comparative legal context. In selecting the criminal provisions, several aspects were taken into account, such as whether there is a recent legislative proposal and the legal interest to be protected. The provision on rape was chosen because this provision has recently been amended in the Netherlands and some other EU Member States. In addition, this provision protects one of the core legal goods in criminal law, namely the physical, and sexual, integrity of persons. Moreover, in the selected countries, the provision consists of a prohibition, legal classification, and a sanction. As an example, see Figure 1, which schematically depicts the components of Article 243 of the Dutch Criminal Code.

The empirical legal method is used to answer the questions of (1) which principles play a role in the construction of the rape provision, (2) to which part of the criminal provision—prohibition, legal classification, or sanction—these principles apply, and (3) how these principles interact with each other. This methodological approach offers insight into the principles that guide legislators in the construction of criminal offenses. To answer these questions, the explanatory memoranda on the criminalization of rape in Belgium, Germany, the Netherlands, and Sweden were systematically analyzed. After all, the explanatory memorandum contains the legislator's reasoning for the proposed criminal provision, which may also include comments on previous versions of the proposed criminalization. In the software program, Atlas.ti, the various arguments used by the legislator for the offense construction were categorized through thematic and open coding.¹⁰

⁹RAAD VOOR DE RECHTSPRAAK [DUTCH COUNCIL FOR THE JUDICIARY], ADVIES WETSVORSTEL SEKSUELE MISDRIJVEN [ADVICE ON THE SEXUAL OFFENCES BILL] 3 (June 2, 2021) (Neth.), <https://www.rechtspraak.nl/SiteCollectionDocuments/2021-25-advies-wet-seksuele-misdrijven.pdf>.

¹⁰Access to the dataset "Offence Construction Principles - The Offence of Rape" can be obtained via <https://research.vu.nl/en/persons/sanne-buisman/datasets/>.

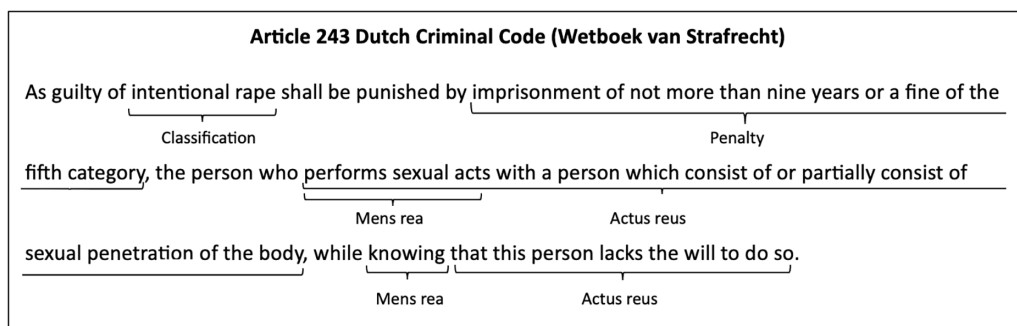


Figure 1. Elements of the criminal provision

Thematic coding involves analyzing data based on a codebook that is compiled in advance. The codebook consists of the various offense construction principles, and the different elements of criminal provision. The offense construction principles that I have identified in earlier research provided the initial basis for the codebook.¹¹ I identified five principles: internal subsidiarity and the related principle of fair labeling, legality, effectiveness, and retrospective proportionality.¹² In addition, the different elements of the criminal provision were added: the prohibitor, which consists of an actus reus and mens rea, the legal classification, and the sanction. During the coding of the explanatory memoranda, the codebook was further developed to include the principles that were identified in the process, namely the principle of coherence and the guilt principles, as well as the legitimating principles: harm, wrong, and *Rechtsgut*. After each adaption of the codebook, the documents were recoded according to the updated codebook (cyclic-iterative analysis).¹³ See Figure 2 for the complete codebook and an explanation of the different codes.

In order to avoid knowledge gaps, this research combines a systematic analysis with a comparative legal study. A systematic analysis based on the explanatory memorandum of one State alone has some limitations. First, the quality of the explanatory memorandum is highly dependent on the quality and expertise of the legislative officials in the Ministry of Justice or members of parliament, and on the political climate. Moreover, the explanatory memorandum does not contain all considerations for the design of the criminal provision, but only those that the legislator considers to be decisive.

The selection of countries was based on (1) whether there has been a recent proposal to modernize or adapt the rape provision, and (2) whether an explanatory memorandum to the legislative proposal was available. Based on these criteria France for example did not qualify, because they have not changed their criminal provision on rape as to date. Spain did not qualify either because they have no explanatory memorandum available. On the basis of these selection criteria, Belgium, Germany, the Netherlands, and Sweden were selected for the systematic comparative legal analysis. Figure 3 shows the main characteristics of the rape provision by country.

Belgium already proposed a consent-based rape offense in 1982.¹⁴ The aim was to give a broader definition of rape by making consent the decisive element of the prohibition, and thus

¹¹See Buisman, *supra* note 6, 181–85.

¹²See *id.*

¹³Tom Decorte, *Kwalitatieve data-analyse [Qualitative Data Analysis]*, in *KWALITATIEVE METHODEN EN TECHNIEKEN IN DE CRIMINOLOGIE [QUALITATIVE METHODS AND TECHNIQUES IN CRIMINOLOGY]* 463, 463–512 (Tom Decorte & Damian Zaitch eds., 2016).

¹⁴Wetsontwerp tot wijziging van sommige bepalingen betreffende het misdrijf verkrachting [Bill Amending Certain Provisions Relating to the Crime of Rape], Kamer van Volksvertegenwoordigers [House of Representatives] 166/001, 1981/82 (1981) (Belg.) [hereinafter *Belgian 1982 Bill*].

Code	Explanation
<i>Elements of the criminal provision</i>	
• Prohibition	The prohibition contains a description of the criminal conduct.
• Actus Reus	The <i>actus reus</i> or objective component of the offense involves the specific criminal conduct of the offender, such as an act or omission. In other words, the <i>actus reus</i> describes the conduct that damages the legal interests of another person or the State.
• Mens Rea	The <i>mens rea</i> or subjective component of the crime involves the state of mind necessary to convict the accused of a crime.
• Legal classification	The legal classification accurately informs the offender and the public of the crime for which the offender is accused or convicted and helps to acknowledge the suffering inflicted on victims.
• Penalty	This element communicates the minimum and/or maximum penalty that may be imposed on the offender upon conviction.
<i>Principles</i>	
○ Principle of coherence	This principle ensures that the new criminal provision does not disrupt the internal consistency of the legal system and that there are no unjustified differences between the various criminal provisions.
• Principle of effectiveness	The principle of effectiveness can be divided into prosecutability and effectiveness of the sanction. Prosecutability requires that the definition of the offense is clear as to what is to be investigated, prosecuted, and convicted and that the elements of the prohibition do not create evidentiary problems. Effectiveness of sanctions refers to whether the sanction achieves the punishment aims, such as deterrence and retribution.
• Fair labelling	This principle requires that the offender and society are accurately informed of the specific crime for which the offender has been accused or convicted. The principle helps to structure the law and to distinguish between different types of harmful and unlawful conduct.
• Principle of internal subsidiarity	Based on this principle, the legislator should determine whether the conduct already falls within the scope of one of the existing criminal provisions
• Legality	The legality principle requires that an offense be defined with sufficient clarity and precision on a prior statutory criminal provision.
• Guilt principle	The guilt principle gives rise to several requirements. Firstly, it necessitates the inclusion of a <i>mens rea</i> component in the prohibition of a crime. Secondly, the imposition of punishment is contingent upon the presence of a certain degree of culpability. Within the paradigm of punishment, the principle necessitates that the severity of the penalty should be proportionate to the degree of culpability.
• Retrospective proportionality	The principle of retrospective proportionality can be divided into two distinct categories. The first category is ordinal proportionality, which stipulates that similar offenses should be subject to similar penalties. Cardinal proportionality, in contrast, involves the determination of the absolute maximum penalty for the offense.
• Legitimizing principles	These threshold principles determine when criminalisation is legitimate.
• Legal interest	There should be a concrete legal interest, such as someone's physical or property interests or public interests, that should be protected through criminal law.
• Harm	Conduct is considered harmful if it has an adverse effect on a legal interest.
• Wrong	Conduct is deemed wrongful if it involves deliberate, reckless, or negligent infringement of the interests of others or the State.

Figure 2. Codebook

protecting the personal integrity of a person, and to protect all victims, regardless of their gender.¹⁵ In 2022, anticipating the modernization of the Belgium Criminal Code (*Strafwetboek*) the criminal provision on rape was updated to modern day standards. The proposal introduced a definition of consent in relation to the right of sexual self-determination, Article 417/5.¹⁶ In addition, the

¹⁵*Id.*

¹⁶Wetsontwerp houdende wijzigingen aan het strafwetboek met betrekking tot het seksueel strafrecht [Bill Containing Amendments to the Criminal Code Regarding Sexual Criminal Law], Kamer van Volksvertegenwoordigers [House of Representatives] 2141/001, 55th Leg. p. 14–19 (2021) (Belg.) [hereinafter Belgian 2021 Bill]. See BELGISCH STAATSBLED [OFFICIAL GAZETTE OF BELGIUM] ch. I/1, www.ejustice.just.fgov.be (providing Chapter I/1 of the Belgium Criminal Code in Dutch).

	Belgium	Germany	The Netherlands	Sweden
Applicable law	Article 417/11 Strafwetboek	§ 177 Strafgesetzbuch	Article 242 and 243 Wetboek van Strafrecht	6 kap. Brottsbalk (1962:700)
Actus reus	Any act consisting of sexual penetration of any kind and by any means	Sexual acts which involve the penetration of the body	Sexual acts, which consist of or include sexual penetration of the body	Vaginal, anal or oral intercourse, or any other sexual act similar to sexual intercourse given the seriousness of the offense
	On a person or with the help of a person who does not consent to it	Against the discernible will of the other person	With a person lacking the will to do so	With a person who does participate voluntarily
Mens rea	Intent	Intent	Intent and negligence	Intent and negligence
Legal classification	Rape (<i>verkrachting/viol</i>)	Rape (<i>Vergewaltigung</i>)	Negligent rape (<i>schuldverkrachting</i>), intentional rape (<i>opzetverkrachting</i>), aggravated intentional rape (<i>gekwalficeerde opzetverkrachting</i>)	Negligent rape (<i>oaktsam våldtäkt</i>), rape (<i>våldtäkt</i>), aggravated rape (<i>grov våldtäkt</i>)
Penalty	Imprisonment of 10 to 15 years	Imprisonment of one year to 15 year	Negligent rape imprisonment up to 4 years or a fine of the fourth category	Negligent rape imprisonment up to 4 years
			Intentional rape imprisonment up to 9 years or a fine of the fifth category	Rape imprisonment of 3 years up to 6 years
			Aggravated intentional rape imprisonment of up to 12 years or a fine of the fifth category	Aggravated rape imprisonment of 5 years up to 10 years

Figure 3. Schematic overview of the criminal provision of rape in Belgium, Germany, the Netherlands and Sweden

provision of rape was amended to make it gender-neutral, to include third person participation, and to expand the scope to any act consisting or partly consisting of sexual penetration of any kind and by any means.¹⁷

Germany’s criminal law on rape was based on a coercive model until 2016. Lack of consent did not suffice for criminal liability for sexual acts; the victim must have been coerced by the perpetrator.¹⁸ Over the years the coercive-based model was criticized by feminists. Moreover, with the signing of the Istanbul Convention, Germany was required to criminalize non-consensual sexual acts.¹⁹ In what is described as “an unusual legislative process,” Germany introduced a “no means no”-model, which requires some form of communication by the victim, rather than exclusively focusing on consent as a mental state.²⁰ Under § 177 (6) of the German Criminal Code (*Strafgesetzbuch*), rape is considered an aggravating circumstance of sexual assault. It no longer presupposes that the victim must have been coerced but requires one of the six versions of sexual assault, § 177 (1) and (2), plus penetration.²¹

New sexual assault legislation in the Netherlands entered into force on July 1, 2024 after a long legislative process. Until then, the Dutch criminalization of rape was based on the coercive model. In light of the changed social norm, that sexual contact should be voluntary, equal, and based on

¹⁷*Id.* at 27–29.
¹⁸Tatjana Hörnle, *The New German Law on Sexual Assault*, in *SEXUAL ASSAULT: LAW REFORM IN A COMPARATIVE PERSPECTIVE*, *supra* note 4, 141, 141–42 (Tatjana Hörnle ed., 2023).
¹⁹*Id.* at 143.
²⁰Hörnle, *supra* note 18, at 145–46; *see also* Tatjana Hörnle, *The Challenges of Designing Sexual Assault Law*, 77 *CURRENT LEGAL PROBS.* 49, 77 (2024) (being described as a communicational model).
²¹*Id.* at 152.

mutual consent, and after the entering into force of the Istanbul Convention, modernization of the criminal law on sexual assault was necessary.²² The initial plan was to introduce a separate criminalization of sex against the will.²³ This proposal was heavily criticized by stakeholders, such as Amnesty International and the Victim Aid Fund (*fonds slachtofferhulp*), stating that sex without consent should be qualified as rape.²⁴ Consequently, the rape provision was broadened to include sex against the will, which does not require that the victim was coerced. The Dutch law introduces an attitudinal model, which focuses exclusively on consent as a mental state, and thus places the responsibility primarily with the person initiating the sexual acts.²⁵ In addition, the proposal expanded the scope of rape to include, inter alia, sexual acts with a third party and introduced a separate provision on negligent rape.²⁶

Sweden already started the discussion of introducing a consent-based model in 2014. A legislative proposal followed in 2017, which introduced a new definition of rape. Rape now includes vaginal, anal, or oral penetration that is performed “with a person who is not participating voluntarily.”²⁷ To assess voluntariness, particular consideration is given to a person’s acts and expressions. The Swedish model has been characterized as deviating from both communication models and mixed models.²⁸ The rape provision was further expanded to include sexual acts with a third person. Lastly, Sweden introduced a separate provision criminalizing negligent rape.²⁹

The legal comparative analysis is based on the four-step method of Gorlé et al.³⁰ First, the results of the systematic analysis of the different criminal provisions on rape in each country are *described*. These results are also presented schematically in a Sankey diagram, which visualizes the interaction between the different principles and elements of the criminal provision. Second, the collected material is *compared*. Third, the identified differences and similarities between the principles underlying the offense construction in the examined countries are *explained* in Section C. Finally, an evaluative assessment is made of the use of the offense construction principles and the ways in which these principles could contribute to improving the quality of criminal law in Section D.

C. A Systematic Analysis of the New Rape Provision in Belgium, Germany, the Netherlands, and Sweden from a Legal Comparative Perspective

1. Introduction

As explained above, Belgium, Germany, the Netherlands, and Sweden have introduced new legislation in recent years to modernize and broaden the scope of the criminal provisions on sexual offenses, including the provision on rape. For this study, the explanatory memoranda that formed the basis of the legislative changes were systematically analyzed.³¹ The analysis yielded a total of

²²See KAMERSTUKKEN II 2022/23, 36222, no. 3, 5–8 (Neth.).

²³MINISTER VAN JUSTITIE EN VEILIGHEID [MINISTER OF JUSTICE AND SECURITY], KAMERBRIEF: NIEUWE STRAFBAARSTELLINGEN VAN SEKS TEGEN DE WIL EN SEKSUELE INTIMIDATIE [LETTER TO PARLIAMENT: NEW CRIMINAL PROVISIONS FOR SEX AGAINST THE WILL AND SEXUAL HARRASSMENT] (May 22, 2019), <https://open.overheid.nl/repository/ronl-de6538fc-cb22-4837-b558-3cdfbb275b4f/1/pdf/kamerbrief-over-straftbaarstellingen-van-seks-tegen-de-wil-en-seksuele-intimidatie.pdf> (Neth.).

²⁴See, e.g., AMNESTY INTERNATIONAL BLOG, *supra* note 8; FONDS SLACHTOFFERHULP, *supra* note 8.

²⁵KAMERSTUKKEN II 2022/23, 36222, no. 3, 19 (Neth.); Hörnle, *supra* note 18, at 146; Hörnle, *supra* note 20, at 8.

²⁶KAMERSTUKKEN [PARLIAMENTARY DOCUMENTS] II 2022/23, 36222, no. 2, art. 239, 242–43 (proposal for law) (Neth.).

²⁷“Med en person som inte deltar frivilligt.” [“With a person who does not participate voluntarily.”]

²⁸Hörnle, *supra* note 20, at 9.

²⁹Proposition [Prop.] 2017/2018:177 En ny sexualbrottslagstiftning byggd på frivillighet [government bill] (Swed.).

³⁰FRITS GORLÉ, GRETA BOURGEOIS, HUBERT BOCKEN & FILIP REYNTJENS, INLEIDING TOT DE RECHTSVERGELIJKING [INTRODUCTION TO COMPARATIVE LAW] (Walter Pintens ed., 2007).

³¹Belgian 1982 Bill, *supra* note 14; Belgian 2021 Bill, *supra* note 17; Beschlussempfehlung [Committee Recommendation], Deutscher Bundestag: Drucksachen [BT] 18/9097 (Ger.); Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen [BT] 18/8210 (Ger.); Prop. 2017/2018:177 (Swed.); Proposition [Prop.] 2021/2022:231 Skärpt syn på våldtäkt

	Total	Belgium	Germany	The Netherlands	Sweden
Number of citations	519	83	105	198	133
Number of codes	1253	195	256	466	336
Codes per category					
Prohibition	388	77	83	132	114
Actus reus	338	77	82	93	100
Mens rea	65	0	1	52	14
Legal classification	40	2	1	28	9
Penalty	80	3	18	36	23
Principle of coherence	129	35	31	32	30
Principle of effectiveness	52	6	2	30	14
Fair labelling	16	0	0	11	5
Principle of internal subsidiarity	33	4	13	10	6
Legality	293	59	71	87	76
Guilt principle	96	3	18	51	25
Principle of retrospective proportionality	33	0	5	16	12
Legitimizing principles	75	6	14	24	32

Figure 4. Schematic overview of the systematic analysis

519 citations. Each citation was coded using a codebook to determine to which part of the criminal provision and which principle the citation referred. It may happen that a legislative argument touches on several principles, such as the principle of legality and the principle of coherence. In such a case the citation has several codes. In total, 1253 codes were assigned to the citations. The complete overview of the systematic analysis is shown in Figure 4.

The following subsections describe the results of the systematic analysis of each country’s explanatory memorandum. In addition, a Sankey diagram generated from the data in Atlas.ti is used to visualize the interaction between the different principles and elements of the criminal provisions, Figures 5-8. The following sections do not provide a complete description of the meaning of the different constituent elements of the criminal provisions. They do, however, provide insight into the categories of arguments that underpin the design of the criminal provision, thereby identifying the principles at play in the offense construction. This section is the prelude to an evaluative assessment of how these offense construction principles are used and how they could contribute to the quality of criminal provisions.

II. The Construction of the Offense of Rape in Belgium

The Belgian explanatory memorandum contains a limited number of reflections on the design of the criminal provision. The explanatory memorandum pays the most attention to the objective side of the offense (*actus reus*). Within this context the memorandum mainly discusses the meaning and scope of the various components of the prohibition, such as the meaning of “sexual penetration” and “consent.” This explanation is primarily related to the principle of legality, which requires sufficient legal clarity.³² In addition, the legislator explicitly indicates how the proposed legislation is consistent with case law and existing terminology and pays attention to the place of

och andra sexuella kränkningar [government bill] (Swed.); KAMERSTUKKEN II 2022/23, 36222, no. 3 (Neth.); KAMERSTUKKEN II 2022/23, 36222, no. 2 (Neth.).
³²See, e.g., Belgian 2021 Bill, *supra* note 16, at 29.

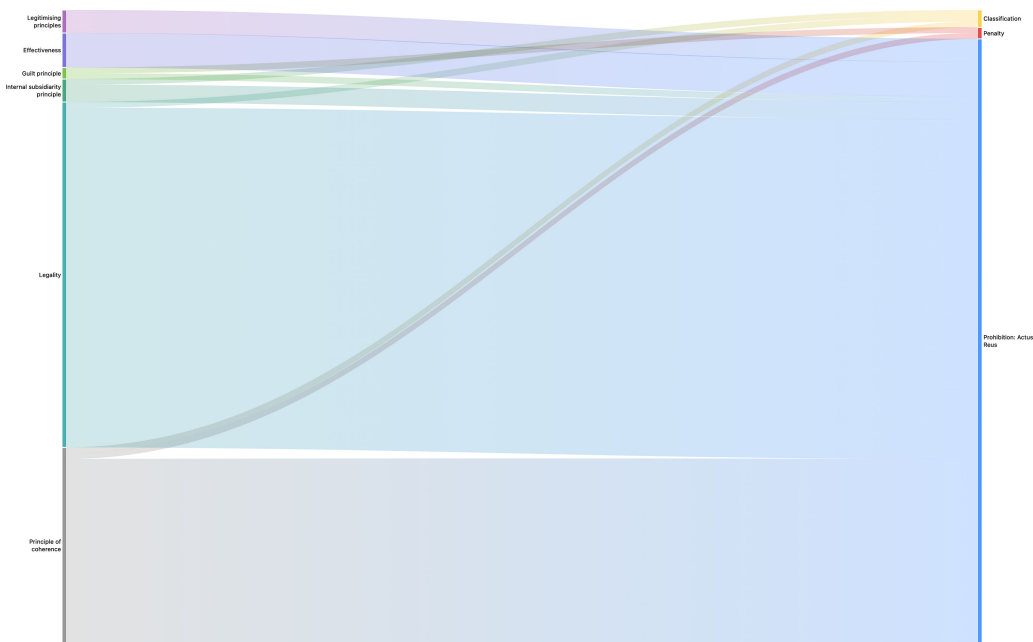


Figure 5. Use of offense construction principles in Belgium

the provision within the Criminal Code. These considerations therefore relate to the principle of coherence.³³

The legal classification has not changed under the legislative proposal, which may explain the limited explanation.³⁴ It does, however, address the categorization of sexual offenses. Prior to 2021, these offenses were classified as “crimes against family order and public morality.” The proposal places these offenses in a new category of “sexual crimes,” which are considered particularly serious crimes. The arguments for this new categorization are related to the principle of coherence as well.³⁵

The Belgian explanatory memorandum does not address the *mens rea* element of the criminal prohibition. In Belgium, a crime requires intent, unless it is explicitly stated that culpa is also sufficient. Therefore, the *mens rea* element needs to be addressed only if a negligent variant is introduced.³⁶ The increase in the maximum penalty for rape is also not explained in detail.³⁷

Figure 5 provides a visual representation of the interaction between the elements of the criminal provision and the principles of offense construction.

³³*Id.* at 21–24.

³⁴Only in two instances the legal classification of rape is discussed in the explanatory memorandum.

³⁵Belgian 2021 Bill, *supra* note 16, at 9.

³⁶See, e.g., LIESBET STEVENS, STRAFRECHT EN SEKSUALITEIT: DE MISDRIJVEN INZAKE AANRANDING VAN DE EERBAARHEID, VERKRACHTING, ONTUCHT, PROSTITUTIE, SEKSRECLAME, ZEDENSCHENNIS EN OVERSPEL [CRIMINAL LAW AND SEXUALITY: CRIMES OF INDECENT ASSAULT, RAPE, INDECENT EXPOSURE, PROSTITUTION, SEX ADVERTISING, INDECENT ASSAULT AND ADULTERY] 62–63 (2002); See also FILIEP DERUYCK, OVERZICHT VAN HET BELGISCH ALGEMEEN STRAFRECHT [OVERVIEW OF THE BELGIAN GENERAL CRIMINAL LAW] 40 (3d ed. 2021); Wetsontwerp tot invoering van Boek I van het Strafwetboek [Bill Introducing Book I of the Criminal Code], Kamer van Volksvertegenwoordigers [House of Representatives] 3374/001, 55th Leg. p. 38 (2023) (Belg.).

³⁷See generally Belgian 2021 Bill, *supra* note 16 (showing prior to the legislative change, rape was punishable by imprisonment of five to ten years).

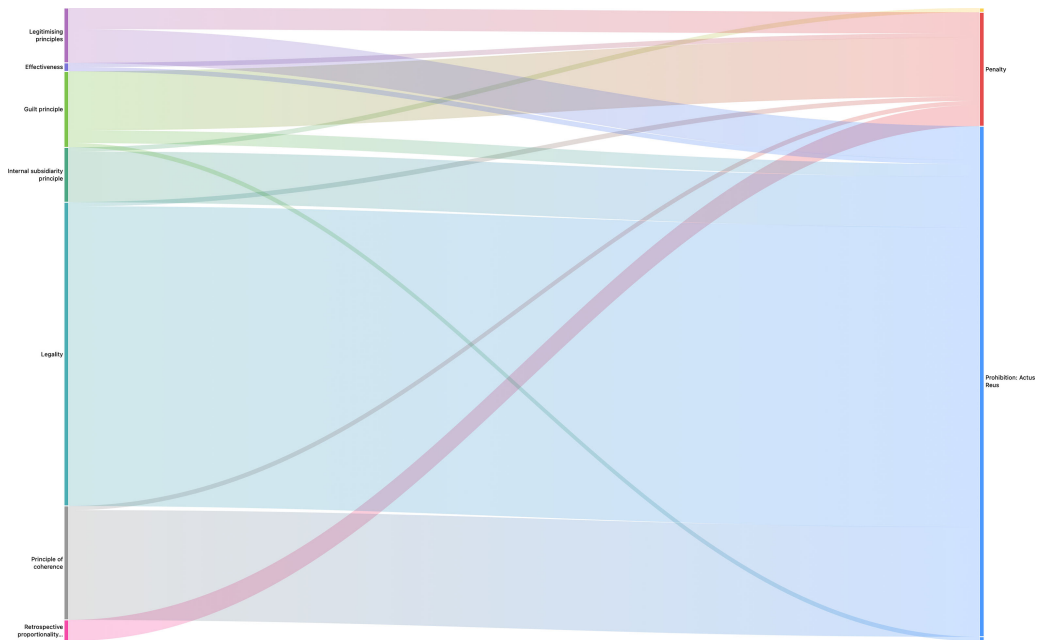


Figure 6. Use of offense construction principles in Germany

III. The Construction of the Offense of Rape in Germany

In Germany, the transition from a coercive to a consensual model required further clarification of the proposed criminal legislation.³⁸ As a possible consequence, arguments related to the offense construction are mostly related to principles that contribute to the clarity and accessibility of criminal law, such as the principle of legality, internal subsidiarity, and the principle of coherence.³⁹ The focus of the explanatory memorandum is mostly on the actus reus by providing further explanations on the meaning and scope of the various components of the actus reus.⁴⁰

There is very little explanation of the meaning and scope of the *mens rea* element. With regard to intent, the explanatory memorandum states in only one sentence that the perpetrator acted intentionally when they accepted that the sexual act was carried out against the objectively recognizable will of the victim.⁴¹ Negligent rape is not criminalized and therefore does not require further explanation.

The definition of rape remains unchanged under the legislative proposal.⁴² The explanatory memorandum simply states that rape is a form of sexual violence that refers to sexual intercourse or similar acts, regardless of whether the victim was coerced.⁴³

Finally, the explanation on the chosen penalty is also limited. Germany has a general maximum penalty and special minimum penalties, so the explanatory memorandum goes into only the chosen minimum penalty.⁴⁴ The minimum penalty for rape is related to the minimum penalty for

³⁸See Beschlussempfehlung, Deutscher Bundestag: Drucksachen [BT] 18/9097, at 9–11 (Ger.).

³⁹*Id.* at 21–23.

⁴⁰*Id.* at 22–24.

⁴¹*Id.* at 24.

⁴²*Id.* at 28.

⁴³*Id.*

⁴⁴Strafgesetzbuch [StGB] [Criminal Code], Nov. 13, 1998, BUNDESGESETZBLATT, Teil I at 3322, last amended by Gesetz [G], Nov. 22, 2021, BGBl I at 4906, art. 2, § 38(2) (Ger.).

sexual assault.⁴⁵ This is determined by the internal coherence of the various penalties and the degree of culpability. Arguments regarding the legitimacy of criminalization and retrospective proportionality are also taken into account.

Figure 6 provides a visual representation of the interaction between the elements of the criminal provision and the identified offense construction principles.

IV. The Construction of the Offense of Rape in the Netherlands

The Dutch explanatory memorandum is characterized by a detailed explanation on the construction of the criminal provision. The explanatory memorandum pays close attention to all aspects of the criminal provisions, and the choices made are supported by a range of categories of arguments. This approach aligns with a more general development in Dutch legislative practice, in which more and more attention is being paid to the quality of the legislation.⁴⁶

In the Netherlands, too, most attention is paid to the meaning and scope of the *actus reus*. The components of the *actus reus* are highlighted from the perspective of the principles of legality, coherence, effectiveness, and guilt.⁴⁷ In light of the criminalization of negligent rape, the meaning and scope of the *mens rea* elements are also discussed in more detail. The rationales underpinning the decisions of the legislator related to the principles of legality guilt and effectiveness.⁴⁸

The legal classification deals with the distinction between intentional rape, negligent rape, and aggravated rape. The reasons for this distinction in classification are related to the principle of guilt and the principle of fair labeling.⁴⁹ In addition, the principle of legality plays an important role; after all, the qualification must clearly and precisely communicate what the suspect is accused of.⁵⁰

Finally, the relationship between the maximum penalties for the various sexual offenses is clarified. This is the legislator's response to the problem of imbalance between the different maximum penalties for sexual offenses as identified by the study conducted for the Research and Data Centre of the Ministry of Justice and Security.⁵¹ The considerations underlying the choice of maximum penalties are mainly related to the principles of retrospective proportionality and legality.⁵²

Figure 7 provides a visual representation of the interaction between the elements of the criminal provision and the identified offense construction principles.

V. The Construction of the Offense of Rape in Sweden

The Swedish explanatory memorandum devotes most of its attention to the scope and meaning of the definition of the offense. Several categories or arguments are presented, which are related to the principle of legality, internal subsidiarity, coherence, and legitimacy.⁵³

⁴⁵Beschlussempfehlung [Recommendation for a Decision], Deutscher Bundestag: Drucksachen [BT] 18/9097, at 28 (Ger.).

⁴⁶See KAMERSTUKKEN [PARLIAMENTARY DOCUMENTS] II 1990/91, 22008, nos. 1–2 (Neth.); see also KAMERSTUKKEN [PARLIAMENTARY DOCUMENTS] II 2008/09, 31731, no. 1 (Neth.); KAMERSTUKKEN [PARLIAMENTARY DOCUMENTS] II 2015/16, 33009, no. 30 (Neth.); KAMERSTUKKEN II 2022/23, 36222, no. 3, 16, 75–79 (Neth.).

⁴⁷*Id.*

⁴⁸*Id.* at 81–83.

⁴⁹*Id.* at 51.

⁵⁰*Id.* at 19, 79.

⁵¹*Id.* at 15; Kai LINDENBERG & ALWIN VAN DIJK, WETENSCHAPPELIJK ONDERZOEK- EN DATACENTRUM [RESEARCH AND DATA CENTRE OF THE MINISTRY OF JUSTICE AND SECURITY], HERZIENING VAN DE ZEDENDELICTEN? EEN ANALYSE VAN TITEL XIV, TWEEDE BOEK, WETBOEK VAN STRAFRECHT MET HET OOG OP SAMENHANG, COMPLEXITEIT EN NORMSTELLING [OVERHAUL OF SEXUAL OFFENCES? AN ANALYSIS OF TITLE XIV, BOOK TWO, OF THE DUTCH CRIMINAL CODE WITH A VIEW TO COHERENCE, COMPLEXITY AND STANDARD-SETTING] (2016).

⁵²KAMERSTUKKEN II 2022/23 36222, no. 3, 21–22 (Neth.).

⁵³See, e.g., Prop. 2017/18:177, at 31–33 (Swed.).

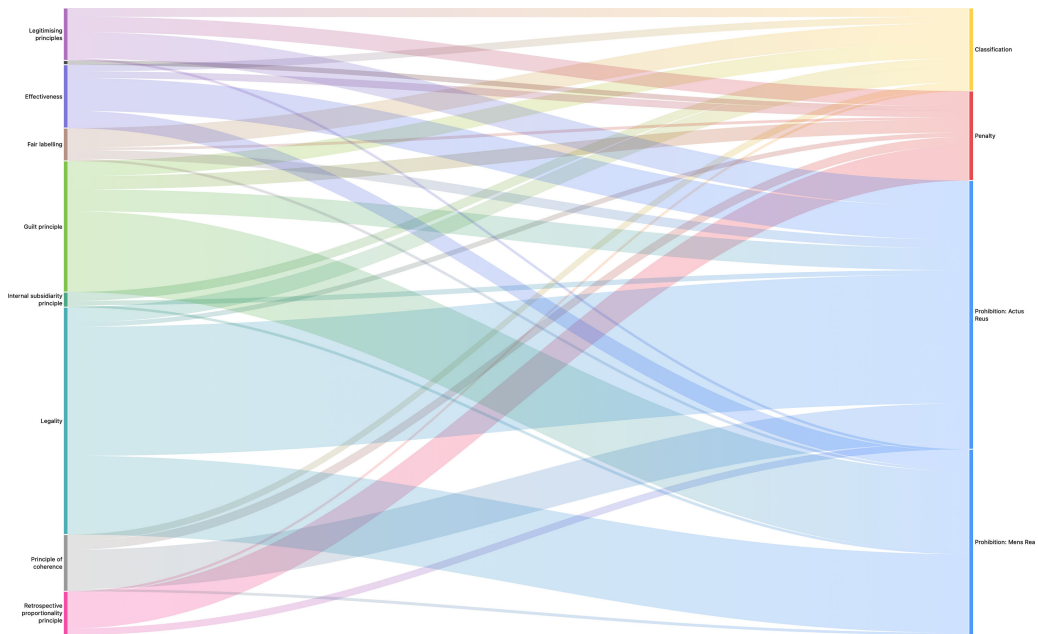


Figure 7. Use of offense construction principles in the Netherlands

The criminalization of non-sexual acts in Sweden also led to a reevaluation of the legal classification of rape. In the end, the legislator decided not to change the classification of rape because the term “rape” has a clear and significant meaning in society. Moreover, changing the classification could signal to society that the offense is less serious than rape.⁵⁴ In this context, the principles of legality, culpability, and fair labeling play an important role. The question of how to classify negligent rape was also considered. Here, the difference between intentional rape and negligent rape is particularly important to the legal classification. The legal classification of negligent rape communicates that it is a less serious offense, negligent act, and it also communicates in relation to which conduct the negligent act was committed, rape.⁵⁵ In this respect, the principle of guilt and internal subsidiarity play an important role.

The penalty for rape remained the same under the new criminal provision. However, the minimum sentence for aggravated rape was increased from four to five years. The average sentences imposed were considered disproportionate to the seriousness of the crime committed (37.5 months up to 69 months). The maximum penalty for negligent rape was set at four years. The underpinnings of the proposed penalties here are related to the principles of retrospective proportionality and the principle of guilt.⁵⁶

Figure 8 illustrates the interaction between the elements of the criminal provision and the identified offense construction principles.

VI. The Offense of Rape from a Comparative Legal Perspective

A closer look at the explanations for the offense construction reveals a sliding scale between countries where a lot of explanation is given for the offense construction—the Netherlands and Sweden—and countries where the explanation is less comprehensive—Germany and Belgium.

⁵⁴*Id.* at 26.

⁵⁵*Id.* at 49.

⁵⁶*Id.* at 61–63.

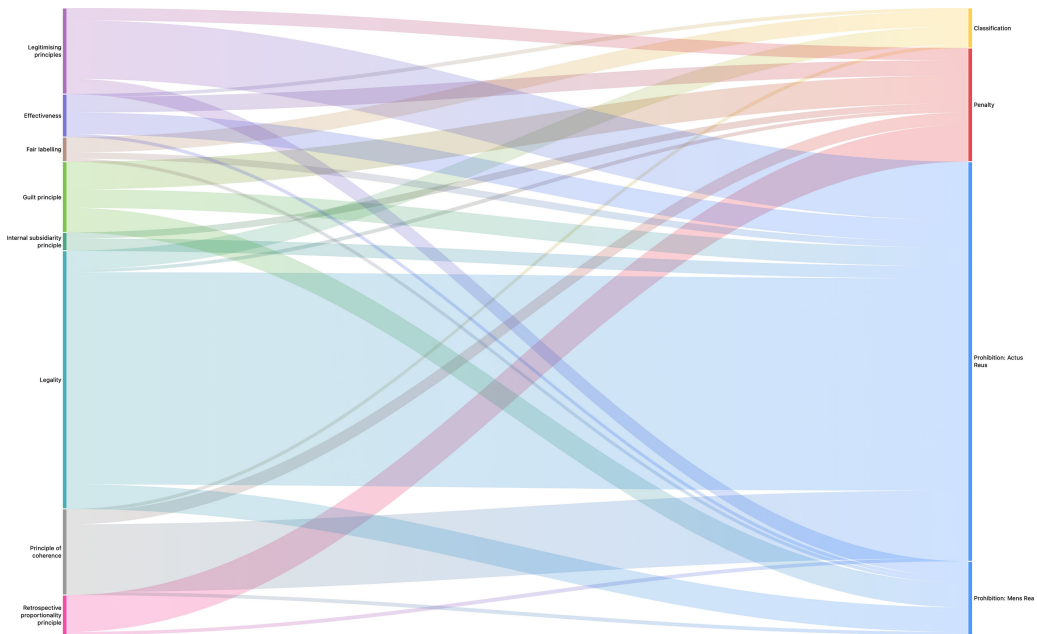


Figure 8. Use of offense construction principles in the Sweden

Although the explanation varies between countries, there are also similarities in the use of offense construction principles.

First, most of the arguments in support of the offense construction fall into the category of the principle of legality. This is understandable, given that the justifications are supposed to contribute to the clarity and accessibility of criminal law. Second, legitimizing principles—harm, wrong, and legal interest—are important in the construction of the offense. Indeed, a well-defined criminal offense requires the legislator to have a clear picture of the wrongful conduct that harms a particular legal interest. Finally, with regard to the principle of coherence, the legislator must ensure that the introduction of a new criminal provision fits into the existing legal system, so that legal unity can be guaranteed.⁵⁷ Ultimately, this increases the clarity and accessibility of the legislation as well. This may also be the reason why in all the countries studied, the legislator tries to align new criminal provisions as much as possible with the terminology that is already used in the Criminal Code, other laws, case law, or European and international legislation.

There are also differences between the explanatory memoranda. In Belgium and Germany, the primary focus is on formulating the *actus reus* of the prohibition. Little or no attention is paid to the other elements of the criminal provision. For example, the principle of guilt becomes more important when the legislator decides to criminalize negligent rape in addition to intentional rape. The introduction of a separate criminalization of negligent rape requires that the legislator also justifies its choice. Moreover, in such a case the penalty must be differentiated according to the specific criminal reproach against the accused. For this reason, the principle of guilt plays a greater role in the Netherlands and Sweden. In addition, the introduction of negligent rape in these countries leads legislators to consider the specific legal classification of the offense. Therefore, the principle of fair labeling also plays a greater role in the Netherlands and Sweden.

⁵⁷See Buisman, *De criteria voor strafbaarstelling*, in STRAFRECHTELIJKE CRIMINOLOGIE: EEN THEMATISCHE INLEIDING IN DE RELATIE TUSSEN CRIMINOLOGIE EN STRAFRECHT, *supra* note 5, at 60–66.

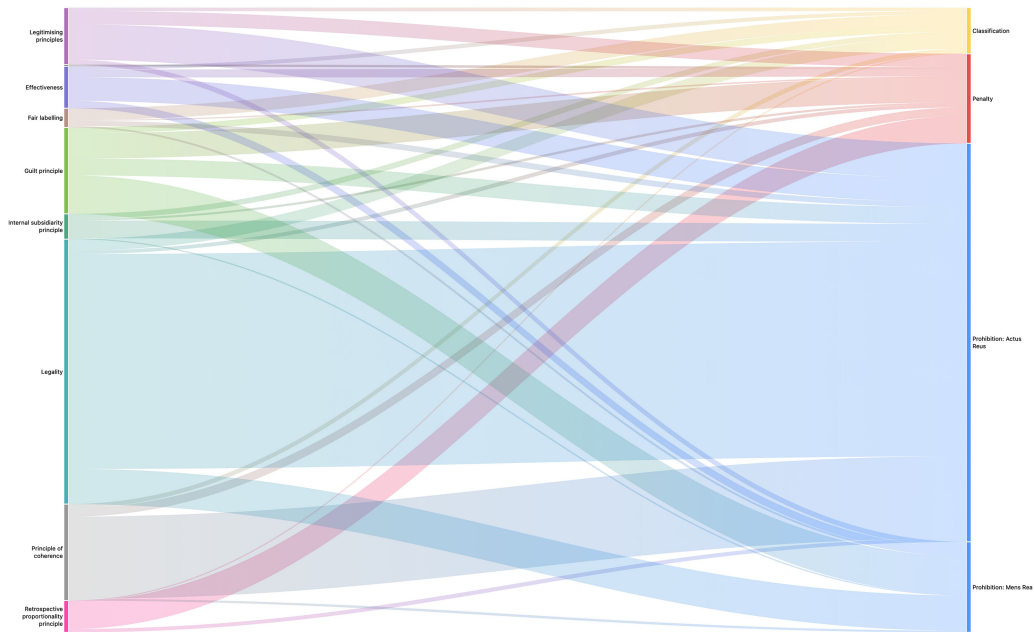


Figure 9. Overall use of offense construction principles in Belgium, Germany Sweden and the Netherlands

D. Offense Construction Principles as Foundations of the Criminal Provision

I. Introduction

The previous section described the categories of arguments that underlie the design of the criminal provision of rape in Belgium, Germany, the Netherlands, and Sweden. Figure 9 provides an overview of the principles identified in the four countries studied and how they interact with the elements of the criminal provision. This section assesses how the use of these principles can contribute to improving the quality of the design of criminal provisions. It also examines how the different principles interact when designing the criminal provision.

The following subsections will discuss each of the elements of the criminal provision such as criminal prohibition, legal classification, and penalty. Each subsection begins with a brief introduction to the function of the element of the criminal provision so that the operationalization and assessment of the various principles identified can be placed in this context.

II. Offense Construction Principles and the Criminal Prohibition

1. Actus Reus

The *actus reus* comprises the physical conduct of the offender, such as an act or omission. In other words, the *actus reus* describes the conduct that harms the legal interest of another person or the state. Consequently, the *actus reus* is regarded as the objective aspect of the offense definition. Criminalization requires that the *actus reus* be defined as clearly as possible. Citizens must know what conduct will trigger a government response, and the police and judiciary must know what conduct should be investigated, prosecuted, and convicted.⁵⁸ It is therefore self-evident that the

⁵⁸JAAP DE HULLU & PIET HEIN VAN KEMPEN, MATERIEEL STRAFRECHT: OVER ALGEMENE LEERSTUKKEN VAN STRAFRECHTELIJKE AANSPRAKELIJKHEID NAAR NEDERLANDS RECHT [SUBSTANTIVE CRIMINAL LAW: ON GENERAL DOCTRINE OF CRIMINAL LIABILITY UNDER DUTCH LAW] 85, 97–98, 105–10 (2024); Judith Altena, Het legaliteitsbeginsel en de doorwerking van het Europees recht in het Nederlandse materiële strafrecht [The Principle of Legality and the Impact of European Law on Dutch Substantive Criminal Law] 56–57 (Ph.D. dissertation, Leiden University) (on file with Leiden

explanatory memorandum should pay particular attention to the principle of legality, internal subsidiarity, coherence, and effectiveness. This also serves the purpose of the explanatory memorandum, which is to provide insight into the meaning and aim of the proposed legislation.

The principle of legality necessitates that each criminal offense be defined in a sufficiently clear and precise manner.⁵⁹ To this end, the legislator provides a detailed explanation of the meaning and scope of the various components of the *actus reus*. However, an examination of the explanatory memoranda indicates that the legislator does not undertake a thorough examination to ascertain whether the proposed *actus reus* complies with the requirements of the legality principle. In more than half of the cases, the legislator merely provides an isolated explanation and interpretation of a single component.⁶⁰ In the Swedish explanatory memorandum, for instance, the legislator offers an interpretation of “sexual acts”:

The term “sexual act” is defined as having essentially the same meaning as “sexual intercourse,” yet it is augmented by an additional element. For an act to be classified as a “sexual act,” there must be a reasonable degree of prolonged contact with the genitals of the other person, or between the body of another person and one’s own genitals.⁶¹

The advent of such justifications is more likely to occur in the context of components that are not already embedded within the legal framework, that do not originate from treaties or case law, or that do not seamlessly align with existing legal paradigms. The extent to which an explanation contributes to the principle of legality is contingent, at least in part, on its quality. An explanation that states consent can be given verbally or non-verbally offers minimal guidance in assessing whether there has been consent to specific sexual acts.⁶² The principle of legality is most effectively realized when the legislator engages with other principles concurrently, such as the principle of coherence, the internal subsidiarity principle, and the effectiveness principle.

The principle of coherence, which is fundamental to the legislative process, necessitates that lawmakers ensure that the proposed criminal provision does not disrupt the internal consistency of the legal system. Furthermore, it is imperative that there are no unwarranted differences between different criminal provisions. In this regard, legislators frequently employ preexisting terminology, such as “violence” and “sexual penetration.”⁶³ In addition, legislators seek to align the interpretation of these constituents with prevailing case law.⁶⁴ This practice ensures the preservation of established legal practice and of the existing legal framework. It is therefore vital to consider the principle of coherence when formulating criminal provisions.

Further clarity can be attained by explicitly delineating the different criminal provisions in instances of overlap. In accordance with the principle of internal subsidiarity, the legislator must examine existing legislation to determine whether the conduct in question is already covered or can be brought under existing criminal law, thereby achieving the necessary demarcation between the various criminal provisions.⁶⁵ To illustrate, the criminalization of rape, in contrast to that of

University Scholarly Publications); *Del Rio Prada v. Spain*, App. No. 42750/09, para. 77 (Oct. 21, 2013), <https://hudoc.echr.coe.int/eng?i=001-127697>.

⁵⁹DE HULLU & VAN KEMPEN, *supra* note 58, at 105–06; *Del Rio Prada*, App. No. 42750/09.

⁶⁰In 143 of the 255 citations in the dataset.

⁶¹Prop. 2017/2018:177, at 17 (Swed.).

⁶²See, e.g., *Beschlussempfehlung* [Recommendation for a Decision], Deutscher Bundestag: Drucksachen [BT] 18/9097, 24 (Ger.); Belgian 2021 Bill, *supra* note 16.

⁶³See, e.g., *Beschlussempfehlung* [Recommendation for a Decision], Deutscher Bundestag: Drucksachen [BT] 18/9097, 15 (Ger.); Belgian 2021 Bill, *supra* note 16; Prop. 2017/2018:177, at 63 (Swed.); KAMERSTUKKEN II 2022/23, 36222, no. 3, 85 (Neth.).

⁶⁴See, e.g., KAMERSTUKKEN II 2022/23, 36222, no. 3, 71 (Neth.); *Beschlussempfehlung* [Recommendation for a Decision], Deutscher Bundestag: Drucksachen [BT] 18/9097, 10 (Ger.); Belgian 2021 Bill, *supra* note 16; Prop. 2017/2018:177, at 69 (Swed.).

⁶⁵Buisman, *supra* note 6, at 181–82; HAENEN, *supra* note 5, at 131.

sexual assault, necessitates not only sexual acts but also penetration.⁶⁶ The expanded scope of the new criminalization of rape necessitates the clarification of which acts will fall under the new rape provisions and which acts will be punishable under existing criminal provisions.⁶⁷ Such clarifications enable a more precise understanding of the scope of new and existing criminal legislation.

The principle of effectiveness, in the sense of prosecutability, can also provide further insight into the meaning and scope of the *actus reus*. This principle considers the practical advantages of a clear definition of offenses for law enforcement, prosecutors, and the judiciary.⁶⁸ Consequently, it can be regarded as an equivalent to the principle of legality. The explanatory memoranda examined demonstrate that the practical application of the principle of effectiveness focuses primarily on the provability of the offense. In particular, the perspective of the judge is considered here. Within this framework, the legislator provides as much guidance as possible for the judicial assessment of whether a specific case involves rape. The legislator may provide general guidelines, for example, that the assessment must take place on the basis of the concrete circumstances of the case.⁶⁹ This places the responsibility for further interpretation and operationalization of the component on the court. It is important, however, to note that such generic guidelines offer minimal guidance for judicial interpretation.⁷⁰ Another possibility is that the legislator formulates more specific criteria. In such a case, the legislator takes responsibility of the further interpretation of the constituent's meaning and scope, thereby offering greater insight into its intended implications.⁷¹ With the transition from a coercive model to a consent-based model, the legislator has emphasized that the crime of rape should be easier to prove because coercion is no longer a requirement.⁷² This is a signal to the courts to adopt a less stringent evidentiary standard for the *actus reus*. When it comes to law enforcement, however, this perspective needs to be nuanced. For instance, the Dutch legislator has noted that the adoption of a consent-based model does not inherently simplify the process of evidence collection, particularly in scenarios where the victim's testimony is contradicted by the suspect. Thus, the lower standard of consent does not necessarily result in a better collection of evidence.⁷³

Finally, the systematic analysis reveals that the design of the *actus reus* appears to be related to the principles of legitimization such as harm, wrong, and legal interest. In the context of the legitimization of criminalization, the legislator must always assess whether there is wrongful conduct that harms a specific legal interest.⁷⁴ This assessment offers valuable insights into the identification of the conduct that should be subjected to criminalization. These insights can then guide the design of the *actus reus*.⁷⁵ For instance, the Belgian legislator considers the new definition of rape to attach particular importance to the concept of "lack of consent," stating that "in the absence of consent, the act becomes a direct violation of the integrity of the person."⁷⁶ It is therefore evident that in Belgium, the protection of sexual integrity is realized through the component of "lack of consent."

⁶⁶KAMERSTUKKEN II 2022/23, 36222, no. 3, 86 (Neth.); Beslusesmpfehlung [Recommendation for a Decision], Deutscher Bundestag: Drucksachen [BT] 18/9097, 28 (Ger.).

⁶⁷See, e.g., Beslusesmpfehlung [Recommendation for a Decision], Deutscher Bundestag: Drucksachen [BT] 18/9097, 10 (Ger.); KAMERSTUKKEN II 2022/23, 36222, no. 3, 73 (Neth.).

⁶⁸Buisman, *supra* note 5, at 73; DE ROOS, *supra* note 5, at 78.

⁶⁹See, e.g., Prop. 2021/2022:231, at 54 (Swed.).

⁷⁰See, e.g., Belgian 1982 Bill, *supra* note 14, at 2.

⁷¹See, e.g., KAMERSTUKKEN II 2022/23, 36222, no. 3, 8 (Neth.).

⁷²*Id.*

⁷³*Id.* at 39.

⁷⁴Buisman, *supra* note 5, at 66.

⁷⁵See, e.g., KAMERSTUKKEN II 2022/23, 36222, no. 3, 78 (Neth.); Prop. 2017/2018:177, at 139 (Swed.); Belgian 2021 Bill, *supra* note 16, at 14.

⁷⁶See generally Belgian 1982 Bill, *supra* note 14.

2. *Mens Rea*

Mens rea is defined as the state of mind that is required to convict a defendant of a crime.⁷⁷ This element can manifest in three distinct forms: intent, recklessness, or negligence. *Mens rea* is therefore closely related to the wrongfulness of the conduct, which involves “the *deliberate, reckless or negligent* violation of the interests of other persons (or the state).”⁷⁸ Typically, a *mens rea* element is required only in case of a felony and not in case of a misdemeanor.⁷⁹ Consequently, the criminalization of conduct as a felony necessitates that the legislator determines whether to criminalize solely intentional conduct or to also include reckless and/or negligent conduct. An analysis of the legal systems examined reveals that crimes in principle always require that the acts were committed intentionally.⁸⁰ Consequently, the choice of a specific *mens rea* component is only required if the legislator opts to introduce a negligent variant.

In view of the above, the decision to criminalize negligent rape warrants further explanation on the incorporation of negligence. To this end, the legislator may examine the specific criminal reproach in question. In Sweden, for instance, the legislator has explicitly stated that the criminalization of negligent rape is predicated on the notion that sexual abuse is such a grave offense, also in light of the significant psychological harm that can be inflicted on the victim or the risk thereof—referencing the harm principle—that even negligent acts should be subject to punishment. According to the legislator, the distinction between intentional and negligent conduct is therefore irrelevant in this context. This assertion serves as a basis for the justification of the adoption of a negligent variant.⁸¹

The circumstances under which, according to the legislator, intent or negligence exist are discussed in more detail as well. The extent to which the concept of *mens rea* is discussed varies across the countries examined in this study. For example, the Belgian explanatory memorandum does not provide an explanation of the meaning of the *mens rea* component: intent. In Germany, the subject of intent is addressed in a single sentence. Conversely, the Swedish explanatory memorandum places particular emphasis on culpa. By contrast, the Dutch explanatory memorandum is the most comprehensive, addressing both components. It is noteworthy that in countries that criminalize both intentional and negligent rape, there is an inherent invitation for further reflection on the conceptual intricacies of these notions.⁸² In this context, the categories of arguments relate to the principle of legality and effectiveness.

In accordance with the principle of legality, the legislator provides a comprehensive explanation of the meaning and scope of intent or negligence. This explanation may consist primarily of a general definition of the *mens rea* component, in connection to the *actus reus* of the rape provision. To illustrate, the German legislator explains in general terms that the requirement of intent is satisfied if the perpetrator at least accepts that the sexual act is performed against the objectively discernible will of the victim.⁸³ Nevertheless, this statement does not elaborate on the

⁷⁷DE HULLU & VAN KEMPEN, *supra* note 58, at 232.

⁷⁸Gerhard Seher, *Comment on Andreas von Hirsch: The Roles of Harm and Wrongdoing in Criminalisation Theory*, 8 CRIM. L. & PHIL. 257, 260 (2014) (emphasis added).

⁷⁹ANDREW ASHWORTH & JERMEY HORDER, *PRINCIPLES OF CRIMINAL LAW* 74 (7th ed. 2013); DE HULLU & VAN KEMPEN, *supra* note 58, at 232.

⁸⁰DERUYCK, *supra* note 36, at 40; Strafgesetzbuch [StGB], Nov. 13, 1998, BGBl I at 3322, last amended by Gesetz [G], Nov. 22, 2021, BGBl I at 4906, art. 2, § 15 (Ger.); BRÖTTSBALKEN [BRB] [Penal Code] 1:2 (Swed.); DE HULLU & VAN KEMPEN, *supra* note 58, at 288–289.

⁸¹Prop. 2017/2018:177, at 41 (Swed.); cf. KAMERSTUKKEN II 2022/23, 36222, no. 3, 76 (Neth.) (showing the Dutch reasoning that the specific criminal reproach of negligent rape, namely gross negligence, justifies a separate criminal provision of negligent rape).

⁸²Compare Belgian 1982 Bill, *supra* note 14, Belgian 2021 Bill, *supra* note 16, Prop. 2017/2018:177 (Swed.), and Prop. 2021/2022:231 (Swed.), with Beschlussempfehlung [Recommendation for a Decision], Deutscher Bundestag: Drucksachen [BT] 18/9097 (Ger.). Regierungsentwurf [Government Draft], Deutscher Bundestag: Drucksachen [BT] 18/8210 (Ger.), and KAMERSTUKKEN II 2022/23, 36222, no. 3 (Neth.), and KAMERSTUKKEN II 2022/23, 36222, no. 2 (Neth.).

⁸³Beschlussempfehlung [Recommendation for a Decision], Deutscher Bundestag: Drucksachen [BT] 18/9097, 23 (Ger.).

specific instances in which this condition is met.⁸⁴ The explanation may also consist of a general definition combined with more specific examples of cases that would constitute as intentional or negligent rape. For instance, in response to inquiries from stakeholders⁸⁵ regarding the interpretation and scope of intent and negligence as outlined in the preliminary proposal on the Sexual Offences Act,⁸⁶ the Dutch legislator has opted to provide more concrete examples of these two categories of rape.⁸⁷ These numerous and sometimes contradictory examples in the Dutch explanatory memorandum, however, seem to undermine, rather than contribute to, the principle of legality. In this way, the memorandum creates more questions than it resolves.

Considerations in light of the effectiveness principle, such as prosecutability of the offense, do not provide further clarity on the meaning and scope of the *mens rea* element. Consequently, the assessment factors provided to the judge remain quite general in nature. For instance, the Swedish explanatory memorandum asserts that the determination of whether the act qualifies as negligent rape depends on the specific circumstances of the case, and that only those acts that are “clearly punishable” should fall within the scope of criminal law: “Negligent acts in an individual case must therefore be truly reprehensible.”⁸⁸ Nevertheless, this does not provide a clear answer as to when an act can be considered negligent. This ambiguity may be ascribed to the legislator’s acknowledgement that “the determination of whether the suspect committed negligent or intentional rape in borderline cases depends on the precise assessment of the court.”⁸⁹

III. Offense Construction Principles and the Legal Classification of the Offense

The legislator may choose to incorporate a legal classification of the conduct into the criminal provision, such as rape, assault, theft, or manslaughter. This nomenclature serves to provide both the offender and the public with a precise understanding of the nature of the crime for which the offender has been convicted. This practice also acknowledges the suffering inflicted upon victims.⁹⁰ The legal classification functions as a significant constraint on the interpretation of the crime, thereby ensuring that the legal definition does not become subject to interpretation that is contradictory or otherwise disconnected from the original meaning.⁹¹

In the context of rape provisions, the classification plays an important signaling role and contributes to the delineation of the offense. The systematic analysis reveals a correlation between classification and the principle of legality. The potency of legality arguments is strengthened when they are combined with other principles, such as the principle of internal subsidiarity and the principle of coherence. For instance, the Dutch legislator has indicated that the distinction between sexual assault and rape lies in the sexual penetration of the body. This distinction offers

⁸⁴HÖRNLE, *supra* note 4, at 149.

⁸⁵See, e.g., RAAD VOOR DE RECHTSPRAAK [DUTCH COUNCIL FOR THE JUDICIARY], ADVIES VOORONTWERP WETSVORSTEL WET SEKSUELE MISDRIJVEN [ADVICE PRELIMINARY DRAFT BILL SEXUAL OFFENCES ACT] 15 (July 20, 2020) (Neth.); COLLEGE VAN PROCUREURS-GENERAAL [PUBLIC PROSECUTION SERVICE], ADVIES WETSVORSTEL SEKSUELE MISDRIJVEN [ADVICE ON THE BILL ON SEXUAL OFFENCES] 4–5 (June 11, 2021) (Neth.).

⁸⁶See generally MINISTERIE VAN JUSTITIE EN VEILIGHEID [MINISTRY OF JUSTICE & SECURITY], VOORONTWERP WETSVORSTEL SEKSUELE MISDRIJVEN [PRELIMINARY DRAFT BILL ON SEXUAL OFFENCES] (May 12, 2020) (Neth.).

⁸⁷KAMERSTUKKEN II 2022/23, 36222, no. 3, 17 (Neth.).

⁸⁸Prop. 2017/2018:177, at 91 (Swed.).

⁸⁹Compare KAMERSTUKKEN II 2022/23, 36222, no. 3, 80 (Neth.), with Prop. 2017/2018:177, at 91 (Swed.) (“What constitutes as negligence is ultimately a matter of criminal law practice.”).

⁹⁰Victor Tadros, *Fair Labelling and Social Solidarity*, in PRINCIPLES AND VALUES IN CRIMINAL LAW AND CRIMINAL JUSTICE: ESSAYS IN HONOUR OF ANDREW ASHWORTH 67, 67–80 (Lucia Zedner & Julian V. Roberts eds., 2012).

⁹¹DE HULLU & VAN KEMPEN, *supra* note 58, 113–14; see also Sven Bakker, Uitzonderlijke excepties in het strafrecht: Een zoektocht naar systematiek bij de beslissingen omtrent uitsluiting van strafrechtelijke aansprakelijkheid in bijzondere contexten [Exceptional Exceptions in Criminal Law: A Search for Systematicity in Decisions Regarding Exclusion of Criminal Liability in Special Contexts] 312 (Dec. 9, 2021) (Ph.D. dissertation, Erasmus University Rotterdam) (on file with university) (recommending an explicit legal classification in all criminal provisions).

insight into the specific conduct that constitutes rape, thereby distinguishing it from sexual assault.⁹² Additionally, arguments concerning legality and consistency may provide a rationale for maintaining the classification of rape. For instance, the Swedish government has determined that,

the legislation pertaining to sexual crimes is already designed in such a manner that criminal liability for rape encompasses a considerably broader scope of acts than those committed by violence or threats of violence. Assuming the term “violence” in common parlance can be defined more broadly to encompass more than just physical violence, it follows that the term “rape” for the most serious sexual crimes may not be perceived as misleading.⁹³

Moreover,

the term “rape,” which has traditionally been reserved for the most serious sexual crimes, possesses a distinct social meaning that is not necessarily based on the legal criteria for the crime. The most compelling argument for maintaining the classification of “rape” is the clear signal value it conveys, reflecting the severity of the crime. The substitution of “rape” with “sexual violence” in legal discourse and legislation bears the risk that the crime is perceived as less severe.⁹⁴

Furthermore, arguments pertaining to the principle of fair labeling are of great importance. This fundamental principle dictates that the classification and description of a crime must align with its severity, and that penalties should reflect the severity of the offense. The Dutch explanatory memorandum, for example, asserts that the designation of sexual offenses “on the one hand do justice to what has happened to the victim and on the other hand express the severity of the acts to be distinguished by categorizing them with the most appropriate nomenclature.”⁹⁵ The Swedish legislator similarly underscores the necessity of ensuring that the legal classification of an offense “clearly reflects both the lower mens rea element [negligence] and the intentional crimes to which the provision applies. Furthermore, from the offender’s perspective, it may be advantageous to clarify whether the sexual act is classified as rape or sexual assault.”⁹⁶

These examples provide further insight into the interplay between the classification of the offense and the principle of guilt. Indeed, the guilt principle assists in delineating the boundaries of criminal liability by determining the specific criminal reproach.⁹⁷ This reproach, in turn, determines how to classify the offense. In this regard, the Dutch legislator has articulated that “the more severe the reproach, the more severe the legal classification of the criminal conduct.”⁹⁸ Consequently, negligent rape has its own separate criminal provision, with its own classification that is based on the nature of the criminal reproach.⁹⁹ In this way, the guilt principle serves as a foundational framework for delineating and distinguishing between various forms of harmful and wrongful conduct.

⁹²KAMERSTUKKEN II 2022/23, 36222, no. 3, 86 (Neth.); Beslusempfehlung [Recommendation for a Decision], Deutscher Bundestag: Drucksachen [BT] 18/9097, 28 (Ger.).

⁹³Prop. 2017/2018:177, at 47 (Swed.).

⁹⁴*Id.*

⁹⁵A.P. SIMESTER & ANDREAS VON HIRSCH, CRIMES, HARMS AND WRONGS: ON THE PRINCIPLES OF CRIMINALISATION 202 (2014); HILMI. M. ZAWATI & TERESA A. DOHERTY, FAIR LABELLING AND THE DILEMMA OF PROSECUTING GENDER-BASED CRIMES AT THE INTERNATIONAL CRIMINAL TRIBUNALS 27 (2014).

⁹⁶Prop. 2017/2018:177, at 91 (Swed.).

⁹⁷Piet Hein van Kempen & Joerie Bemelmans, *EU Protection of the Substantive Criminal Law Principles of Guilt and ne bis in idem under the Charter of Fundamental Rights: Underdevelopment and Overdevelopment in an Incomplete Criminal Justice Framework*, 9 NEW J. EUR. CRIM. L. 247, 253 (2018).

⁹⁸KAMERSTUKKEN II 2022/23, 36222, no. 3, 19.

⁹⁹*Id.*

IV. Offense Construction Principles and the Penalty Scales

The last element of the criminal provision is the penalty that may be imposed. In the light of *nullum crimen, nulla poene sine praevia lege poenali*, there can be no punishment without law, no punishment without a crime, and no crime without a legal provision.¹⁰⁰ Therefore, legality is required for both crime and punishment. Consequently, the legislator must establish a legal framework for the minimum or maximum penalty and the conditions under which it may be imposed.¹⁰¹ The system of penalties and the discretion granted to the judge reflect the confidence of the legislator in the judiciary.¹⁰²

The principles of retrospective proportionality and the principle of guilt appear to have the greatest impact on the penalty. The principle of retrospective proportionality requires the legislator to weigh the proposed penalty against the seriousness of the crime. Thus, the legislator must ensure that similar crimes carry similar penalties—ordinal proportionality—and determine what the absolute punishment for the crime should be—cardinal proportionality.¹⁰³ In this sense, the Swedish legislator takes the seriousness of the crime as a fundamental starting point for determining the punishment for sexual crimes: “The punishment should [therefore] reflect how reprehensible a particular crime is.”¹⁰⁴ More serious crimes should be punished more severely than less serious crimes, and similar crimes should be punished equally severely: The penalty for a crime is thus a measure of how serious the legislator considers the particular type of crime in relation to other crimes.¹⁰⁵ This raises the question of how the legislator then operationalizes these general principles.

In Germany and the Netherlands, the legislator has taken the old penalty for rape by coercion as a starting point.¹⁰⁶ Then, depending on the degree of culpability, the maximum or minimum penalty is determined.¹⁰⁷ In Germany, for example, the minimum penalty for the basic offenses ranges from six months to ten years imprisonment, with “additional aggravating factors that increase the severity of the crime to be taken into account separately.”¹⁰⁸ The Dutch legislator also takes into account the seriousness of the crime, in particular the extent to which the sexual integrity of the victim has been violated: “Higher maximum penalties shall be attached to the commission of more severe acts consisting of sexual penetration of the body.”¹⁰⁹ Similarly, the Swedish legislator states that rape is a very serious violation of another person’s sexual integrity.

That the protection of sexual integrity is relatively highly valued is demonstrated by the fact that rape already carries a higher minimum sentence than, for example, grievous bodily harm. Therefore, according to the legislator, it cannot be concluded from direct comparisons

¹⁰⁰PAUL J.A. VON FEUERBACH, *LEHRBUCH DES GEMEINEN IN DEUTSCHLAND GELTENDEN PEINLICHEN RECHTS* [TEXTBOOK OF THE COMMON PENAL LAW APPLICABLE IN GERMANY] § 24 (1801).

¹⁰¹Gerard K. Schoep, *Straftoemetingsrecht en strafvorming* [Sentencing Law and Sentencing] 79–80 (Oct. 20, 2008) (Ph.D. dissertation, Leiden University) (on file with university).

¹⁰²Pauline Schuyt, *Het bepalen van de straf: een taak van de rechter* [Determining the Sentence: A Task for the Judge], 32 TREMA STRAFTOEMETINGSBULLETIN [TREMA SENTENCING BULLETIN] 13, 14 (2009) (Neth.).

¹⁰³Petter Asp, *The Substantive Criminal Law Competence of the EU*, 79 SKRIFTER UTGIVNA AV JURIDISKA FAKULTETEN VID STOCKHOLMS UNIVERSITET 148, 199–200 (Dec. 1, 2012) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2728241#;~:text=Petter%20Asp,-Stockholm%20University%20%2D%20Faculty&text=As%20regards%20the%20criminal%20law,Member%20States%20to%20the%20EU); Buisman, *supra* note 6, at 184–85.

¹⁰⁴Prop. 2021/2022:231, at 84 (Swed.).

¹⁰⁵*Id.*

¹⁰⁶Beschlusssempfehlung [Recommendation for a Decision], Deutscher Bundestag: Drucksachen [BT] 18/8210, 16 (Ger.); KAMERSTUKKEN II 2022/23, 36222, no. 3, 21–22 (Neth.).

¹⁰⁷JAAP DE HULLU, INGEBORG MAEJOLEIN KOOPMANS & TH. A. DE ROOS, *HET WETTELIJK STRAFMAXIMUM: EEN ONDERZOEK NAAR HAT PATROON VAN STRAFMAXIMA IN HET COMMUNE EN HET BIJZONDERE STRAFRECHT* [THE STATUTORY MAXIMUM PENALTY: A STUDY OF THE PATTERN OF MAXIMUM PENALTIES IN COMMON AND SPECIAL CRIMINAL LAW] 114–16 (1999).

¹⁰⁸Beschlusssempfehlung [Recommendation for a Decision], Deutscher Bundestag: Drucksachen [BT] 18/8210, 16 (Ger.).

¹⁰⁹KAMERSTUKKEN II 2022/23, 36222, no. 3, 21 (Neth.).

with other types of crimes that a minimum sentence of three years would be disproportionately high.¹¹⁰

Consequently, examples of a relationship between the scales of punishment and the legitimizing principles of harm, wrong, and legal interest can also be found in the various explanatory memoranda. The seriousness of the crime depends largely on the wrongful conduct that harms a specific legal interest. For example, in the case of forcing a person to perform or tolerate a sexual act by means of a threat, the German legislator is of the opinion that the range of punishment should extend from three months to three years in order to be able to punish even minor misconduct in accordance with the degree of culpability.¹¹¹ With regard to the notion of harmfulness, the Dutch legislator states that “the high statutory maximum penalties in the proposal reflect the serious harm caused to victims of sexual offenses in comparison to other crimes.”¹¹² Therefore, the range of the penalty scale must always be considered in the light of the criminal conduct.

In addition, legislators consider whether the judge has sufficient discretion to impose an appropriate sentence in an individual case. For example, the Dutch legislator considers that the new maximum penalties for the various sexual assault and rape offenses “enable the prosecution and the judiciary to determine a sentence appropriate to the nature and seriousness of the criminal conduct.”¹¹³ The Swedish explanatory memorandum states “that a maximum penalty of four years’ imprisonment still provides sufficient room for an appropriate sentence even in the most serious cases of negligent rape.”¹¹⁴ This does not explain how the legislature reached this conclusion. It does, however, express that the legislature values the judge’s freedom in sentencing.

Nevertheless, some important considerations are also missing in the explanatory memoranda. First, there is no consideration of the effectiveness of the penalty in light of investigative powers. This concerns whether the proposed penalty allows for the use of certain coercive measures, such as DNA testing and testing for sexually transmitted diseases. There is likely no mention of this because the proposed penalties already exceed the threshold for the use of these coercive measures. Second, there is no consideration of the deterrent effect of the penalty. The legislator does not explain how the chosen sanction can contribute to specific and general prevention. Finally, the long-term effects of a sanction—such as damage to reputation or consequences for the application for a Certificate of Good Conduct—are not taken into account when determining the sanction.

E. Closing Remarks

This Article presents the results of the first exploratory study of the principles underlying the design of a criminal provision. Using comparative legal empirical research, it identifies the principles that play a role in the construction of the criminal provision of rape at the national level, to which part of the criminal provision—prohibition, legal classification, or sanction—these principles apply, and how these principles interact with each other.

The study indicates that legislators employ a variety of arguments to justify the design of the criminal provision. In accordance with the objective of the explanatory memorandum, this justification is principally aimed to provide insight into the meaning and scope of the proposed legislation. Consequently, principles that facilitate the comprehensibility of the proposal, such as the principle of legality, the principle of coherence, the internal subsidiarity principle, and the principle

¹¹⁰Proposition [Prop.] 2021/2022:231, at 96.

¹¹¹Strafgesetzbuch [StGB] [Criminal Code], Nov. 13, 1998, BGBl I at 3322, last amended by Gesetz [G], Nov. 22, 2021, BGBl I at 4906, art. 2, § 177(2) (Ger.).

¹¹²*Kamerstukken II*, 36222, 3, 4 (2022/23) (Neth.).

¹¹³*Id.* at 22.

¹¹⁴Proposition [Prop.] 2021/2022:231, at 96.

of effectiveness play a central role in the formulation and design of the criminal provision. The *actus reus* of the prohibition receives the most attention. The *actus reus* describes the conduct that provokes a government response, thereby providing clarity for citizens, law enforcement, and the judicial system on what conduct will be investigated, prosecuted, and convicted. Moreover, the explanation is stronger when these principles are not operationalized in isolation, but in relation to other principles. In the context of legality, for instance, an explanation is rendered more robust when it aligns with existing terminology and definitions, such as the principle of coherence.

Nonetheless, the quality of explanations given is also a critical factor in this regard. The present research suggests that there do not seem to be any requirements for the quality of the explanatory memoranda. In certain instances, the legislator offers a standalone explanation and interpretation of a constituent element but fails to provide any insight as to when this constituent element is fulfilled. For example, the fact that consent can be given verbally or non-verbally does not clarify when consent to the sexual acts was then given. Furthermore, the quality of the criminal provision does not necessarily increase when more examples are given by the legislator, particularly when these examples exhibit inherent contradictions. Consequently, further research is imperative to examine the influence of offense construction principles on the legislative process. A question that arises is whether offense construction principles should serve merely as an argumentative framework for legislators, or whether they should impose specific obligations on the offense construction process.

Further research into the construction and design of different offenses and the underlying principles that inform them is necessary to answer this question. It is expected that the outcomes will vary according to the nature of the offense. For example, there are other interests at stake with property offenses compared to offenses that infringe upon the physical integrity of persons. Moreover, in the context of digital crimes, the investigative powers necessary for the investigation must be taken into account. Further research into design of the criminal provision and the principles underlying it will offer valuable insights into the role of these principles in the offense construction process.

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Annex 2: Criminal provisions

Belgium

Article 417/5 New Belgium Criminal Code (*Nieuw Strafwetboek*)

Consent presupposes that it is freely given. Whether this is the case, will be assessed in the light of the circumstances of the case. Consent may be withdrawn at any time before or during the sexual act.

Consent is not given if the sexual act has been committed by taking advantage of the victim's vulnerable state due to, inter alia, fear, the influence of alcohol, narcotics, psychotropic substances, or any other substance having a similar effect, an illness, or a situation of disability, which has affected the free will. In any case, consent is not given if the sexual act is the result of a threat, physical or psychological violence, coercion, surprise, deception, or any other criminal act.

In any case, consent is not given if the sexual act is committed against an unconscious or sleeping victim.

Article 417/11 New Belgium Criminal Code (*Nieuw Strafwetboek*)

Rape is any act consisting or partially consisting of sexual penetration of any kind and by any means, committed against a person or with the help of a person who does not consent to it.

This crime is punishable by 10 to 15 years imprisonment.

Germany

Section 177 German Criminal Code (*Strafgesetzbuch*)

(1) Whoever, against a person's discernible will, performs sexual acts on that person or has that person perform sexual acts on them, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person incurs a penalty of imprisonment for a term of between six months and five years.

(2) Whoever performs sexual acts on another person or has that person perform sexual acts, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person incurs the same penalty if

1. the offender exploits the fact that the person is not able to form or express a contrary will,
2. the offender exploits the fact that the person is significantly impaired in respect of the ability to form or express a will due to said person's physical or mental condition, unless the offender has obtained the consent of that person,
3. the offender exploits an element of surprise,
4. the offender exploits a situation in which the victim is threatened with serious harm in case of offering resistance or
5. the offender has coerced the person to perform or acquiesce to the sexual acts by threatening serious harm.

(3) The attempt is punishable.

(4) The penalty is imprisonment for a term of at least one year if the inability to form or express a will is due to the victim's illness or disability.

(5) The penalty is imprisonment for a term of at least one year if the offender

1. uses force against the victim,
2. threatens the victim with a present danger to life or limb or
3. exploits a situation in which the victim is unprotected and at the mercy of the offender's influence.

(6) In especially serious cases, the penalty is imprisonment for a term of at least two years. An especially serious case typically occurs where

1. the offender has sexual intercourse with the victim or has the victim have sexual intercourse or commits such similar sexual acts on the victim or has the victim commit them on them which are particularly degrading for the victim, especially if they involve penetration of the body (rape), or
2. the offense is committed jointly by more than one person.

(7) The penalty is imprisonment for a term of at least three years if the offender

1. carries a weapon or other dangerous implement,
2. otherwise carries an instrument or other means for the purpose of preventing or overcoming the resistance of another person by force or threat of force or
3. places the victim at risk of serious damage to health.

(8) The penalty is imprisonment for a term of at least five years if

1. the offender uses a weapon or other dangerous implement during the commission of the offense or
2. the offender
 - a) seriously physically abuses the victim during the offense or
 - b) by committing the offense places the victim in danger of death.

(9) In less serious cases under subsections (1) and (2), the penalty is imprisonment for a term of between three months and three years, in less serious cases under subsections (4) and (5) imprisonment for a term of between six months and 10 years, and in less serious cases under subsections (7) and (8) imprisonment for a term of between one year and 10 years.

The Netherlands

Article 242 Dutch Criminal Code (Wetboek van Strafrecht)

As guilty of negligence rape shall be punished with imprisonment of up to four years or a fine of the fourth category, the person who performs sexual acts, which consists or partially consists of sexual penetration of the body, when he has serious reason to believe that the person lacks the will to do so.

Article 243 Dutch Criminal Code (Wetboek van Strafrecht)

1. As guilty of intentional rape shall be punished with imprisonment of up to nine years or a fifth category fine, the person who performs sexual acts, which consist or partially consist of sexual penetration of the body, when he knows that the person lacks the will to do so.

2. The person who commits the crime described in the first paragraph, preceded accompanied or followed by coercion, violence or threat, shall be punished as guilty of aggravated intentional rape with imprisonment for up to twelve years or a fifth category fine.

Article 244 Dutch Criminal Code (Wetboek van Strafrecht)

For the application of the crimes described in Articles 240 to 243, a person lacks the will to engage in sexual activity if he or she is in a state of unconsciousness, diminished consciousness, or physical incapacity, or has such a mental disorder, psychogeriatric disorder, or mental disability that he or she is unable or insufficiently able to determine or express a will regarding sexual activity or to resist it.

Sweden

Chapter 6, Section 1 Swedish Criminal Code (Brottsbalken)

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

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

If the offense is less serious, the sentence is imprisonment for at least six months and at most for years.

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

Chapter 6, Section 1a Swedish Criminal Code (Brottsbalken)

A person who commits an act referred to in Section 1 and is grossly negligent regarding the circumstance that the other person is not participating voluntarily is guilty of *negligent rape* and is sentenced to imprisonment for at most four years.

If, in view of the circumstances, the act is less serious, the person is not held responsible.

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