

Autonomy and Beyond – Voluntariness in the Light of Lived Autonomy*

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Abstract: *In this article, we aim to introduce and discuss the use of an everyday life-based understanding of autonomy that recognises the fact that a person's autonomy is constantly changing, rather than stuck in given categories. We call this understanding of autonomy lived autonomy and suggest it be used as an analytical tool in legal research. We use a flower to symbolise the lived aspect of autonomy to underline how autonomy is constantly changing and thus demonstrate that person's autonomy is elastic. A person's autonomy can be diminished or expanded over time due to relational, time and spatial boundaries, i.e., everyday life that consists of an endless variety of aspects. Inspired by Smith, we use the concept of everyday life perspective to capture the human being as a subject rooted in everyday life. In addition to Smith's daily routines and activities, we add cognitive and bodily memories, as well as symbols, patterns, knowledge and experiences. These are aspects of everyday life that we use as active subjects to express, for example, will, desire and needs. These aspects, perceived as well as inherited and shared memories, knowledge and experiences, can also be obstacles to expressing our will, desire or need.*

The concept is described and developed with the new consent-based regulation of rape as an example, in particular in relation to the criterion of voluntariness.

The article starts by placing the concept of autonomy in a broader context and introduces autonomy as a concept in philosophical and legal theory, followed by a feminist critique of the traditional liberal understanding of autonomy. Then, the everyday life perspective is introduced to develop the understanding of the concept, from the traditional one towards an everyday life-based understanding of autonomy, lived autonomy. As an example of how lived autonomy can be used as an analytical tool in legal research, we apply the concept in relation to the new requisite of voluntariness in the Swedish rape legislation that came into force July 2018.

Additionally, the everyday life-based understanding of autonomy also has a communicative function, and as such, the concept serves as a link between the local context and at the same time as part of an international academic debate of one of the core issues of within legal scholarship. But also, as a link between law and reality in both local and global perspective.

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1. Background and introduction

At the core of law, we find autonomy. Without a concept of autonomy, we could not enter into agreements (rent a car, lend money from the bank, buy new shoes, get married or divorced, send our children to school...), would not be able to vote (and hence we could not live in a de-

mocracy) and could not take legal responsibility for our actions or even be declared born or dead.

Today, legal theory builds on the prevailing idea of the liberal autonomous subject. This liberal subject has been at the centre of legal theory since the Enlightenment, although it has been challenged in critical legal theory, including feminist legal studies, for some decades (Lacey 1998; Svensson 1997). One critique put forward concerns the view of the human being as attached to the liberal subject. As such, she has the ability of good judgment and is wise and insightful. She is also assumed to be free to make her own decisions without being subordinate to others, i.e. at the core of the liberal subject is the assumption of her full access to free will (Svedberg 2016; Gunnarsson & Svensson 2009; Gustafsson 2011). In a broader perspective the law defines what it means to be a human being. This point of departure often lacks the understanding of human beings as part of a given context and societal structures and, in effect, creates a gap between law and reality, as well as between theory and practice. A fundamental assumption in law is that it regulates relationships between two equal parties. In some situations, in which the law recognises an unequal power dynamic, such as business-to-consumer, landlord-tenant and employer-employee relationships, a relationship is regulated by specific protective legislation (these are examples of contractual relationships). These examples concern horizontal relationships between natural persons and/or legal persons. However, the law also regulates vertical relationships between the state and the individual, as well as between the state and legal persons. Vertical relationships are subject to protective regulation to an even greater extent due to the obvious unequal power dynamic. All these power imbalances recognised by the law are in some way constant and stuck in certain pre-defined categories. Hence, only in these situations does the law recognise and admit that a subject has a demarcated autonomy. In all other situations, the law assumes that a subject has

full autonomy in accordance with the liberal idea.¹

In this article, we aim to introduce and discuss the use of an everyday life-based understanding of autonomy that recognises the fact that autonomy is constantly changing, rather than stuck in given categories. We call this understanding lived autonomy and suggest it be used as an analytical tool in legal research. We use a flower² to symbolise the lived aspect of autonomy to underline how autonomy is constantly changing and thus demonstrate that an individual's autonomy is elastic.³ A person's autonomy can be diminished or expanded over time due to relational, time and spatial boundaries, i.e. everyday life that consists of an endless variety of aspects. The development of the concept has its background in a previous article on Swedish rape legislation. To explain the ideas presented here, we need to start from those presented in the previous article.

In that article we examine the Swedish rape legislation from an everyday life perspective (Bladini & Svedberg Andersson 2020). It contains a historical overview of the legislative

1. This view of the subject as the starting point in law (i.e. the legal subject) is presented by, for example, Rawls using the veil of ignorance. (Rawls 2005). In relation to the application of law, the example of criminal law in general and sexual offences in particular, see Niemi-Kiesilainen 2001 and Andersson 2001).
2. It should be noted that the flower is also used as a symbol of the social movement in Japan that protests against sexual crimes and sexual violence and seeks changes to the law. The movement was founded by Minori Kitahara, in March 2019, who demanded action due to several acquittals of sex offenders in Japan. Since the first demonstrations in Tokyo and Osaka Prefecture on 11 April 2019, demonstrations have been held on the 11th of each month; see <https://english.kyodonews.net/news/2020/03/de1a32818b0e-feature-flower-demo-fighting-sexual-violence-in-japan.html>.
3. For a description and illustration of autonomy as a flower, see below under section 3.

process from 1998⁴ to the current rape legislation being passed, i.e. from violence and threats, through lack of consent and towards voluntariness as the decisive criterion for criminal liability. Although there are some exceptions, the analysis of the preparatory works shows that the previous and current regulations both struggle to deal with “[...] vulnerabilities, structural power imbalances and various forms of situations where the victim cannot use her capability to express her will due to a demarcated autonomy in the specific time- and spatial-bound context” (Bladini & Svedberg Andersson 2021: 124). In addition, the article shows that the prerequisite voluntariness in the rape legislation is closely linked to how we understand autonomy, as it is an emanation of the subject with full access to free will. Contemporary regulation thus builds on the assumption that a victim of rape has the ability to express her free will. We argue that there is a need for an in-depth discussion of ideas of autonomy in legal theory in relation to rape law and criminal law, as well as to law

4. 1998 was the first time the concept of lack of consent as the basic requirement for criminal liability was investigated in Sweden (by the Sexual Offences Committee of 1998; see Government public investigations/SOU 2001:14, *An increased protection of sexual integrity and related issues*). However, the question of whether the rape legislation should be based on use of force or lack of consent has been investigated on three occasions by the Sexual Offences Committee of 1998 (Government public investigation/SOU 2010:71, *The Sexual Offences Act – the evaluation and reform proposals*), by the Sexual Offences Committee of 2008 (Government public investigation/SOU 2016:60, *A stronger protection of sexual integrity*), and most recently by the Sexual Offences Committee of 2014. These reports were followed by legal reforms in 2005 (Government Bill 2004/05:45, *A new sexual Offence Legislation*), 2013 (Government Bill 2012/13:111, *A reinforced Sexual Offence Legislation*) and 2018 (Government Bill 2017/18:177, *A new Sexual Offence Legislation based on voluntariness*).

in general, as these ideas affect people’s access to and protection by the law.

This article starts in a *theoretical landscape* in which we place the concept of autonomy more broadly and briefly introduce autonomy as a concept in philosophical and legal theory, followed by a feminist critique of the traditional view of autonomy. The everyday life view is also included in this section as a scientific perspective relevant to the concept of lived autonomy. In the following section, we suggest how to *rethink autonomy* by introducing the concept of lived autonomy; this is done through a description of how the concept could be used in the example of the new rape legislation. The article ends with *conclusions and reflections*.

2. Theoretical landscape

This section is a draft of the surrounding theoretical landscape and is relevant to the development of lived autonomy, as it is the soil in which the theoretical and methodological tool lived autonomy grows. We start broadly by saying something on autonomy itself, followed by a sketch of the traditional view of autonomy as the prevailing idea in law. Some arguments from feminist criticism are then presented, concluding with an everyday life perspective. We would like to underline that the concept is closely linked to the idea of the subject and the human being and has been a central issue of philosophical and legal research for centuries. As we intend to develop a theoretical and methodological tool for legal research, this part does not give a full picture of the field but rather a sketch from which to proceed.

2.1 Autonomy and the liberal idea of the subject

The nature of autonomy is neither stable nor settled, but it features in various forms in discussions on, for example, justice, freedom of speech and the idea of the liberal state in moral and political philosophy (Rawls 1980:554; Scanlon, 1972:215 and Dworkin 1978). Additionally, it plays a central role in ideas on liberty and

equality, both of which are fundamental in the construction and interpretations of rape legislation. The concept has been used synonymously with liberty, self-rule or sovereignty and freedom of will, and equated with dignity, integrity, individuality, independence, responsibility and self-knowledge. Some of the prerequisites that have been identified for autonomy are self-assertion, critical reflection, freedom from obligation, absence of external causation and knowledge of one's own interests. It is related to actions, beliefs, reasons for acting, rules, the will of other persons, thoughts and principles. Dworkin states that the only commonalities between different authors' perspectives are that it is a feature of persons and that it is a desirable quality to have (Dworkin 2001).

The notion of the human being as an autonomous individual derives from the philosophy of Kant, who stated that every individual has an autonomous sphere in which free will is fully accessible and defined by logic and reason.⁵ The subject is in one way defined and discussed as part of society and a given context, but the relations to others are defined as unproblematic, as the subject is rational and able to make decisions in relation to herself and others. Legal theory, and therefore the law, builds on this liberal idea of the autonomous subject (Gunnarsson & Svensson 2009:221; Wennström 2005). As we said at the outset, the law recognises that this is not always the case, which partly explains the state's intervention in society through protective legislation in unequal relations, although the fundamental assumption is based on traditional autonomy.

In a collection of feminist critiques that challenge and contribute to contemporary philosophical debate, the authors draw on social and relational aspects of autonomy and discuss the aspect of social interdependency rather than independence from others, agency in relation

5. Compare with our Figure 1 of the traditional view of autonomy in section 3.1.

to dependency or oppression, self-conception and imagination (Mackenzie and Stoljar 2000). Some of the contributions in this anthology are related to the concept of lived autonomy and will be discussed in detail below.

2.2 Autonomy from a feminist legal studies perspective

The liberal view of the subject has been challenged in critical legal theory, including feminist legal studies, for a number of decades (Lacey 1998; Svensson 1997). Several feminist legal scholars have criticised the traditional view of the subject as it cannot account for structural perspectives, such as power imbalances in general and intersectional perspectives in particular, vulnerabilities and coercive circumstances (Lacey 1998; Gunnarsson et al. 2018; Svedberg 2013; Bladini 2013; Andersson 2011; Burman 2010; Berglund, 2013. See also Naffine 2002:150–173; Niemi 2010:159–172).

We want to start by referring to Nedelsky, who states that “feminism requires a new conception of autonomy” (Nedelsky 1989:7) and emphasises that the prevalent idea of autonomy builds on a liberal theory that is incompatible with feminist theory. Since autonomy is nevertheless crucial to feminism, it has to be reformulated. We agree with Nedelsky on this point: autonomy is fundamental to feminism as well as to the overall objective guiding Swedish gender equality policy, clarifying that women and men must have the same power to shape society and their own lives (Government Communication (2016/17:10) *Makt, mål och myndighet – feministisk politik för en jämställd framtid.*).

She suggests that “autonomy is a capability that exists only in the context of social relations that support it and in conjunction with the internal sense of being autonomous” (Nedelsky 1989:25). Thus, Nedelsky recognises a social component of the idea of autonomy. She holds that autonomy is made possible by constructive relationships and undermined by destructive ones. She sets the concept in relation to law in

general, but she also discusses it in the context of violence against women (Nedelsky 2011).

2.3 *Autonomy in relation to sexual*

One crucial aspect of feminist critique of criminal law in general, and in relation to the regulation of sexual violence in particular, concerns the traditional view of the subject, in line with the autonomous and rational individual able to make free and rational choices, regardless of context (Lacey 1998; Naffine 2002; Svensson 1997; Niemi 2010). The lack of context has been criticised in relation to sexual violence and rape in particular, due to the inability to consider power imbalances, vulnerabilities and coercive circumstances that follows from such a perspective (MacKinnon 1996; Andersson 2010; Lacey 1998). In *Relational Autonomy*, mentioned above, Mackenzie and Stoljar collect some essays on feminist theory on autonomy, in which the authors move beyond the critique of the subject as independent of others and re-theorise the idea of autonomy as relational. Loyd and Mackenzie stress the temporal dimensions of selfhood, in this sense related to lived autonomy. Loyd presents a method, related to an everyday life perspective, by which she suggests feminists exercise imagination and sympathetic identification in relation to what she calls human memory (although she is addressing the responsible self and avoids the language of autonomy). This collection also offers a comprehensive overview of feminist critiques of autonomy and contemporary theories in light of the discussion on procedural versus substantive accounts of autonomy (Mackenzie and Stoljar 2000).

Smart has highlighted that a central point in feminist literature is that law is permeated by social constructions of masculinity and femininity, and hence is embedded in patriarchal sexual practice (Smart 1995:79). In effect, the legal system relies on gendered stereotypes and rape myths (MacKinnon 1996; McGlynn & Munro 2010; Wegerstad 2015; Burman 2010; Andersson 2004 and Uhnoo 2014). MacKinnon argues that

the legal inability to define legal reality in terms of social reality serves as one explanation of the challenges faced in courts (MacKinnon 2016). Naffine has also addressed the problem of not taking women's everyday lives as the point of departure in discussions of rape by questioning that the harm caused by rape is described in abstract terms instead of those of women's lived experiences (Naffine 2009).

One part of feminist legal research that we include in this field does not necessarily address autonomy explicitly but deals with questions that are all closely linked to autonomy, e.g. structural perspectives, coercive circumstances, context and the view of the subject. The concept of *sexual autonomy* has been discussed in feminist legal research on rape legislation (See for example Munro, 2015; Munro, 2008). It seems that it has mainly been analysed as one of the interests to be protected by criminal law.

Rape is constructed on the basis of a violation of sexual autonomy, which makes consent (or lack of consent) a fundamental premise in the definition. More specifically, the logic implies that a perpetrator, by using violence to obtain sex, deprives another person of the right to make autonomous decisions about his/her sexual life, and consequently it can be concluded that no consent has been established/given (by the victim). This position is endorsed by international law and appears in two models in national legal systems: the 'consent-based' and 'coercion-based' models respectively (Dowds 2019:35–36).

In our view, it is possible to distinguish a connection between, or a confusion between, sexual self-determination as one of the interests to be protected by criminal law and a view of autonomy in the broader sense, i.e. in terms of the ability to make decisions in life generally. Before we move on, we want to dwell on this concept for a while to eliminate conceptual confusion between *sexual autonomy* and *lived autonomy*. As indicated above, a common description of the former is that rape constitutes a violation

of sexual autonomy. Dowds, for example, with the support of Schulhofer, has described the concept as containing two dimensions, so-called *positive* sexual autonomy and *negative* sexual autonomy, and advocates a third dimension, which she calls the *contextual dimension* of sexual autonomy. Positive sexual autonomy refers to the “freedom to determine one’s own sexual experiences, to choose how and with whom one expresses oneself sexually” (Dowds 2019:40), e.g. “that every adult is free to decide for themselves what sort of sex to engage in” (Dowds 2019:40), where negative autonomy “provides that individuals have the right to safeguard themselves against, and to exclude, any and all unwanted sex” (Dowds 2019:40–41). Based on Kelly’s “continuum of coercion”, Dowds argues that the recognition of the third dimension of sexual autonomy promotes a broader understanding of rape within both ‘consent-based’ and ‘coercion-based’ models of defining rape. She gives the example of a domestically abusive relationship in which the perpetrator does not necessarily have to use physical violence to obtain sex. In line with this view and to move forwards she has been inspired by military law, more specifically the *doctrine of constructive force*. She analyses several military court cases and shows that the doctrine applies an approach wherein “all the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm” (Dowds 2019:55). We sympathise with Dowd’s efforts to create analytical tools to conceptualise rape that encompass a range of behaviours beyond physical force. In this respect, the concept of sexual autonomy has a connection with the concept of lived autonomy, but here we want to draw attention to and point out the central differences between the concepts and their purposes.

First, we emphasise that lived autonomy is not limited in time and space in the same way that sexual autonomy is. In the military court

cases cited by Dowd in applying constructive force, the court emphasises the unequal relationship between a superior officer and a subordinate, i.e. the latter, by virtue of his position and rank, uses his position to obtain sex. In these cases, the officer places the victim in an unsecure and threatening confined environment/room, such as a storage room. Admittedly, the doctrine considers that no force is required to establish rape, but as a rule of interpretation, the circumstances in which valid consent has been given are still limited in time and space. You must bear in mind that the doctrine involves assessing whether a violation of sexual integrity has occurred. We consider that the doctrine becomes difficult to apply if a victim, for example, suffers from self-harming behaviour or has been abused in the past (victims of trafficking) and the perpetrator knows this, yet has sex with the person without the use violence.

Secondly, unlike sexual autonomy, lived autonomy does not aim to establish whether consent has been given or its validity in cases of rape that do not involve violence. This is also one of the main reasons why Sweden has chosen to explicitly use voluntariness as a basis for criminal liability rather than consent. This is to avoid confusion with the legal rule on consent, which constitutes a general ground for freedom from responsibility in Swedish criminal law (SCC 24:7).

Thirdly, we read most discussions on the concept of sexual autonomy as based on liberal ideology, and by that the idea of the liberal subject. The ideology stresses the individual’s freedom as being essential, where freedom is primarily defined as a right to choose, in this case to choose sex or to refrain from unwanted sex. The idea of sexual autonomy is therefore similar to the constitutional freedoms and rights and the distinction between negative and positive freedoms, a distinction established by Isaiah Berlin but that can be traced back to Kant; negative freedom is also associated with British philosophers such as Locke, Mill, Hobbes and

Smith and positive freedom with continental philosophers such as Hegel, Rousseau, Marx and others. This also explains the central aspect of consent in the construction of rape through the violation of sexual autonomy. We stress that a person's autonomy is neither fixed nor static, instead it is considered elastic and changeable and takes its point of departure from his/her everyday life perspective. We do not believe that the solution lies in legal constructions or in pointing out their shortcomings. Our intention is to contribute to more ways of understanding a person's autonomy in the general sense (although this article takes sexual offences as a starting point for the discussion to show how it can be used in a normative analysis) and increase the knowledge of legal actors about a victim.

Burman has discussed the debates on the legal construction of rape and emphasises that the fundamental dimensions of gender, power, sexuality and equality have hardly been addressed or recognised in Swedish law or policy-making processes. She argues that this is noticeable because equality, gender and power have had a significant impact on legislative and policy work on men's violence against women (Burman 2010). However, we would like to stress that the latest reform, i.e. the current voluntary-based legislation, includes a more nuanced perspective of gender equality and sexuality, although it fails to properly include a power perspective, which we will return to below. Andersson has been discussing the legal construction of rape thoroughly. She takes a wider approach in her analysis and discusses criminal legislation on violence against women from a structural and vulnerability perspective. She highlights the possibilities for and importance of including structural perspectives in criminal law. She argues that the subject should be contextualised and dealt with in relation to different aspects of power imbalances to ensure her opportunities to utilise the legal protections she should be guaranteed. This would also diminish

the conflict between criminal law and policy work on violence against women and take away some of the obstacles that are specifically linked to the criminal process and evidence in these cases (Andersson 2011:431).

From a historical and cultural perspective, the shift from defining rape as a moral crime to a crime that recognises and protects personal and sexual integrity has been an important symbolic movement in admitting women's sexual autonomy (Fenton 2010). On the one hand, sexual autonomy is fundamental to women's status and right to sexual self-determination and, on the other, the notion of sexual autonomy is problematic. Niemi argues that the Finish legislation on sexual abuse over time shows that the main and explicit interest to be protected during the 1990s was the right to sexual autonomy, which builds on the liberal idea of the autonomous subject (Niemi- Kiesiläinen 2001). Sexuality is described as an act exchanged between two equal parties, but at the same time most sex crimes are defined by unequal power relations, where the victim is a minor, or in some other way vulnerable (Niemi-Kiesiläinen 2001). In addition, Swedish legislation to a large extent addresses situations in which an act is committed in a relationship of inequality. The line that divides an erotic and mutual sexual act between two independent and autonomous individuals and a context of unequal power and vulnerability is also crucial to our later analysis.

We wish to return to this discussion in relation to an analysis of *different* and possibly *opposing* ideas of autonomy in law. By *different*, we mean the difference between self-determination in a more general sense (to make decisions in various situations in everyday life) and the narrow concept of sexual self-determination that needs to be protected from the offence of rape. By *opposing* ideas, we mean the traditional idea of autonomy and our suggested concept of lived autonomy.

2.4 An everyday life perspective

The concept of everyday life perspective is rooted in feminist theory and is primarily associated with Smith (Smith 1987). Everyday life is both an object of study and a scientific perspective (Svedberg 2013:54). Smith divides the world into two spheres, i.e. the world of ruling and the everyday world. The channels of expression in the world of ruling are texts and discourses (such as science, media, politics, etc.). This sphere is dominated by men and men's perspectives. The second sphere, the everyday world, occupies a large part of people's lives and consists of routines that are repeated from day to day, a world in which women's work and activities are largely linked. Smith emphasises that in the everyday world we are subjects and active (human) beings, whereas in science we are instead objects. Svedberg, who has interpreted Smith, argues that the concept should also be seen as a critique of scientific knowledge and its claim to objectivity and universality (Svedberg 2013:55).

The concept of an everyday life perspective as a theoretical analytical concept was introduced in legal research by Svedberg in 2013, showing how an everyday life perspective can be used in legal research.⁶ Since then, the concept has been applied in legal research by Pettersson followed by Bladini,⁷ and recently by

6. Svedberg applied the concept in the analysis of *if* and *how* the political goal of a gender-equal transportations system is transferred to the legal fields that are pointed out as important to promote and achieve a gender equality transport system. One of her conclusions is that the political goal in itself is characterised by male experiences and typical male life patterns. In addition, she states that the transport policy gender-equality goal is not transferred to the legal fields that explicitly affect women's and men's opportunities to shape society and their own lives and thus live gender-equal lives (Svedberg 2013).
7. Pettersson used the concept to analyse the right to transport in everyday life for people with

Bladini and Svedberg Andersson to analyse the Swedish rape legislation.

Inspired by Smith, we use the concept of everyday life perspective to capture the human being as a subject rooted in everyday life. We see everyday life as time and context bound. In addition to Smith's daily routines and activities, we want to add cognitive and bodily memories,⁸ as well as symbols, patterns, knowledge and experiences. These are aspects of everyday life that we use as active subjects to express, for example, will, desire and needs. These aspects, perceived as well as inherited and shared memories, knowledge and experiences, can also be obstacles to expressing our will, desire or need.⁹

disabilities in Swedish, Danish and Norwegian Law showing that social citizenship does not strengthen the independence and individual autonomy of those who depend on the various legal provisions to meet their transport needs in their everyday lives (Pettersson 2015). Bladini applied an everyday life perspective in analyses of online abuse targeting women to show how it silences women's voices (Bladini 2021).

8. In this part, we are inspired by Listerborn and her concept 'the body as a situation'. She argues that the body should not be seen as an object but as part of a context and discourse. Her concept explains women's fear and has been developed and used in the context of physical space. This fear is based on knowledge of women's bodies as situated in our culture, i.e. vulnerable and subordinated through male violence. The knowledge of atrocities committed against other women around the world and over time is the situation that our bodies are placed in, where violence is understood as a male action. The female body contains lived memories and experiences. These bodily experiences constitute the context that contributes to reproduce power relations between the sexes (Listerborn 2002).
9. It can be noted that the concept of lived autonomy is somehow related to Cornell's imaginary domain, which stresses that one's personhood is never assumed as given but rather as an ongoing process throughout one's lifetime. In this part she is building on Lacan (Cornell 1995). This, in turn, puts the light on Lacey's

With an everyday life understanding of autonomy, we want to emphasise the lived aspect of autonomy. In contrast to the traditional view of autonomy, this means, *firstly*, that we consider the concept of autonomy as relational. In addition, and *secondly*, that the concept of autonomy is seen as time and context bounded. This view of autonomy means that it is seen as a process in which autonomy is constructed and delimited in and against the background of an individual's everyday life. In sum, an individual's autonomy (its range) varies and is elastic, as opposed to the traditional notion of autonomy in which it is static. We believe that lived autonomy can make power relations visible. In relation to the rape legislation, we try to problematise the prerequisite voluntariness by applying the concept of lived autonomy (everyday life-based understanding of autonomy), since the assessment of whether someone participates voluntarily is closely linked to the view of autonomy. More specifically, a person's ability to express her will (autonomy) depends on her everyday life.

3. Rethinking autonomy – Lived autonomy in development

In this section we wish to describe our concept of lived autonomy. This will be done using traditional autonomy as a backdrop and its use as an analytical tool illustrated in relation to the new rape offence.

idea of sexual integrity that builds on Cornell's work on the imaginary domain (Lacey 1998:118) as this domain creates the political as well as psychic sphere within which sexual equality is realised and where freedom and the ability to choose is re-framed as mutuality of relationships and responsibility between individuals (Lacey 1998).

3.1 Introducing lived autonomy

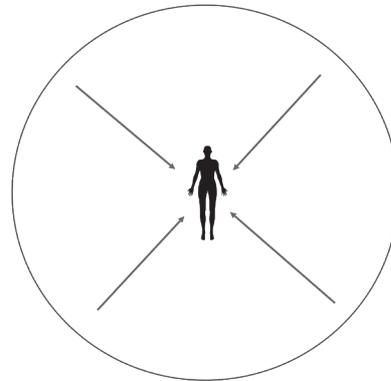


Figure 1 illustrates the traditional autonomy.

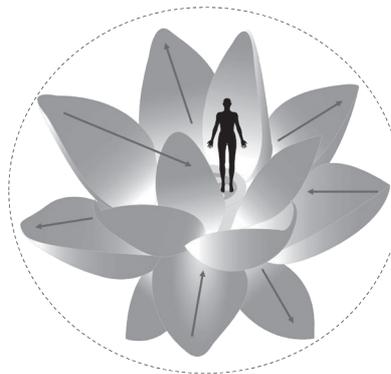


Figure 2 illustrates the lived autonomy.

The first figure illustrates traditional autonomy as the dominant idea in law, i.e. an individual capable of making rational decisions detached from her context, as described in section 1. She is placed at the centre of a circle, representing her autonomy, which is both wide and static, and as suggested by Kant, in which free will is fully accessible and defined by logic and reason. This is the starting point for the liberal idea of autonomy as we understand it. It means that she is able to access and express her will, desire and needs. A critical reflection on this view of the subject shows that she is placed in a vacuum, not settled in time and space and she is unrelated to others. However, this view does

recognise certain situations that undermine the autonomy of the subject and her abilities to express her will. Nevertheless, the starting point for the analysis is to seek demarcations and coercive circumstances from the outside/the surroundings and not with the subject herself, as the arrows in the figure illustrate. This means, according to this view, some surrounding factors may affect the sphere (i.e. the autonomy of the subject). With such a view of autonomy as the point of departure in legal research, it becomes more difficult to make visible power relations and vulnerabilities, and hence to account for them, as the tools become too narrow.

The second figure illustrates the suggested understanding of lived autonomy. It is symbolised as a flower to underline the lived aspect, i.e. everyday life as discussed in section 2.2.2., containing daily routines and activities, cognitive and bodily memories, symbols, patterns, knowledge and experiences. The lived aspects are not delimited in time by a specific event but recognised in relation to the whole lifetime of a person. We argue that these aspects are foundational to autonomy (as it diminishes or expands) and hence the ability or inability to express will, desire and needs. This means that the individual and her autonomy are placed in the everyday world rather than outside of time and space as well as relationships. In contrast to the traditional view, the starting point when addressing and analysing the subject and her autonomy is two-fold, taking the internal perspective as a starting point and the external factors as additional. In this sense, lived autonomy provides an opportunity to comprehend more aspects and situations when autonomy is limited.

The petals of the flower illustrate that autonomy is constantly changing, thus showing that an individual's autonomy is elastic. The expansion or demarcation of autonomy is illustrated by the length of the petals. As is well known, a flower can fade, but with good soil it can flourish. The same applies to a person's autonomy. It can be reduced or expanded over time due to

the relational and situational context and depends on an infinite number of factors, of which coercive circumstances and vulnerabilities are only a few. A person's autonomy also changes over the course of his/her life: a young person might have delimited autonomy compared to an adult. In our critique of traditional autonomy, we reject the idea that all flowers could grow, evolve and flourish equally, irrespective of soil and climate conditions.

3.2 Using lived autonomy

In this section you will find a draft analysis of the requisite of voluntariness through the lens of lived autonomy to illustrate how the concept can be used in legal research. However, we will start with a methodological reflection.

In a previous article, we used an everyday life perspective as a methodological analytical tool, taking the material for analysis as given. This means that the preparatory work was used as normative material. As such, it is assumed to contain statements about the purpose of the law as well as how a certain legal rule, i.e. the rape legislation, is to be interpreted and applied.

This fact, that the preparatory work constitutes a normative material, should not be confused with the possibility of using the everyday life perspective (or lived autonomy) as a normative concept. We would like to emphasise in particular that this is not necessarily the purpose of the concept, even if it can be used for normative analysis. However, by using the everyday life perspective in analyses of law and its application, different power relations can be made visible in terms of, e.g., whose everyday life (e.g. whose knowledge and experience) is valued and prioritised. Here we refer to the conclusions that can be drawn from such an analysis and which, like the concept of everyday life perspective (or lived autonomy), can also be perceived as normative statements. However, the theoretical starting points are based on feminist legal studies that in turn have an impact on the aims of this article. Our purpose is not

to rewrite the law or replace the liberal autonomy with a lived autonomy but to contribute to several understandings of autonomy within legal research, where the concept, among others, should be considered as a valuable theoretical, methodological and analytical tool.

Let us look at the regulation of rape, starting with the first and second sentences of the offence as regulated in the Swedish Criminal Code (SCC) 6:1: "A person who performs sexual intercourse, or some other sexual act that in view of the seriousness of the violation is comparable to sexual intercourse, with a person who is not participating voluntarily is guilty of rape [...]. When assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way."

These sentences tell us that participation must be voluntary. Current rape legislation, based on voluntariness, entered into force on 1 July 2018. The most important change proceeding from this prerequisite is the shift of responsibility for rape from the victim to the perpetrator. We consider this a great step forward as it sends a strong normative message that a woman's body is unavailable until she says 'yes'.

Despite these efforts made to strengthen personal and sexual integrity and sexual self-determination, we stress that the concept of voluntariness is problematic, as we have already pointed to above. We argue that the ability to express voluntariness is an emanation of autonomy, which in turn is elastic and affected by a great variety of aspects (from everyday life). If we go back to Figures 1 and 2 to illustrate autonomy, we argue that the soil and climate conditions for the flower (autonomy) affect the ability to express will. A quote from Munro gives an illustrative picture of the challenges of voluntariness that traditional autonomy fails to capture and handle:

The terrain of (hetero)sexual negotiation has historically been far from equal, and broader dynamics of gender power, relationship norms, and social expectations can permeate consent in ways that dress capitulation with the trappings of affirmation.¹⁰

With the concept of lived autonomy, we can capture the challenges that Munro is pointing at in the quote.

If we return to the regulation of rape and look at the third sentence on the offence, in which the legislation also addresses some serious situations where unequal powers are recognised, we see that voluntariness in those situations is void. The legislation mentions three situations: the *first* is the use of force, such as assault, other violence or threat; the *second* is when the perpetrator improperly exploits the fact that the person is in a particularly vulnerable situation due to unconsciousness, sleep, grave fear, the influence of alcohol or drugs, illness, bodily injury, mental disturbance or otherwise in view of the circumstances; and the *third* is when the perpetrator abuses the fact that the victim is in a position of dependence in relation to the perpetrator. These situations are recognised as *serious* violations of the victim's right to self-determination and personal as well as sexual integrity.¹¹ We argue that this

10. The quote comes from Munro (2015) p. 5 and frames our concept of lived autonomy in an illustrative way.

11. It should be noted that the list of circumstances, i.e. in all three situations, in which participation can never be considered voluntary under the provision on rape is exhaustive in the sense that it includes all circumstances whose occurrence means that participation can never be considered voluntary, but it is not exhaustive in the sense that there may be other situations in which participation is involuntary, but these situations are then (technically) assessed according to the first sentence of the provision: "A person who performs sexual intercourse, or some other sexual act that in view

shows that the rape regulation recognises that a victim's autonomy is sometimes diminished in the ways that our concept of lived autonomy seeks to capture, although lived autonomy encompasses many more situations by taking its starting point in everyday life.

Even though the legislation reveals such a perspective in these specific situations, there is a grey area between the voluntary situation and these three specific non-voluntary situations. How this grey area should be handled has been left to the courts to decide in the light of the expressions of voluntariness made by the victim and the situation as a whole (Gov. Bill (2017/18:177):78). In this assessment of voluntariness, the dominant view of autonomy is crucial to the question of whether or not someone participates voluntarily as it might affect the outcome of the case.

In the concrete situation, in other words if the court uses lived autonomy as its starting point, which is relational and time and context bound, a court can take the victim's everyday life into consideration when applying the prerequisite of voluntariness. The assessment of whether the victim has participated voluntarily or not will hence include her ability to express her will, desire and needs based on everyday life, i.e. routines, activities, perceived, inherited and shared cognitive as well as bodily memories, symbols, patterns, knowledge and experiences. Let us give an example, a young woman suffering from self-harming behaviour as a re-

of the seriousness of the violation is comparable to sexual intercourse, with a person who is not participating voluntarily is guilty of rape" (Gov. Bill 2017/18:177 p. 38).

Another point is that the circumstances listed in the second paragraph (cases of exploitation) are not exhaustive which can be inferred from the phrase "or otherwise having regard to the circumstances". The assessment of whether the victim has been in a particularly vulnerable situation is based on the situation as a whole (Gov. Bill 2017/18:177 p. 82).

sult of a traumatic experience, which the perpetrator is aware of, might, in Munroe's words, "permeate [her] consent in ways that dress capitulation with the trappings of affirmation". The same situation can occur in the case of a woman who has been in a violent relationship for a long time and experienced an everyday life of violence, threats and serious violations. In this case, the question of whether she has participated voluntarily in sexual activities can be strongly questioned.¹² If lived autonomy is used when assessing voluntariness in the cases above, it seems obvious that autonomy is diminished due to the victims' cognitive and bodily memories, symbols, patterns, knowledge and experiences. Referring to the examples, on an abstract level the concept of lived autonomy allows us to discover and consider power imbalances between parties.

The assessment of the prerequisite, to determine voluntariness in the light of expressions in word or deed, can be read as an expression of traditional autonomy. As the expression of voluntariness through word and deed takes for granted that an individual has the capacity to 1) know what she wants and, more importantly, 2) express her will, in the sense that she is able (or choose) to say yes or no. Consequently, it is possible to interpret the third sentence in the legal construction as recognition of lived autonomy, and the rest of the legal construction of rape clearly takes traditional autonomy for granted. To illustrate how the concept of autonomy in

12. Note that these cases are examples of how to assess voluntariness in various ways, but it does not necessarily mean that all situations would constitute rape, but that it is a way to handle and make visible various forms of non-voluntariness in different situations. Some of them might be assessed as other forms of sexual offences and some might fall under the scope of rape. What we suggest is that this tool makes these evaluations more nuanced as it is possible to take into account many more forms and varieties of voluntariness-non-voluntariness.

present rape legislation can be understood in relation to the other two (Figures 1 and 2 above), we use this figure:

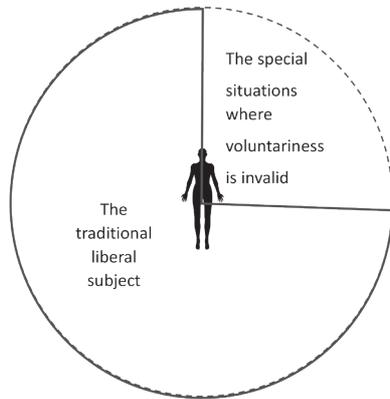


Figure 3 illustrates the autonomy of the victim in the new rape law.

The point of difference is that she has a wide and static right to personal and sexual integrity and a clear and accessible opportunity to exercise her self-determination (a wide and static autonomy).

This figure illustrates how autonomy is expressed in rape legislation as we see it. The conceptualisation of autonomy in rape cases is built on the traditional one, despite the explicitly expressed derogations: use of force, a particularly vulnerable situation or a serious abuse of the victim's dependence on the perpetrator. All other possible situations that can occur in everyday life are interpreted in the light of traditional autonomy and, hence, fail to recognise the dress of capitulation behind the trappings of affirmation.

4. Conclusions and reflections

Autonomy is at the core of law, and the prevailing idea of human beings in law is built upon the liberal subject. She is rational, wise and free to make decisions without being subordinate to others. Hence, her autonomy is wide and static, see Figure 1 above. There are of course plenty of

exceptions, when imbalances of power are obvious and recognised by law. One example is protection regulations, such as the special laws regulating business-to-consumer, landlord-tenant and employer-employee relationships. All these power imbalances recognised by the law are in some way both obvious (i.e. the power imbalances are significant), constant and defined by certain predetermined categories. Hence, only in these situations is the law able to recognise and admit that a subject has a demarcated autonomy. In other situations, the law assumes that a subject has full autonomy in accordance with the liberal idea. In effect, the liberal view of autonomy is incapable of discovering, or handling, other types of power imbalances. As we maintain that autonomy is constantly changing due to time-and space-bound contexts, we suggest the concept of lived autonomy as a theoretical tool for legal analysis to discover and handle, if necessary, other situations of unequal relationships.

This view of autonomy, lived autonomy, builds on an everyday life perspective and is a process rather than a state in which autonomy is constructed and delimited in and against the background of each individual's everyday life. Everyday life involves regular routines and activities, perceived as well as inherited and shared cognitive and bodily memories, symbols, patterns, knowledge and experiences. These aspects are foundational to our autonomy (as it diminishes or expands) and hence the ability or inability to express will, desire or need.

To show the usefulness of the concept, we started with a brief analysis of the new rape legislation constructed around the requisite of voluntariness. The analysis shows that the rule takes as a general starting point the idea that the subject has access to and the ability to express her will. The implication is that her voluntariness is primarily assessed by the courts in relation to how she expressed it by word or deed. There are three exceptions in which the autonomy of the subject is clearly demarcated

by the use of force, vulnerability or dependence in relation to the perpetrator. This construction is similar to the protective legislations mentioned above, as these situations are obvious and defined by predetermined categories. The courts are hence left to assess voluntariness in all other situations. We argue that a starting point of lived autonomy would be helpful as it can reveal various ranges of autonomy (voluntariness/non-voluntariness) to undress affirmation and make capitulation visible.

Finally, we argue that this tool makes it possible to recognise and account for the fact that not all flowers could grow, evolve and flourish in the same way irrespective of soil and climate conditions.

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