

Sentencing regarding sexual abuse of minors

Demanded and imposed sentences and sentencing reasoning concerning paid and unpaid sexual acts involving minor victims in the Netherlands, Germany, Switzerland, Ireland, and Scotland

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Summary

This study focuses on demanding and imposing sentences for hands-on sexual abuse of minors. For the purpose of this study, sexual abuse of minors is defined as the behaviour described in sections 244 (sexual penetration of a victim under 12), 245 (sexual penetration of a victim between 12 and 16), 247 (indecent assault concerning a victim that is unconscious, physically unable or under 16), 248b (make use of sexual services of a 16 or 17-year old for a fee) and 249 paragraph 1 (sexual abuse in a position of trust) of the Dutch Penal Code. In total, 713 judgments, passed between 2015 and 2019, were analysed, in which male adult perpetrators have been convicted for sexual abuse of one or more minors.

The actual sentences demanded by the public prosecutor were inventoried in each of the 713 cases. With respect to a stratified sample of 180 cases, it was also analysed to what extent and why the demanded sentences differ from the guidelines established by the public prosecution department. Furthermore, it was analysed to what extent sentences imposed by a court differ from the demanded sentences and the prosecution guidelines. The Dutch maximum statutory sentences and imposed sentences concerning sexual abuse of minors were compared to those in Germany, Switzerland, Ireland, and Scotland. Finally, the features of perpetrators of child prostitution (section 248b Penal Code) in Dutch criminal cases and the demanded and imposed sentences in those cases were investigated. For this purpose, the criminal files of 60 convicted perpetrators were studied.

Cases of sexual abuse of minors

Most of the 713 analysed cases concerned oral, vaginal or anal penetration of a victim by the perpetrator or forced penetration of the perpetrator by the victim (60 percent). The remaining cases related to penetration in different ways (16 percent), touching nude genitalia (16 percent), different forms of sexual touching – like touching genitals while the victim was dressed or touching nude breasts – (6 percent), and digital forms of sexual abuse, in which the victim was forced to perform sexual conduct with itself, for example in front of a webcam (1 percent). In three-quarters of the cases, the victim was abused more than once. The average age of the perpetrators was 39 years ($sd = 3.7$) when the abuse started. With respect to over one-quarter of the perpetrators psychological problems were reported, as a personality disorder of paraphilia. The 713 perpetrators together made 1,165 victims, of whom three quarters were female (78 percent). The average age of the victim when the abuse started was 11 years ($sd = 4.0$). 28 percent of the perpetrators were a (step) family member to the first or second degree. One out of five victims met the perpetrator via the internet.

Perpetrators who penetrated the victim by a genital organ were younger than perpetrators who conducted different types of indecent behaviour. There is no connection between the type of sexual abuse and personality disorders or paraphilia of the perpetrator. The different types of sexual conduct do not lead to differences in criminal liability as established by the courts. The average age of the male victims at the start of the sexual abuse is lower than the average age of the female victims. Victims whose nude genitalia were touched are younger than victims of penetration, by a genital organ or otherwise. There is a connection between the type of abuse and the type of relationship between the perpetrator and the victim: penetration by a genital organ mostly occurs when sexual abuse takes place within an affective relationship, followed by internet contacts and abuse by a member of the family to the first degree.

In 27 percent of all cases, an unsuspended prison sentence was demanded, in 63 percent a partly suspended prison sentence, and in 9 percent a completely suspended prison sentence. In the remaining cases community service (1 percent), a fine (0.1 percent), finding of guilt without the imposition of a sentence (0.1 percent), or acquittal was demanded. In three-quarters of the cases, the modality of the sentence (suspended or not) corresponds to the demanded modality. Penetration by a genital part is more often sanctioned by a completely unsuspended sentence and less often by a completely suspended sentence, compared to different forms of indecent assault. The unsuspended part of the prison sentence imposed is higher as the period in which the abuse took place is longer, and the number of victims is higher. In 8 percent of the cases, an entrustment order was imposed, mostly next to an unsuspended prison sentence. In 57 percent of all cases, the court decided that the convicted person had to respect special conditions. The conditions determined by the court most often are the duty to report to the probation service, ambulant psychological treatment, and prohibition to contact the victim.

The prosecution guideline provides a sentencing range per type of indecent behaviour. For example, the sentencing range with respect to penetration by a genital organ is 15 to 48 months of imprisonment. In 46 percent of the cases in which was penetrated by a genital organ, the demanded sentence was under the bottom limit of the sentencing range, in 44 percent, the demanded sentence was within the sentencing range, and in 11 percent, it exceeded the upper limit of the sentencing range. In cases of touching nude genitalia and penetration in a different way than by a genital organ, the demanded sentence is lower than is indicated by the guideline: in 51 percent under the bottom limit of the sentencing range, in 44 percent within the range, and in 5 percent exceeding the upper limit. Since the reasons of the public prosecutor for demanding a specific sentence is virtually absent in judgments, it is difficult to explain why prosecutors often deviate from the guideline. However, it is possible to identify factors that were considered relevant for the imposition of a sentence from the sentencing reasoning by courts. It is assumed that prosecutors find the same factors relevant as courts do. It is expected that a more severe sentence is demanded if more aggravating factors and fewer mitigating factors occur. However, in cases concerning touching or penetration other than by a genital organ, there is hardly any connection between aggravating and mitigating factors on the one side and the duration of the demanded unsuspended imprisonment on the other side. However, with respect to penetration by a genital organ, a connection was found between sentencing factors and the duration of the demanded prison sentence: in cases in which relatively many aggravating and less mitigating factors occur, higher prison sentences are demanded.

Comparative law

Dutch law and practice were compared to the law and practice in Germany, Switzerland, Ireland, and Scotland. These countries all have legislation in which equivalents of the criminal offences involved in this study are penalized. The legal definition of the crimes differs strongly between the countries. In order to allow a comparison of the statutory sentences in the best possible way, it was established in what legal provision sexual behaviour is penalized that would constitute the offences of sections 244, 245, 247, 248b or 249 paragraph 1 of the Dutch Penal Code, along with the statutory sentences.

The comparison makes clear that the statutory sentences in the Netherlands are a little more severe than those in Switzerland and a little less severe than those in Germany. At the same time, they are considerably higher in both Ireland and Scotland. For example, the maximum statutory sentence for penetration of a child under 12 (without aggravating circumstances) is 10 years in Switzerland, 12 years in the Netherlands, 15 years in Germany, and lifelong imprisonment in Ireland and Scotland. In Germany, not only a maximum penalty but also a minimum penalty of 2 years imprisonment is determined. In order to be able to interpret the results of the comparison, a comparison of statutory sentences regarding three different types of criminal offences was made: theft, robbery, and abduction and this resulted in the same ranking of the countries: Switzerland, the Netherlands, Germany, Ireland, and Scotland, Switzerland being the country with the lowest maximum statutory sentences. It is concluded cautiously that the differences in statutory offences can be explained largely by differences in the sanction climate. The foreign countries seem to have higher statutory sentences not only for sexual offences with minor victims but also different types of offences.

In order to be able to survey the actually imposed sentences, judgments by foreign courts are collected. Compared to the Netherlands, judgments are published (publicly accessible) in minimal numbers in foreign countries. As far as judgments are published, they appeared not always usable for this study since often relevant facts are not mentioned. For example, the age of the victim and relevant details of the offences sometimes fail. The primary goal was to collect judgments by first instance courts. However, they appeared to be published in Germany only. Therefore, with respect to Switzerland, Ireland, and Scotland, judgments by appeal courts were collected. In some appeal judgments, the relevant contents of the judgment in the first instance were mentioned. If the appeal court overruled the judgment in first instance, only the appeal judgment was taken into account. Finally, a number of Scottish so-called sentencing statements were studied, statements delivered during a public hearing by the sentencing judge.

In total, 46 German judgments, 50 Swiss judgments, 68 Irish judgments, 37 Scottish judgments, and 11 Scottish sentencing statements were selected. The sentencing method differs strongly between the countries. In almost every case, the accused was found guilty of more than one offence. If that is the case, in German and Swiss judgments, first, an appropriate sentence per offence is determined. Next, one sentence for all proven offences is determined based on cumulation principles. Usually, separate sentences are determined in Ireland too. The court next determines whether these sentences will be executed concurrently or consecutively. In Scottish judgments, sometimes separate sentences per offence are mentioned, maar in most of the cases the judgment contains only one total sentence for all proven offences. These sentencing methods make it possible to identify both the appropriate sentence per offence and the imposed sentence for all offences together.

All selected judgments were inventoried: the proven sexual offences with minor victims, the victim's age, the appropriate sentence per offence, and the imposed total sentence were identified. In order to make the sentencing comparable to sentencing in the Netherlands, it was determined for each proven offence, what Dutch offence it would have constituted. Next, per country, a chart was drawn in which the sentencing for specific types of sexual behaviour was mentioned, both sentences per offence and total imposed sentences. With respect to the total sentences, it was mentioned what parts were imposed as a suspended sentence. Finally, the results of the foreign countries were compared to the results of the Dutch part of this study. It is important to interpret the results with scrutiny because of the relatively small amounts of judgments and the differences between the countries how the sentences are determined and executed. Only a general picture can be derived from the charts presented.

The analysis of the selected judgments shows that Dutch (total) prison sentences are comparable to those imposed in Switzerland. However, in Switzerland often fines are imposed instead of prison sentences, often completely suspended, in case of less severe offences, even concerning less severe cases of sexual penetration. The statutory offences in Germany are comparable to those in the Netherlands. However, the average total imposed sentences are considerably higher in Germany. The average (total) sentence for vaginal penetration of a minor under 12 by a genital part (section 244 Penal Code) is punished twice as severe as in the Netherlands. If the victim is under 16 (section 245 Penal Code), the same behaviour is punished even 6 times more severely than in the Netherlands. The meaning of these figures must be put into perspective because of the limitations of the study mentioned before. Still, the picture arises that the same types of behaviour are punished more severely in Germany, compared to the Netherlands. Although in Scotland, lifelong sentences can be imposed for many of the offences involved in this study, the total executable parts of the sentences imposed in Scotland are about as high as in Germany. Irish courts impose sentences that are by far the most severe of all countries studied. The Irish sentences for penetration of a victim under 12 respectively 16 years of age – again based on a limited number of judgments – are four respectively eight times higher than Dutch sentences. It is conceivable that countries in which more severe sentences are imposed have a generally more severe punishing climate, meaning that for different behaviour comparable in severity, higher sentences are imposed too, and this has not been the subject of this study.

Sexual abuse in return for payment

Because of the special features of sexual abuse on payment of a charge, all cases in which an adult man was convicted for paid sexual abuse of a 16 or 17-year old (section 248b Penal Code), were studied separately. 75 convicting judgments passed between 2015 and 2019 were analysed, and in 60 of these cases, the case files were studied. The 60 files concerned 29 victims; in 15 cases the victim was only involved in that specific case. Some victims had paid sex with several men. For this reason, more cases concern the same victim. For example, 24 men were convicted for having sex with the same girl. In most cases, the perpetrator was convicted for penetration by his genital part (80 percent). The other cases concerned touching nude genitals (usual masturbation of the perpetrator; 18 percent) or having the victim defecating in the perpetrator's mouth while he was sucking her anus (2 percent). In most cases, the perpetrator had sex with the victim once (68 percent), sometimes twice (17 percent), 3 times (3 percent), or more often. Most customers contacted the victim through a sex website (87 percent), where the victim or a pimp placed an advertisement. In a small number of cases, the perpetrator placed an advertisement, looking for someone to have sex. In the remaining cases, perpetrator and victim met outside of the internet, or it did not become

clear from the case files in what way the contact had come about. Customers paid between 50 and 175 euros (average: 93 euros) per meeting. In general, the fee was higher in case of longer duration of the meeting, more extensive sexual activities, and sexual acts without a rubber.

In general, customers lived a good life. More than half of them were married or were in a relationship, almost all of them had a job or attended education (94 percent). Almost none of the perpetrators used drugs. For most of the perpetrators, the Probation Services estimated the risk of a future crime to be low (87 percent). With respect to the remaining perpetrators, the risk of re-offending was estimated as average (8 percent) or high (5 percent). Almost half of the perpetrators had visited a prostitute before. Reasons for visiting a prostitute were, among other things, relaxation, sexual problems within a relationship, and sexual desires by perpetrators without a relationship. With the exception of one perpetrator, all of them stated during police interviews that they had not been looking for a minor prostitute specifically.

There is a big gap between the modality of the sentence (suspended or not) demanded by the public prosecutor and determined by the court. The prosecutor usually demanded an unsuspended part of the prison sentence between 3 and 6 months (77 percent), whereas courts in three-quarters of the cases (75 percent) imposed an unsuspended prison sentence of one day, in most cases combined with a suspended prison sentence and community service. Community service is demanded in a small number of cases, whereas it is imposed in three quarters of the cases (76 percent). Courts imposing a prison sentence of one day almost certainly do so in order to meet the requirements for imposing community service, which is, as a rule, prohibited in case of conviction for this offence. The prosecution service introduced a prosecution guideline regarding sexual abuse of a 16 or 17-year old for a fee. The sentencing range for sexual conduct without penetration is 1 to 6 months of imprisonment in the guideline. In almost all studied cases falling within this category, the public prosecutor demanded a sentence within this range. In case of oral, vaginal, or anal penetration, the sentencing range mentioned in the guideline is 6 to 15 months of imprisonment. In 75 percent of the penetration cases, a sentence under the bottom limit of the range is demanded. In the remaining 25 percent of the cases, a sentence within the sentencing range is demanded.

Concluding remarks

Sexual abuse of minors is a very severe criminal offence, which affects the victims drastically and often for an extended period of time. This study shows that demanded and imposed sentences for sexual abuse of minors are often lower than can be expected based on the prosecution guidelines, even in case of aggravating circumstances. This conclusion is, in general, valid for sexual abuse of minors. It is even more valid in cases of child prostitution, as the demanded and imposed sentences are substantially more lenient than can be expected from the applicable prosecution guideline and judicial guidelines. In some European countries, more severe prison sentences are imposed for sexual abuse of minors. However, it is important to realise that the general sentencing climate in those countries appears to be more severe. It must be emphasized that this study did not address the effectiveness of sanctions. For that reason, this study provides no basis to reflect on the issue of what would be an appropriate sanction or intervention for such offences.