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Children's rights, online sexual abuse and the exploitation of children

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ESSAY 6

CHILDREN'S RIGHTS, ONLINE SEXUAL ABUSE AND THE EXPLOITATION OF CHILDREN

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1. Introduction

In days gone by, we had our first kiss behind the bike shed in the schoolyard. These days, young people largely live their lives online — and their sexual development has shifted into the digital realm too. Adolescents today are constantly experimenting with their sexuality in online environments, by sharing sexually explicit images with each other, for example. Unfortunately, this otherwise healthy experimentation behaviour is often exploited for nefarious purposes. Setting boundaries and respecting them is even more crucial online than it is offline. When those boundaries are crossed online, the consequences go further than the psychological impact alone — the images in question often linger online for a long time to come. For that reason, the UN Convention on the Rights of the Child (CRC) — stipulates that children are entitled to protection against sexual exploitation and sexual abuse (Article 34 of the CRC), both online and offline (Article 25 of the CRC)¹. Because the topic of sexual abuse and sexual exploitation stirs up such strong emotions, it is also an offence that is treated with little nuance in the public discourse. As a result, the human rights of (possible) perpetrators barely receive any consideration,

and there is little appetite for understanding the position in which they may find themselves².

In this essay, we will take a closer look at recent developments in terms of the regulations around online sexual abuse of children in the Netherlands and Europe. We will analyse how legislation efforts are mainly geared towards the right of the child and protection against all forms of sexual abuse and sexual exploitation (Article 34 of the CRC). Next, we will demonstrate how such a limited perspective overlooks the complex interplay between the different children's rights under the CRC, in particular Article 16 and Article 6. We will also reflect on how this development stands in the way of finding the answers we need when it comes to the complex issue of online sexual abuse of children. We will conclude this essay with a range of specific recommendations on how stakeholders at both Dutch and European level can adopt a holistic approach toward the rights of children when formulating prevention and response mechanisms in relation to the online sexual abuse of children.

2. Current developments in the Netherlands

The mood in the Netherlands quickly turns sour when it comes to any association between underage children and sexuality. Dutch children receive age-specific sex education to prevent any sexual abuse. In these lessons, children learn how to respect the boundaries set by other people, and how sex forms part of a loving relationship. In the spring of 2023, sex education for primary school children suddenly became a topic of public debate. Poorly informed politicians fanned the flames of this discussion by suggesting that children as young as four were being confronted with sexuality that clearly was not appropriate for their age. One political party even argued that sex education had no place in the classroom, even though the Guidelines of the Committee for the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC/C/156, paragraph 56) stipulates that children should receive comprehensive sex education at all levels of the education system³.

Two significant entities are involved in combating the online sexual exploitation and sexual abuse of children in the Netherlands. Back in 1995, the internet industry set up a hotline for anonymous reports from the public and other hotlines around the world. At the time this hotline was set up, the images circulating mainly involved children that had been abused in a private setting. Over the course of the decade that followed, more and more material was reported that was created by children themselves. These were images they had sent to their boyfriends or girlfriends, and that were sometimes being published online without their consent. For that reason, the Child Pornography hotline set up the Helpwanted helpline to support victims. Using this helpline, children and adolescents could easily access the support they needed when material had been circulated online.

Even though images shared online can be regarded as illegal material, this does not always mean that any sexual abuse is involved. By 2017, 12% of adolescents had shared an intimate photo themselves over the course of the last six months. In 2012, this figure stood at around 5%⁴. There is no reason to think this figure has not gone up any further. Only a small percentage of these images lead to an unpleasant experience (in 6% of boys and 14% of girls)⁵. Even so, all these images are illegal under Dutch criminal law, as they depict underage children in a partially or fully undressed state or in a sexual pose. When the online sexual abuse of children

is being discussed, the voluntary nature of these types of images is barely considered. As a result, clear-cut and very necessary solutions — such as sex education, conversations around sexual experimentation online, the role of free pornography for adults and the protection of the privacy of the child — are often disregarded. To sum up, because the debate around the voluntary sharing of such images focuses so strongly on the protection of children, we are failing to note the other children's rights that play a role in this context, such as the right of children to privacy (Article 16 of the CRC) and the right to development (Article 6 of the CRC and others).

2.1. The Dutch legal context

What exactly are the regulations on online child sex abuse under Dutch law? The term used in Dutch legislation is the 'sexualization of children'. Before discussing the legal framework in more depth, let's turn our attention to Article 240b, clause 1 of the Dutch Criminal Code⁶, which reads as follows:

Any person who distributes, openly exhibits, creates, imports, passes on, exports or possesses an image — or a data carrier, containing an image — of a sexual act involving or appearing to involve a person who has apparently not yet reached the age of eighteen years will be penalized by a prison sentence of a maximum of four years or a Category 5 fine.

According to this provision, the sexual abuse of children, whether online or offline, includes images or devices containing an image of a sexual act involving a person who appears to be underage. The production of images showing online child sex abuse can take place in a range of ways, and different actors can be involved. This definition includes images that were voluntarily created in the context of a relationship and with each other's consent, abuse recorded online or offline by the perpetrator themselves or by someone else, or the production of this type of material for commercial purposes. On some occasions, children's heads are photoshopped onto pornographic images of adults. Computer-generated material and realistic cartoons that show children being sexually abused are also prohibited. Finally, this definition includes normal images of children that have been misappropriated, for example by zooming in on their genitalia. In other words, all sexual material showing someone who is or appears to be underage can be considered illegal.

The topic of consensual sexual exploration among adolescents has been subject to a significant amount of discussion over the past few years, including in the Netherlands. Objectively speaking, consensual self-generated sexually explicit material and child sexual abuse material depict the same behaviour. In both cases, sexual activity involving a minor is being shown. In many countries, provisions like the one quoted above do not allow for any distinction between the circumstances in which such material is produced. This type of law also criminalizes the production, distribution and possession of voluntarily generated sexually explicit material as child sexual abuse material⁷. Even when initially produced and shared with consent, self-generated sexually explicit material can leave adolescents at risk. Such material can be spread further among third parties outside the control of the child, or can be used in instances of bullying⁸. In view of these risks, the law argues for the criminalization of self-generated sexually explicit material, either as a child sexual abuse material offence or as a separate, less severe offence. This criminalization is thought to serve as a deterrent for the production of such sexually explicit material⁹.

However, by shifting our focus away from the right of children to protection alone, we can facilitate a more balanced approach toward age-appropriate adolescent sexual exploration and protecting adolescents from sexual abuse and sexual exploitation. In its General Comment 4 regarding the health and development of adolescents, the Committee on the Rights of the Child acknowledges that sexuality is part of the development of a personal identity. By the same token, the Comment recognizes the challenges facing adolescents in this regard¹⁰. Even though the development of a sexual identity has traditionally taken place offline, the digital environment¹¹ serves as an increasingly important domain for such activities, for example in the form of sharing sexualized or nude images, videos or text. Given the fact that adolescents often share this material on a voluntary basis as part of a developmental interaction, this needs to be considered in the law and in any policies in this area¹². The Committee on the Rights of the Child endorses this approach by stating clearly that the states bound by the Convention must not punish adolescents

of a similar age for consensual sexual activity online, including taking images of themselves¹³.

In response to the complex issues surrounding online sexual exploitation, and to help interpret the legal framework regarding online child sex abuse in the Netherlands, the Netherlands Public Prosecution Service has drawn up a directive to clarify how it will act in cases of this type. This directive offers a framework and rules for the approach to be taken to online child sex abuse and sex offences from a criminal law perspective. The wellbeing of the victim is the central tenet in this directive. As such, the voluntary sharing of image material is not regarded as a criminal offence, as long as the images in question have not been leaked. Once again, the position of the victim is the deciding factor.

The directive sets out in detail what is to be regarded as online child sex abuse. The Dutch Child Pornography Hotline also uses this directive. People who suspect they have come across child sex abuse online can use this hotline to report such images. In the event of a suspected criminal offence, the hotline sends a deletion request to the website and internet host via which the images or videos were published. For 95% of the reports made, the material in question is deleted within 24 hours. The hotline does not have the authority to launch an investigation into the owner of such images or the person who posted them online. Only the courts can do so.

Regardless, the distribution of images remains a difficult problem to tackle. In a case where an image of Mert*, then aged 13, was distributed, the Netherlands Public Prosecution Office initially decided not to prosecute, as per the directive. However, after Mert committed suicide, his parents demanded that prosecution take place, resulting in community service for two of the three suspects. As such, the distribution of sexually explicit images of minors can always result in a case being brought before the court, even when the exact details of the case fall outside of the public prosecutor's directive. What this case demonstrates is that the distribution of these images is not always innocent, but equally, that this phenomenon has now become so widespread that it cannot be adequately addressed under our criminal code.

* Name has been changed.

2.2. Recent changes in the Dutch legal context

On 4 July 2023, the House of Representatives adopted a new set of legislation on sexual offences. If approved by the Senate, approaching children under the age of 16 online for sex will be prohibited, unless this is done with mutual consent and the persons involved are over the age of 12. While the proposal was being debated, an amendment was adopted that brings the distribution of nude images without consent by the person(s) depicted under the new sex crime legislation. Legislation making it a criminal offence to distribute nude images online without permission — with intent to harm another person — had already been introduced at the start of 2020.

In addition, new legislation is currently being drafted to deal with online images showing the sexual abuse of children. This legislation instructs the new Authority for the Prevention of Online Terrorist Content and Child

Sexual Abuse Material (ATKM) to deal with any images showing the sexual abuse of children, in addition to online terrorist content. This shifts the fight against the online sharing of child sex abuse images away from criminal law and places it under administrative law instead. The idea behind this change is that it is much more difficult to deal with entities hosting websites on which this type of material is being distributed under criminal law than it is under administrative law. The ATKM will work closely together with the internet industry, and will also be authorized to address parties involved throughout the chain if the final distributor cannot be contacted or is unwilling to remove the material. The ATKM will have the option to hand out hefty fines or impose an order for regular penalty payments. This approach will ensure internet hosts can be dealt with more quickly and effectively.



3. Current developments in Europe

Online sexual abuse and the sexual exploitation of children is also a priority at the European level. In Europe, the public discourse has shifted towards the role of the private sector — more specifically, online platforms and internet providers — and their role in preventing and combating the online child sex abuse. Reports by various providers show that the sexual abuse of children via their services is a persistent problem that requires urgent attention¹⁴, prompting legislators at both national and European level to develop legislation that heightens their accountability.

It is against this background that on 11 May 2022, the European Commission published a proposal for a regulation laying down rules to prevent and combat material depicting child sexual abuse¹⁵ (hereinafter: the proposed regulation). The proposed regulation seeks to offer service providers legal certainty in terms of their responsibilities for assessing and mitigating any risks. Where necessary, providers will be required to take down known and/or unknown child sexual abuse

material. In addition, providers can be obliged to use technologies to identify any possible perpetrators who approach children with the intention of sexually abusing them (online grooming).

The proposed regulation received both widespread praise and criticism from a broad range of stakeholders. Some view the proposed regulation as a crucial step towards holding the private sector accountable for their role in acting on the sexual abuse of children that is taking part on their platforms. Others regard the proposed regulation as a Trojan horse that is set to introduce mass surveillance throughout the European Union. Once again, the impact of such regulatory measures is mainly being discussed from the perspective of the protection of children (Article 34 of the CRC). As a result, the right of children to privacy in terms of the confidentiality of their communication (Article 16 of the CRC) and the impact of such legislation on consensual online sexual exploration by children is not being considered.

3.1 Proposed European regulation

The regulation proposed by the European Commission on 11 May 2022 has significant implications for service providers. One major measure proposed under the regulation is detection orders. When a service provider runs a significant risk of their services being used for online child sex abuse — despite the fact that mitigating measures have been taken — the coordinating authority can demand that a detection order is issued to the service provider. This means that the service provider will be required to use tools to scan all content on their platform, including private communication, for any (possibly) illegal material. To support the implementation of the proposed regulation, an EU centre will be set up as an independent body of the European Union with legal personality¹⁶. This EU centre will facilitate the process of risk assessment, detection, reporting and removal. While some view the proposed regulation as a crucial step in holding service providers to account for their role in tackling online child abuse, others view it as a violation of the rights to privacy and data protection of both adults and children.

One aspect that has been largely overlooked in the debate surrounding the proposed regulation is the impact on sexual exploration by adolescents online. When a provider uses technical tools to detect potentially illegal material, all forms of sexually explicit material generated by children — with or without the consent of the user — may be flagged as potentially illegal material. These

reports may then be passed to national law enforcement agencies for further investigation. The technological tools used, which include artificial intelligence, are unable to determine whether a sexual image or video containing an adolescent depicts consensual sexual exploration, or sexual abuse or sexual exploitation. The gathering of further evidence and the identification of the context in which the images were created by the police and courts will prove to be crucial. Without these factors, the circumstances in which the material was produced cannot be taken into account, and no adequate qualification can be given.

Furthermore, there is a risk that online sexual exploration by adolescents will be subject to constant monitoring by private and public entities, which would constitute a breach of the right to privacy. Even though the measures are intended to protect children against online sexual abuse, the question must be asked — from a holistic children's rights perspective — whether the negative impact on online sexual exploration by adolescents can simply be disregarded as a negligible side effect. Our aim is to put up for discussion this exclusive focus on the protection of children from online sexual abuse in the proposed regulation. For that reason, we are proposing a holistic perspective on children's rights that accounts for the impact of this regulation on the other rights of children, more specifically their right to privacy (Article 16 of the CRC) and their right to development (Article 6 of the CRC).

4. Monitoring private communication

The UN Committee on the Rights of the Child posits that children and adolescents need to be able to express themselves sexually without any fear of legal consequences. However, the Committee has not clearly linked such sexual expression to one of the rights under the CRC, such as the right to privacy (Article 16 of the CRC) or the right to development (Article 6 of the CRC). The formulation of Article 16 of the CRC is modelled on Article 17 of the International Covenant on Civil and Political Rights. According to the UN Human Rights Committee, private sexual activity with the consent of an adult fall under the concept of privacy¹⁷. The right to development (Article 6 of the CRC) presents another potential reference point. In its General Comment no. 3, the UN Committee on the Rights of the Child states that the right of development should also focus adequately on the sexuality, behaviour and lifestyle of children¹⁸. As such, sexual development falls under Article 6 of the CRC 19. Even so, there is currently no clear commitment to consider children's sexual development as part of a protected right, which has implications for how legislators in the European Union and member states approach this issue.

The question is whether the proposed legislation — which grants private and public entities constant insight into the private conversations of adolescents, including any sexual communication — is a violation of children's rights in itself. It is particularly interesting to consider how vulnerable groups of children, such as children in the LGBTIQ+ community, may be affected by such control measures. Recent research by Thorn into the perspectives of LGBTIQ+ adolescents has shown that three out of four participants in the study agreed that it is important to be able to research sexual orientation and gender identity online. What's more, 43% of participants believed it was normal for LGBTIQ+ people of their age to share nude photographs with each other²⁰. Given the importance of digital spaces in which adolescents, including LGBTIQ+ adolescents, can explore their sexuality, any monitoring of their private communication

and flagging of self-generated sexually explicit material is highly likely to have an inhibitory effect on their online sexual exploration. As a consequence, a space that is essential for the sexual development of adolescents is being sealed off. Even though the protection of children against sexual abuse and exploitation online is a legitimate objective under Article 34 of the CRC, the negative impact on the sexual expression of adolescents cannot simply be labelled as a negligible side effect. What is required instead is an in-depth debate to establish a proportionate measure to respect the right of adolescents to sexual development under Article 6 of the CRC (the right to development) and Article 16 of the CRC (the right to privacy). As part of this, Article 5 of the CRC (the principle of considering the evolving capacities of children) must also be taken into account.

In view of the significant concerns in terms of children's rights when it comes to monitoring private communication, it is a positive development that the detection measures in the proposed regulation have encountered strong opposition in the European Parliament. On 22 November 2023, the European Parliament adopted a proposal from the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament (the LIBE Committee) regarding the mandatory scanning of material containing child sexual abuse in the communication of all users, including children and adolescents. Instead, the standpoint adopted by the European Parliament requires that detection orders can only be issued when there is a specific suspicion that a user or a group of users is sharing material containing child sexual abuse online. This would mean that the private communication of adults and children would not be subject to general supervision and scanning. This revised conceptualization of detection orders entails a significant improvement in the protection of the right of children and adolescents to privacy, and ensures a proportional balance between competing children's rights. Ultimately, it is the trilogue that will decide what the legislation ends up looking like.

5. Conclusion and recommendations

The new Dutch legislation on sex crimes seeks to account for the fact that a significant part of the lives of adolescents — including their sexual development — is lived online. Whether the distinction between experimental behaviour and abuse is sufficiently enshrined in law remains to be seen in practice. Legislation today increasingly appears to be veering towards condemning the sexual development of adolescents. Instead of educating them and offering support, we are moving towards a situation where their sexual expression is assessed on whether it is deemed desirable or not. What is being overlooked along the way is the fact that children need support to ensure they can develop in a healthy manner, including sexually, both online and offline. In fact, it is through education that we can make sure children are able to make healthy sexual choices and are not dependent on the world of online pornography for such information. Raising awareness about the consequences of online child sexual abuse among adolescents is another important strategy. This approach has not been adequately researched to date and deserves more attention.

The EU centre to be set up has the potential to become the place within the European Union where the problem of online child sexual abuse is tackled using a multi-

stakeholder approach. A centre of this type opens up opportunities that have not been adequately addressed in the proposed regulation. It is through research, advice, sharing methods, identifying custom solutions in mutual dialogue and encouraging innovation that the fight against online child sex abuse can truly get off the ground. The centre ought to engage privacy organizations such as the European supervisory authority for data protection (the European Data Protection Board, EDPB) as well as children's rights organizations, internet service providers, online platforms, and of course, children themselves. The EU centre can also highlight any areas where the law falls short. Furthermore, in its role as an authority, the centre can enter into dialogue with countries that are not members of the European Union — a significant point, as we are witnessing a shift in images depicting the sexual abuse of minors from within the European Union to countries that are not members of the EU. The fight against online child sex abuse can only truly get off the ground if we take appropriate measures in mutual dialogue with all stakeholders that protect the full catalogue of human rights. Partnerships of this type will help ensure that the sexual abuse of children online can effectively be rooted out, instead of simply shifting to countries outside of the European Union²¹.

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