

# CRIMINALIZATION AND PROSECUTION OF RAPE IN THE NETHERLANDS

## SUBMISSION TO THE UN SPECIAL RAPPOREUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES

Amnesty International presents the attached responses to the questionnaire on criminalization and prosecution of rape in the Netherlands. This submission has been prepared in response to the call for contributions issued by the United Nations (UN) Special Rapporteur on violence against women, its causes and consequences ahead of her upcoming report on rape as a grave and systematic human rights violation and a form of gender-based violence against women.

### Definition and scope of criminal law provisions

1. Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant Sections of the Criminal Code and the Criminal procedure code.

Please note these are not official translations:

([https://www.legislationline.org/download/id/6415/file/Netherlands\\_CC\\_am2012\\_en.pdf](https://www.legislationline.org/download/id/6415/file/Netherlands_CC_am2012_en.pdf)). The Dutch word 'dwang' is translated as 'compels', whilst it could also be translated as 'forces'. This is the same word in Dutch but another connotation in English.

### Section 242 of the Dutch Criminal Code: rape

Any person who by an act of violence or any other act or by threat of violence or threat of any other act compels a person to submit to acts comprising or including sexual penetration of the body shall be guilty of rape and shall be liable to a term of imprisonment not exceeding twelve years or a fine of the fifth category.

### Section 243 of the Dutch Criminal Code (sexual penetration of an unconscious person or other person unable to resist or to express their will)

Any person who engages in acts comprising or including sexual penetration of the body with a person whom he knows to be unconscious, to have diminished consciousness or to be physically unable to resist, or to be suffering from such a degree of mental disease or defect that such person is incapable or not sufficiently capable of exercising or expressing his will in the matter or of offering resistance, shall be liable to a term of imprisonment not exceeding eight years or a fine of the fifth category.

### Section 249 of the Dutch Criminal Code (sexual abuse by abuse of authority/trust)

1. Any person who sexually abuses his minor child, step-child or foster child, his ward, a minor with whose care, education or supervision he is entrusted, or his employee or subordinate who is a minor, shall be liable to a term of imprisonment not exceeding six years or a fine of the fourth category.

2. The following persons shall be liable to the same punishment:

1°.the civil servant who sexually abuses a person subject to his authority or entrusted to or placed under his supervision;

2°.the director, doctor, teacher, official, supervisor or staff member of a prison, state institution for the care and protection of children, orphanage, hospital, or charitable institution, who sexually abuses a person admitted to such institution;

3°.the person employed in the health care or social care sector who sexually abuses a person who has entrusted himself, as a patient or client, to his assistance or care..

2. Based on the wording of those provisions, is the provided definition of rape:

a) Gender specific, covering women only NO

The criminal code speaks of 'any person'

b) Gender neutral, covering all persons YES

c) Based on the lack of consent of victim NO

d) Based on the use of force or threat YES

e) Some combination of the above. NO

The definition of rape is a force-based definition.

f) Does it cover only vaginal rape? NO

g) Does it cover all forms of penetration? Yes. Please specify.

h) Is marital rape in this provision explicitly included? NO

i) Is the law silent on marital rape? YES

j) Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? YES

Up until 1991 the law excluded rape in a marriage. After protests and public debate the rape legislation was revised. (9 October 1991 Stb. 519, Hand. II 1 988-1989 20.Z930 nr. 3).

k) Is marital rape excluded in the provisions, or is marital rape not considered as a crime? NO

It is considered as a crime.

3. To what extent legislation in your country excludes criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit relevant articles with corresponding translations.

The legislation does not exclude the criminalization of the perpetrator if the victim and alleged perpetrator live together. There is a tendency in case law to consider rape in the house/bed of the victim as an aggravating circumstance, as this is a place where they should have been safe (see e.g. ECLI:NL:GHARL:2017:7670).

4. What is the legal age for sexual consent?

The legal age for sexual consent is 16 years. (Article 245 of the Criminal Code: Any person who, out of wedlock, engages in lewd acts comprising or including sexual penetration of the body with a person who has reached the age of twelve years but not yet sixteen years, shall be liable to a term of imprisonment not exceeding eight years or a fine of the fifth category.)

5. Are there provisions that differentiate for sexual activity between peers? If so, please provide them. NO

In spite of Articles 244, and 245, sex between minors is not always punishable.<sup>1</sup> In any case, sex with a minor is allowed when the minor is 16 years or older, provided there is no abuse or coercion. Sex with an underage child under the age of 16 is also permitted under certain circumstances. By judgment of March 30, 2010 (LJN: BK4794), the Supreme Court ruled that a sharp demarcation of such circumstances in general cannot be given and that it is up to the judge to weigh the circumstances of the case. The requirements are: the existence of an affective relationship between the suspect and declarant, the express consent of the declarant to the conduct and a slight age difference.

6. Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape

The maximum sanctions for criminalized forms of rape are listed below. However, it is important to note that the sanctions are in practice much lower. The courts published a document (<https://www.rechtspraak.nl/sitecollectiondocuments/orientatiepunten-en-afspraken-lovs.pdf>, page 8) in which it is listed that an average sentence for rape is 24 months' imprisonment. A daily newspaper (het Algemeen Dagblad) published statistics on the 11th of February 2020 (<https://www.ad.nl/binnenland/zelden-rechtszaak-na-verkrachting~a7b27ec1/>) of the convictions and penalties over the last couple of years. According to these, over the last 3 years a rapist was sentenced on average to 1 year and 5 months' imprisonment. Since 2017, the courts have never imposed the maximum sentence of 12 years imprisonment. The highest sentence was 6 years, the lowest was 21 days.

**Section 242 of the Dutch Criminal Code: rape:** a term of imprisonment not exceeding twelve years or a fine of the fifth category.

**Section 243 of the Dutch Criminal Code (sexual penetration of unconscious person or other person unable to resist or to express their will):** a term of imprisonment not exceeding eight years or a fine of the fifth category.

**Section 249 of the Dutch Criminal Code (sexual abuse by abuse of authority/trust):** a term of imprisonment not exceeding six years or a fine of the fourth category.

7. What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator?

In the criminal proceedings, the court can decide on financial compensation as reparation to the victim (to be paid by the perpetrator). See article 51 A Criminal Procedures Code and book 6, article 106 of the Civil Code.

And for example the following cases and amounts of compensation, 17<sup>th</sup> of February 2020 (ECLI:NL:GHARL:2020:1202): € 4,828.38, 12<sup>th</sup> of November 2019 (ECLI:NL:GHDHA:2019:3375): € 3,082.02, 22<sup>th</sup> of July 2019 (ECLI:NL:GHARL:2019:5941): € 4,607.64, 22<sup>th</sup> of March 2019 (ECLI:NL:GHARL:2019:2547): € 5,000, 22 January 2019 (ECLI:NL:GHAMS:2019:126): € 5,000, 17<sup>th</sup> December 2019 (ECLI:NL:GHAMS:2019:4590): € 9,332.85, 4<sup>th</sup> December 2019 (ECLI:NL:GHARL:2019:10390): victim 1 € 8,380.32 and victim 2: € 7,513.64, 24<sup>th</sup> May 2019 (ECLI:GHAMS:2019:1737): € 21,147.50, 3<sup>rd</sup> May 2019 (ECLI:NL:GHARL:2019:3879): € 8,099.54, 28<sup>th</sup> March 2019 (ECLI:NL:GHARL:2019:2776): victim 1 € 19,601 and victim 2 € 18,714.

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<sup>1</sup> Article 244: Any person who engages in acts comprising or including sexual penetration of the body with a person who is under the age of twelve years, shall be liable to a term of imprisonment not exceeding twelve years or a fine of the fifth category.

Article 245: Any person who, out of wedlock, engages in lewd acts comprising or including sexual penetration of the body with a person who has reached the age of twelve years but not yet sixteen years, shall be liable to a term of imprisonment not exceeding eight years or a fine of the fifth category.

## Aggravating and mitigating circumstances

8. Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?

a) Is rape by more than one perpetrator an aggravating circumstance? YES

(article 248 of the Criminal Code: increase of the penalty by one third)

b) Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims? (for example, doctor/patient; teacher/student; age difference) YES

(article 248 of the Criminal Code: increase of the penalty by one third).

c) Is rape by spouse or intimate partner an aggravating circumstance?

The rape by a partner is not explicitly mentioned in the law. The relationship between the victim and perpetrator can be an aggravating circumstance as well as a mitigating circumstance. It depends on the merits of the case (public prosecution guidelines available at: <https://wetten.overheid.nl/BWBR0032282/2012-12-01>).

9. Does the law foresee mitigating circumstances for the purposes of punishment? If yes, please specify. YES

The Guidelines for prosecutors (<https://wetten.overheid.nl/BWBR0032282/2012-12-01>) investigating sex crimes prescribe that they will demand 36 months of imprisonment without conditional leave for the first rape by an adult perpetrator who has never been charged with the crime of rape before, unless there are aggravating or mitigating circumstances.

In addition to having prior criminal convictions (whether or not for sexual crimes) and the aforementioned articles in the Criminal Code, the Guidelines mention person-specific circumstances that may count as mitigating or aggravating circumstances, including:

-the psychological state of the perpetrator (in that case, the prosecutor may choose to charge TBS (preventive custody in a mental institution) or a conditional prison penalty and/or with special requirements, rather than a prison penalty)

Aggravating circumstances may be when the rape was perpetrated:

- By a partner or ex-partner or in a friendship relationship between perpetrator and victim
- By multiple persons/ a group
- With extreme violence (seriousness and/or nature)
- Frequently (repeated acts during a longer period of time)
- In a specifically violent and/or threatening setting
- Surprise attack
- Place of the offence: Public space/ house of victim/ carried to a deserted location
- Premeditated plan (intentional consideration and preparation)
- Without using a condom
- In a relationship of dependency

- Young age of the victim
- Other vulnerability of the victim (physical/mental restrictions, intoxicated)
- With extremely harmful consequences (losing virginity, HIV/STDs, disruption of family life, serious physical/mental injury, disruption of sexual development)

When imposing a sentence, courts always take into consideration the gravity of the crime, the circumstances of the crime and the age, history and person/personal circumstances of the perpetrator. The age, history and person/personal circumstances of the perpetrator can be both an aggravating or a mitigating factor, depending on the specific circumstances of the case (<https://www.rechtspraak.nl/sitecollectiondocuments/orientatiepunten-en-afspraken-lovs.pdf>, page 8).

10. Is reconciliation between the victim and the perpetrator allowed as part of a legal response? YES

If so, at what stage and what are the consequences?

If the mediation is successful, the public prosecutor may decide not to take the case to court, or the court may take it into account in determining the sentence. (Article 51h Criminal Procedure Code (available in Dutch at: <https://maxius.nl/wetboek-van-strafvordering/artikel51h>)).

11. Regardless of the law, is reconciliation permitted in practice? YES and what is the practice in this regard?

It is assumed that restorative justice is based on the voluntary participation and autonomy of those involved. If one of the parties (eventually) does not wish to participate in a restorative justice provision, the 'classic criminal law' will be used, which also leaves some room for customization. (Article 22c Criminal Code, Article 36f Criminal Code and Article 51f Criminal Procedure Code).

Article 51h of the Criminal Procedure Code: the Public Prosecutor's Office promotes that the police inform the victim and the suspect as soon as possible of the possibilities of mediation. If a mediation between the victim and the suspect has resulted in an agreement, the judge will take this into account if he imposes a punishment and measure.

12. Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? YES If yes, please specify. The court is not obliged to impose a punishment or measure in a proven case. She/he can also declare the suspect guilty without imposing a punishment or measure. The judge then applies Article 9a of the Criminal Code.

a. if the perpetrator marries the victim of rape? NO

b. if the perpetrator loses his "socially dangerous" character or reconciles with the victim? **YES**

Implied in article 9A of the Criminal Code: If the judge deems this advisable in view of the minor seriousness of the offense, the personality of the perpetrator or the circumstances under which the offense was committed, or which subsequently occurred, he can determine in the judgment that no punishment or measure will be imposed.

## Prosecution

13. Is rape reported to the police prosecuted ex officio (public prosecution)? YES

Sexual offenses can be investigated and prosecuted ex officio. Sex offenses are not complaint offenses. In any case, ex officio investigation is considered in cases in which the mental and / or physical integrity of the person concerned is / is seriously threatened or the person concerned is evidently in a position of dependence. Once a declaration has been made, it cannot be withdrawn. If desired, a victim can, after making a report, let the public prosecutor know in writing what the (possibly changed) wishes are regarding criminal prosecution. The public prosecutor can take this into account (see: <https://wetten.overheid.nl/BWBR0037821/2016-05-01#Opschrift>, paragraph 2.1).

14. Is rape reported to the police prosecuted ex parte (private prosecution)? NO

15. Is plea bargain or “friendly settlement” of a case allowed in cases of rape of women?

NO with regard to plea bargain

YES with regard to friendly settlement

A plea bargain is not a possibility in The Netherlands. However, it can be decided to allocate a mediator (this could be called a friendly settlement) to the case. Depending on the outcome of the mediation process the public prosecutor can decide to take the case to court or not. Or it could be taken into account with regard to the penalty.

16. Is plea bargain or “friendly settlement” of a case allowed in cases of rape of children?

NO with regard to plea bargain

YES with regard to friendly settlement

A plea bargain is not a possibility in The Netherlands. However, it can be decided to allocate a mediator (this could be called a friendly settlement) to the case. Depending on the outcome of the mediation process, the public prosecutor can decide to take the case to court or not. Or it could be taken into account in the penalty. It is not possible in rape cases where the perpetrator is below the age of 12 and therefore has no criminal liability.

17. Please provide information on the statute of limitations for prosecuting rape.

Because rape is a crime with a maximum penalty of 12 years imprisonment there is no limitation to the reporting period (<https://www.rijksoverheid.nl/onderwerpen/straffen-en-maatregelen/verjaringstermijn-misdrijven>). On April 1, 2013, the Act on the limitation period for the elimination of serious offenses entered into force. This law means, among other things, that serious crimes cannot expire.

18. What are the provisions allowing a child who was the victim of rape to report it after reaching adulthood, if any?

Sexual abuse of a child also has no limitation to the reporting period.

19. Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses?  
YES If yes, please specify.

Medical evidence is not required. However, it is not sufficient to only have the statement of the victim (see article 342 Criminal Procedure Code). There should be some supporting evidence, that comes from a different source (e.g. the victim’s statement and the statement by a witness whom the victim told about the rape, will not be enough since both statements have the same source: the victim). However, case law shows that, in general, a minimum amount of supporting evidence can be enough to lead to a conviction in rape cases, considering that rape often happens behind closed doors with no witnesses (see e.g. ECLI:NL:GHSHE:2019:4381).

20. To what extent are there rape shield provisions aimed at preventing judges and defence lawyers from exposing a woman’s sexual history during trial?

See answer 22 below

21. What procedural criminal law provisions exist aimed to avoid re-victimizations during the prosecution and court hearings? Please specify.

The public prosecutor has published guidelines to avoid re-victimizations during the prosecution and court hearings (available at: <https://wetten.overheid.nl/BWBR0037821/2016-05-01>).

At paragraph 4.3, the guidelines include the following provisions aimed at avoiding re-victimization:

“When hearing a victim as a witness in a criminal case, a balance of interests will have to be made between the protection of privacy, the safety and health of the victim and the suspect's right to a fair trial. It is in the interest of the victim that interrogations are conducted without unnecessary delays, that the number of interrogations is limited and that interrogations are not repeated. In addition, it is important to avoid visual contact between the victim and the suspect, that the victim must testify at a public hearing and that unnecessary questions about the private life or the person of the victim are asked.

The public prosecutor can propose that the victim be heard outside the public domain and the presence of the suspect, for example by using modern means of communication. Alternatives also include an interrogation by the examining magistrate, the playback of the audio recording of the incriminating statement made by the victim to the police at the hearing, or the hearing of the officers who conducted the interrogation.

Taking into account the interests of the defence, the public prosecutor will actively oppose an unnecessarily burdensome representation of the victim's (sexual) history in the courtroom.”

### **War and/or conflict**

22. Is rape criminalized as a war crime or crime against humanity? YES

It is criminalized as a crime against humanity in the Law on International Crimes (<https://wetten.overheid.nl/BWBR0015252/2020-01-01>), article 4 sub G.

23. Is there a statute of limitations for prosecuting rape in war or in conflict contexts?

Amnesty International's research has not covered this issue to date.

24. Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? NO

25. Has the Rome Statute of the International Criminal Court (ICC) been ratified? YES

The Netherlands signed the Rome Statute on 18 July 1998 and ratified the Rome Statute on 17 July 2001.

26. Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.

In February 2020 a Dutch newspaper (Algemeen Dagblad) published statistics (<https://www.ad.nl/binnenland/zelden-rechtszaak-na-verkrachting~a7b27ec1/>) from the police and courts on rape cases from 2017, 2018 and 2019 (until October of that year). Up until this article in the newspaper there were no recent statistics published by the authorities on rape cases.

The introduction of the article mentions: “Suspects of rape are rarely prosecuted and they rarely get a high sentence.”

- Only 37 percent of the victims who notify the police will make an official declaration/report (in NL there are 2 steps: the 1st notification at the police is not an official declaration to the police. After providing information to the police, the victim can decide to officially report the case or not). Out of the 37% of official reports, 58% are dismissed (lack of proof etc.).
- Out of the 172 cases that reached the Courts between January and October 2019, there were 102 convictions.
- Since 2017 the court never gave the maximum sentence of 12 years imprisonment. The highest sentence was 6 years, the lowest was 21 days.
- On average, a rapist was sentenced for 1 year and 5 months imprisonment.”.

## Other

27. Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.

### **Cases are pending for a long time**

The newspaper AD (Algemeen Dagblad) revealed statistics (<https://www.ad.nl/binnenland/zelden-rechtszaak-na-verkrachting~a7b27ec1/>) that the police had 945 cases pending for more than half a year, out of which 90 cases were pending over 2 years. This is a burden to the victims who need to remember their rape in detail during that time for a potential court hearing.

### **Victims do not report the case to the police**

As mentioned above an estimated 70% of rape victims do not go to the police. After the first meeting at the police only 37% of the victims make an official report to the police (see the statistics reported by the police to the newspaper Algemeen Dagblad: <https://www.ad.nl/binnenland/zelden-rechtszaak-na-verkrachting~a7b27ec1/>).

### **Proposal for new legislation**

On 22 May 2019, the Dutch Minister of Justice and Security sent a policy letter (<https://www.rijksoverheid.nl/documenten/kamerstukken/2019/05/22/kamerbrief-over-straftbaarstellingen-van-seks-tegen-de-wil-en-seksuele-intimidatie>) to the Dutch Parliament in which he announced his plans to introduce new criminal offences of “sexual acts against a person’s will”, without, however, changing the force-based definition of rape. On the 15<sup>th</sup> of May 2020 he published the proposal for online consultation. Up until the 16<sup>th</sup> of August 2020 it is possible to give comments and suggestions on the proposal (<https://www.internetconsultatie.nl/wetseksuelemissdrijven>).

The Minister suggests introducing a new offence that would criminalize sex against a person’s will, carrying a maximum penalty of six years imprisonment, while keeping the definition of rape based on force or threat thereof. While Amnesty International welcomes the Minister’s proposal to criminalize non-consensual acts of sexual nature, we are concerned that the proposal, as presented in the policy letter, fails to meet the standards set out in the Istanbul Convention and other human rights law and standards on sexual violence. The failure to incorporate a consent-based definition of rape in the Criminal Code is our greatest concern.

A key concern of the current definition of rape is its focus on resistance and violence rather than sexual autonomy and lack of freely given consent as required by international law and standards, including the Istanbul Convention.

Under Dutch law, a person can be held criminally liable for rape if it can be proven beyond a reasonable doubt that the perpetrator deliberately compelled the person to sexual acts or at least knew or suspected that the person could not resist or withdraw from the acts. The rape situation needs to be inescapable and intentional before it can be considered a crime. In other words, the current legal definition fosters an approach where evidence of inescapability and/or resistance is key to whether the justice system pursues a rape investigation and prosecution.

Amnesty International stresses that according to international human rights law and standards with regard to sexual violence, there should be no assumption in law or in practice that a victim consented because they did not physically resist the unwanted sexual conduct.

The new crime proposed by the Minister will comprise of both severe (such as penetration without consent) and lighter categories of sexual acts without consent (such as touching body parts and/or genitals without consent), none of them, however, being defined as rape nor subject to the same criminal penalties as rape. The punishment proposed for the acts with penetration is a maximum of 6 years of custodial penalty. This is a much lower penalty than that for rape: 12 years custodial penalty.



Amnesty International is deeply concerned that the Dutch government intends to differentiate between two rape crimes: a “genuine” rape crime that continues to be based on violence or threats of violence and inescapability, and a “lesser” crime of sexual violence based on the notion of freely given consent, carrying a lighter sentence (six instead of twelve years for rape).

In the proposed version, rape cases where no physical force, threat of physical force, proof of resistance or inability to resist are shown are likely to be prosecuted as the new crime, carrying a lower penalty. As such, the Netherlands will fail to offer genuine protection and justice to rape survivors. Amnesty International has urged the Minister of Justice and Security to create a comprehensive legal definition of rape that explicitly includes all types and situations or rape as outlined in international standards.