

Summary

Background to the research

Former Dutch State Secretary Dijkhoff informed the Dutch Lower House, in a letter of 2 June 2016, about the intended amendments to the enforcement of the lifelong prison sentence, with a view to making it 'future-proof'.¹ He hereby also committed to asking the Dutch Research and Documentation Centre [WODC] to conduct a study into the possibilities for raising the sentence for murder from thirty to forty years.² This study, conducted on the orders of the Research and Documentation Centre in the period from January 2019 to 1 August 2019, concerns this commitment regarding an increase of the sentence for murder.

The defined issue and the research questions

This research has been conducted on the basis of the following issue:

Is it responsible, from a judicial, legal methodological perspective, to increase the maximum sentence for murder from thirty to forty years?

Based on this issue, the following research questions were formulated:

Research question 1:

What is the policy theory on which the ratio is based between maximum (prison) sentences (lifelong, respectively thirty years) that can be imposed for murder?

Research question 2:

What custodial penalties have been imposed for murder and manslaughter since the increase of the maximum determinate sentence for murder (from twenty to thirty years) in 2006?

Research question 3:

How often and in what cases was a lifelong prison sentence for murder imposed since the increase of the maximum determinate sentence for murder (from twenty to thirty years) in 2006?

Research question 4:

How often and in what cases was a maximum determinate prison sentence for murder imposed since the increase of the maximum determinate sentence for murder (from twenty to thirty years) in 2006?

Research question 5:

What were the considerations of the court in this regard/what were the reasons thereby given? Is it possible to derive from this that a maximum sentence of thirty years constitutes restrictions?

Research question 5b.

¹ Parliamentary Papers II 2015/16, 29279, no. 325, p. 2.

² Parliamentary Papers II 2015/6, 29279, no. 325, p. 5.

Did the judgment of the Supreme Court of 28 February 2012, ECLI:NL:HR:2012:BR2342 (which set higher demands for proving premeditation) influence the sentences imposed in the period (March) 2012-2018? If so, in what way was this judgment influential? Are there any indications, for instance, that the court opts to declare manslaughter proven, and to punish manslaughter, rather than murder in an increased number of cases?

Research question 6:

What will be the legal and legal-methodological consequences of a possible increase of the sentence for murder from thirty to forty years?

Research question 7:

How do the organisations involved (the Public Prosecution Service, the judiciary, the legal profession, the Council for the Administration of Criminal Justice and Protection of Juveniles [RSJ], the Custodial Institutions Agency [DJI] and victim-related organisations) view a possible increase of the maximum sentence for murder from thirty to forty years?

Reader's guide

As an introduction, chapter 1 presents the background of the research, the defined issue and the research questions, the set-up, the method employed and a reader's guide. Chapter 2 subsequently traces the policy theory for the increase in 2006 (section 2.2, for research question 1), after which the judicial, legal methodological framework is set out (section 2.3, for research question 6), with a modest comparison with the overseas countries of our Kingdom, Suriname, France, Belgium, Germany, Switzerland and Spain (section 2.4). Chapter 3 then gives the outcomes of the quantitative research, accompanied by an inventory of the custodial penalties imposed for murder and manslaughter from 1 February 2006 to 2018 (section 3.2, for research question 2) and subsequently the cases in this period whereby a lifelong prison sentence was given (section 3.3.1, for research question 3) or the maximum provisional sentence (section 3.3.2, for research question 4). The qualitative research is set out in chapter 4. The judicial reasoning for the custodial penalties is first discussed (section 4.2, for research question 5), followed by a discussion of the influence of the judgment of the Dutch Supreme Court of 28 February 2012 (*NJ* 2012/518) on sentencing for murder and manslaughter (section 4.3, for research question 5b). This is followed by an evaluation of the actors in criminal law practice of a possible increase (section 4.4, for research question 7). The conclusions are set out in chapter 5. Here, all research questions are answered (section 5.2), after which, based on final considerations, the key questions are answered (section 5.3).

Summary and answers to the research questions

Via the 'empirical-analytical' or 'policy-based' approach, the policy theory behind the relationship between the lifelong and the maximum determinate sentence is outdated (research question 1). The documents that set out the parliamentary history show that the goal of increasing the sentence in 2006 was twofold. This was because two effects were expected and intended. On one hand, the increased maximum sentence prevents the court from being forced to impose a lifelong prison sentence for offences for which this would actually be excessive (but twenty years too light). On the other hand, and at the same time, the intended change to the law means that in cases where a lifelong sentence is in no event appropriate, a

higher determinate prison sentence can be imposed. The remedy was an increase of the maximum determinate prison sentence, as a result of which the court had a greater choice between twenty years and a life sentence.

To answer research question 6, a detailed study of the Dutch criminal justice system as it was set up in 1886 and has since then only been modestly amended was discussed. The outcome of this judicial and legal methodological analysis was that although it is legally possible to (just) increase the penalty for murder to forty years, this will elicit the necessary reservations. This is particularly due to claims that this would compromise the system of Books 1 and 2 of the Dutch Criminal Code. Such an increase would, in any case, involve a more extensive legal operation than the mere amendment of Article 289 of the Criminal Code in order to avoid bringing any imbalances into the methodology of the legislation, as well as thoroughly substantiating the need for the increase. Otherwise, such an increase would be irresponsible.

The modest legal comparison conducted showed that there were both a large number of similarities and a large number of differences regarding the length of the sentence for murder in various countries. In many cases, the similarities were the life sentence for murder, which is sometimes even compulsory. However, in all cases, a determinate penalty is also possible, which is where the differences arise. Germany and Switzerland have 'modest' maximums of fifteen and twenty years respectively, with Suriname's fifty-year maximum dwarfing them both. Between these there are maximum sentences of forty years (Belgium and Spain), but also thirty years (the warm part of the Kingdom and France.) A further increase would therefore place the Netherlands near the top of the spectrum where the length of the determinate custodial penalty is concerned.

Research question 2 cannot be answered in brief. The total number of convictions for murder in the 2006-2018 research period is 345. The total number of convictions for manslaughter in the same period is 688. These are not only too large numbers to concisely identify all custodial penalties, but furthermore, the relevant qualifications in these cases and the custodial penalties imposed in this regard diverge widely. Annexes I and II to this report therefore give a total overview of all completed murder cases and all completed manslaughter cases respectively during the period from 1 February 2006 up to and including 2018. The overview shows what custodial sentences were imposed. A detailed classification in section 3.2 further clarifies these data, among other things for 'basic' murder and manslaughter cases.

The results of the quantitative research in connection with research questions 3 and 4 furthermore show that courts definitely make use of the maximum prison sentence for murder and aggravated homicide permitted by law since 2006, notably by imposing lifelong prison sentences and determinate sentences for periods of thirty years. However, these numbers are low, both in an absolute and a relative sense. Eight irrevocable convictions were pronounced, whereby one thirty-year prison sentence, one thirty-year prison sentence in combination with a hospital order, and furthermore, six lifelong prison sentences. Where convictions are concerned that have not yet become irrevocable, and convictions in the first instance followed by appeals, whereby a different judgment was subsequently given in appeal or after cassation, the numbers are slightly higher. Almost all cases involve other serious offences in addition to a completed murder or aggravated homicide. Only in three cases was a lifelong prison sentence or a thirty-year determinate prison sentence imposed for a single murder, but these convictions are not irrevocable. The maximum penalty was not imposed for a single murder in any convictions that had become irrevocable. The qualitative analysis for research questions 5 and 7 clearly shows that the current maximum sentence of thirty years is not perceived as a

limitation by the criminal law practice. Neither sentencing, nor penalty considerations, nor talks held with judges have confirmed that there is a need for a maximum sentence of forty years. Neither has the public prosecution service expressed any need for such an increased maximum sentence. A legislative proposal to increase the current maximum sentence for murder to forty years would not therefore seem to be able to be founded upon an urgent need in legal practice.

The stricter requirements of the Supreme Court as from its judgment of 28 February 2012 regarding the (evidential) requirements for the aggravating premeditation component (NJ 2012/518 and NJ 2014/156) quickly and systematically trickle down to the lower legal system. The average prison sentence imposed for both murder and manslaughter rose significantly. The average sentence is significantly higher in murder cases than in manslaughter cases. After the judgment of 28 February 2012, there were proportionally more cases whereby a choice was made by the judges to declare manslaughter proven rather than murder. Based on this analysis, the judgment of the Netherlands Supreme Court of 28 February 2012 can be said to have influenced sentencing. Based on these findings there are various (significant) indications that the criminal court does indeed more frequently choose to deem manslaughter proven, and to punish manslaughter rather than murder.

Answer to the central issue

The central issue has been answered as follows: Although it is legally possible to increase the maximum of the determinate prison sentence set for murder from the current thirty-year maximum to forty years, this meets with the necessary, partly legal methodological objections, which require a greater legislative operation than merely an amendment of Article 289 of the Dutch Penal Code. Without a thorough substantiation of the existence of an apparent necessity for the increase discussed here, and without a further full consideration of the (methodological) consequences and requirements, it is therefore not responsible to (merely) increase the maximum determinate sentence for the crime of murder to forty years.