Summary

Introduction

This research was prompted by the undertaking given on 1 June 2017 by Klaas Dijkhoff, at the time State Secretary for Security and Justice in the Netherlands, during a debate in the House of Representatives following reports in May that year that electronically tagged offenders were sabotaging their ankle tags in order to evade judicial supervision. The then State Secretary undertook to investigate whether these attempts to avoid punishment and supervisory measures should constitute an offence and what the advantages and disadvantages of criminalising such behaviour would be. It was subsequently reported in *De Telegraaf* on 22 March 2018 that a man convicted of murder had sabotaged his ankle tag and breached an exclusion order, with the result that the victim's family unexpectedly came face to face with him. In response to this incident, the Minister for Legal Protection, Sander Dekker, informed the House of Representatives by letter of 26 April 2018 that, in line with the earlier undertaking given by the former State Secretary in 2016, an investigation would be conducted into the possibility of making evading judicial supervision and custodial sentences a criminal offence.

Aim of the research

This comparative law research set out to establish whether and, if so, how and why non-compliance with special conditions and electronic supervision orders and escaping or absconding from detention constitute offences in France, Belgium, Germany, England and Wales, and Canada, with the aim being to contribute to decision-making on whether these acts should be criminalised under Dutch law.

Defining the problem and research questions

The research set out to investigate the following questions:

What can we conclude in the Netherlands from whether non-compliance with special conditions or electronic supervision orders and escaping or absconding from detention constitute offences in France, Belgium, Germany, England and Wales, and Canada? What was the basis for decisions taken on whether such acts should constitute offences in those countries, what form does any punishment imposed take, and what are the advantages and disadvantages experienced to date?

The central issue was divided into the following research questions:

1. Criminalisation and what it entails

Does non-compliance with special conditions or electronic supervision orders or escaping or absconding from detention constitute an offence? If so, what does criminalisation of such behaviour entail?

2. Considerations regarding criminalisation of such acts

What arguments can be used for or against designating such acts as an offence?

3. Problems and benefits of criminalising such acts

Are there any legislative or practical problems or benefits associated with the criminalisation of such acts? If so, what do these entail?

4. Results or effects of criminalising such acts

What is known regarding the results or effects of designating such acts as a separate offence?

5. Comparative law

What problems and benefits of criminalising non-compliance with special conditions or electronic supervision orders or escaping or absconding from detention can be identified through a comparative law analysis?

6. Considerations for and against criminalisation

Given these problems and benefits, to what extent would it be possible and feasible to criminalise non-compliance with special conditions or electronic supervision orders or escaping or absconding from detention under Dutch law?

Scope of the research

The research was limited, firstly, to non-compliance with special conditions and the evading of electronic supervision orders by, for example, sabotaging ankle tags. In order to ensure effective comparison, the research into non-compliance with special conditions focused on special conditions that can be attached to pre-trial detention or suspended prison sentences or imposed under conditional release orders and as part of a behaviour-influencing and freedom-restricting measure in Section 38z of the Dutch Criminal Code [*de gedragsbeïnvloedende en vrijheidsbeperkende maatregel in Artikel 38z Sr*] after a sentence has been served.

For the purposes of this research, escaping from detention was taken to refer to situations where a detainee escapes from secured institutional premises, goes beyond penitentiary fencing or moves away from a secured area within the perimeter walls without authorisation. A detainee was also regarded as evading a custodial sentence if he absconds from a place where he was residing (temporarily or otherwise) during his sentence. This could include a hospital to which a detainee has been admitted in order to receive appropriate treatment. Apart from escaping, detainees can also abscond from detention by not returning from leave on parole. Detainees were taken to include individuals held in pre-trial detention, as well as those serving a custodial sentence.

Electronic supervision can be applied to monitor compliance with a special condition imposed and/or under the terms of parole granted. In some countries it may also be used as an alternative to detention. In such cases, evading electronic supervision is regarded as a form of absconding from detention.

Methodology

This research was based on a multi-level comparative law analysis, comprising both vertical comparative law (comparing international and European regulations and institutions) and horizontal comparative law (comparing the selected countries).

The vertical analysis compared how international and European human rights treaties (such as the European Convention on Human Rights and the fundamental freedoms) and institutions (such as the European Court of Human Rights) interpret standards, policies and practices within Europe and in Canada.

The horizontal analysis compared the legal systems operating in France, Belgium, Germany, England and Wales, and Canada. The comparison comprised three phases: selection, description and analysis, with various separate stages within these phases being distinguished. In the selection phase (phase 1), a quick scan of the legislation and regulations in the various countries (see Annex 2) was performed in order to select the legal systems to be investigated. This resulted in five legal systems – specifically those of France, Belgium, Germany, England and Wales, and Canada – being examined for their relevance for the Netherlands.

The research was performed by studying the applicable legislation and regulations, legislative history (earlier legislation), parliamentary history (parliamentary papers), policy documents (including prison service annual reports), articles from the national and international academic world and various non-legal sources (such as newspaper articles and blogs). This was followed by qualitative empirical research conducted in the form of interviews with experts in the selected countries (see below).

The descriptive phase (phase 2) involved describing the legislation and regulations, institutions and relevant elements of the legal system in the chosen countries, based on the first four research questions (desk research). Following this desk research, qualitative empirical research was conducted through a series of semi-structured interviews.

The third phase was the analysis phase (phase 3), in which we sought to explain the differences and similarities between the selected countries and to identify any problems and benefits with regard to criminalisation of non-compliance with special conditions or electronic supervision orders and/or evading a prison sentence (research question 5). The next step was to determine what the Netherlands could learn from the selected countries' legal systems and specifically whether the problems and benefits identified meant it would be possible and feasible to criminalise non-compliance with special conditions and electronic supervision orders and/or escaping or absconding from detention under Dutch law (research question 6). This final question was answered partly with reference to the criteria for criminalisation.

Findings

Non-compliance with special conditions

Non-compliance with special conditions attached to pre-trial detention or bail does not constitute an offence in France, Belgium or Germany. Non-compliance with special conditions attached to bail is an offence in Canada, but does not, as a general rule, constitute an offence in England and Wales. However, failure to appear at a court hearing on the agreed date without reasonable cause does constitute an offence in England and Wales. Canada's criminalisation of non-compliance with special conditions attached to bail is largely motivated by the harm this is regarded as causing to the integrity of the legal system (the offence is described as an offence against the administration of justice) and aimed at the preventive effect believed to result from designating such behaviour as an offence. In England and Wales, the offence of failing to appear at a court hearing on the agreed date without reasonable cause is motivated by the harm this is regarded as causing to the integrity of the legal system and the disruption to the legal process (specifically the right to a retrial).

The analysis of the problems and benefits resulting from criminalisation of such non-compliance in Canada found the country's legal system to be flooded with cases relating to non-compliance with special bail conditions. Offenders were reported to be 'set up to fail' owing to the many and restrictive conditions imposed in return for their being granted bail. Indeed, many offenders ended up being prosecuted solely for non-compliance with their bail conditions because there was insufficient evidence to prosecute them for the offence to which the bail related. Offenders were also prosecuted for not complying with special conditions that did not in themselves constitute an offence ('criminalising non-criminal behaviour'). The process of detecting, prosecuting and adjudicating on special conditions is also expensive and creates a heavy workload for the probation officers responsible for supervising compliance with bail conditions. Similar arguments were used in England and Wales by those opposing general criminalisation of non-compliance with bail conditions.

No empirical data are available on the concrete results and effects of criminalisation of such non-compliance. As Canada has seen multiple prosecutions and convictions for non-compliance with bail conditions, questions can at the very least be raised regarding the extent to which criminalisation has a deterrent or preventive effect.

Failure to comply with special conditions imposed by a court as part of a suspended sentence is not an offence in France, Belgium, Germany or England and Wales. In Canada, failure to comply with a probation order without a reasonable excuse is an offence. The probation order specifies the special conditions attached to the suspended sentence. Depending on the offence committed, non-compliance may result in a prison sentence of four years (in the event of an indictable offence) or a prison sentence of up to eighteen months or a fine (in the event of an offence punishable on summary conviction).

Canada motivates its criminalisation of this behaviour by the harm it is regarded as causing to the integrity of the legal system (it is also an offence against the administration of justice) and the preventive effect believed to ensue from its being designated an offence.

With regard to the problems and benefits of criminalising non-compliance with special conditions attached to a suspended prison sentence, the problems identified were the same as for the criminalisation of non-compliance with bail conditions.

No empirical data are available on the concrete results and effects of criminalising such non-compliance.

Non-compliance with special conditions attached to a conditional release does not constitute an offence in any of the countries examined. The research into the Canadian situation found that the reasons for not criminalising such behaviour could relate to: i) the decision-making powers (in Canada, the Parole Board decides whether an offender should be eligible for conditional release); ii) the fact that conditional releases can be revoked and offenders returned to prison if they do not comply with the conditions; iii) the belief that criminalisation would be counterproductive to the aim of reintegrating and rehabilitating the offender granted a conditional release, and iv) current practice (the Parole Board has proved well able to respond effectively to non-compliance with such conditions).

It is only in Germany and Canada that non-compliance with special conditions attached to supervision imposed after a sentence has been served constitutes an offence. In Germany, an offender who fails to comply with a special condition imposed as part of a supervision of conduct order [*Führungsaufsicht*] can be sentenced to up to three years in prison or given a fine. In Canada, failing to comply with a supervision order without reasonable cause constitutes a crime against the administration of justice and attracts a prison sentence of up to ten years.

The absence of a legal framework to which recourse can be sought in the event of failure to comply with such conditions explains why Germany has criminalised non-compliance with a condition imposed as part of a supervision of conduct order. This does not apply, however, to offenders who are by law subject to intensive supervision following their conditional release.

In Canada, the criminalisation of non-compliance with conditions imposed as part of a supervision order, and also non-compliance with bail conditions and a probation order, is motivated by the harm these acts are seen as causing to the integrity of the legal system.

A problem identified in the criminalisation of non-compliance with the *Führungsaufsicht* supervision order is the increase in the punishment for this offence to a sentence of three years, with the result that the punishment for not complying with the conditions of the supervision may exceed the punishment for committing the predicate offence. Concerns were also expressed that criminalisation of this offence may result in certain delinquents becoming trapped in a vicious circle, whereby their failure to comply with conditions attracts further intensive supervision and the imposition of conditions that can, in turn, once again be breached. Whether this has actually happened is not known: while there have been more prosecutions of this offence in recent years than previously, no empirical research of the results and effects of the *Führungsaufsicht* supervision order has yet been conducted.

This research did not identify any problems or benefits in or results and effects of criminalising non-compliance with conditions imposed under a supervision order.

It is only in Canada that failure to comply with electronic supervision used for monitoring adherence to special conditions constitutes an offence. Electronic supervision can be included as a special condition in a recognizance order or probation order issued by a court when an offender is given bail or a suspended sentence, respectively. As non-compliance with these court orders is an offence, failure to comply with the related electronic supervision also constitutes an offence against the administration of justice. Here, too, criminalisation is motivated by the adverse impact that such behaviour has on the integrity of the legal system and by the preventive effect that is believed to ensue from criminalisation. The research did not identify any specific problems or benefits regarding non-compliance with electronic supervision orders and nor were any effects of criminalising this behaviour found.

Escaping or absconding from detention

Escaping or absconding from detention does not constitute an offence in Belgium or Germany, but it does constitute an offence in France, England and Wales, and Canada. In Belgium, a bill to criminalise escaping or absconding from detention is pending and the draft of the new Criminal Code also makes provision for this. Nuances were found in the various countries examined with regard to the degree of criminalisation and also the penalties imposed. These show correlation with the specific country's considerations when deciding whether to criminalise such behaviour.

With regard to the considerations concerning criminalisation, the main reasons for the selected countries deciding to criminalise escaping or absconding from detention related to:

1) The harm caused to the integrity of the legal system;
2) The danger the detainee posed to society.

The principal argument for not criminalising this behaviour was found to be the undesirability of punishing the natural desire, present in every person, for freedom.

As far as the problems or benefits of criminalisation are concerned, a benefit of criminalisation was found to be that it provides a criminal-law response to behaviour regarded as harmful to the legal system and dangerous to society. In other words, it reinforces standards. Other benefits mentioned included the ability to deploy criminal-law powers (Belgium) and a more effective approach to dealing with organised crime (France). A problem mentioned with regard to criminalisation was the extra burden it places on judicial authorities. This extra burden should not, however, be exaggerated, given the limited number of escapes and abscondments. Another disadvantage of criminalisation is that it entails a response to behaviour that is not, in itself, dangerous and that – given the natural desire for freedom – could be regarded as being justified.

No empirical data are available on the concrete results and effects of criminalising such behaviour. Interestingly, however, none of the countries investigated seemed to regard escaping or absconding from detention as an urgent societal problem, given the very low number of escapes and abscondments. The fact that few offenders escape or abscond from detention was attributed to the improved security in penitentiaries and the measures designed to limit the risks posed by high-risk detainees considered likely to escape or abscond.

In the case of electronic supervision used to enforce a freedom-restricting sentence, it is only in France that evading such supervision constitutes an offence. France regards evading or not complying with electronic supervision orders as a form of absconding from detention, and so also treats this behaviour as an offence. The background to the other countries' decisions not to criminalise such behaviour would seem to be that the opportunity to extend or withdraw electronic detention was considered to be a sufficient response. No problems, benefits or effects of criminalisation were identified.

Conclusions

Non-compliance with special conditions

With regard to the criminalisation of non-compliance with special conditions attached to the ending of pre-trial detention or to a suspended sentence, we can answer the principal research question by stating that the conclusion from the vertical comparative law analysis is that criminalisation would not seem an appropriate way forward. Although the revised European Rules on Community Sanctions and Measures (ERCSM) of 2017 (unlike the earlier version from 1992) no longer include an explicit prohibition on criminalising non-compliance with special conditions imposed as a sanction in criminal law, criminalising non-compliance with special conditions attached to the ending of pre-trial detention or to a suspended sentence would not seem compatible with the spirit of these rules. The rationale behind decisions to end pre-trial detention (subject to conditions) or to impose a suspended sentence is to avoid incarceration. The aim of the rules (i.e. to avoid incarceration) would be undermined if a custodial sentence were to be the required and only response to non-compliance. Interestingly, criminalisation of such behaviour as a separate offence is not specified as a possible response to non-compliance with an alternative sanction. From the United Nations Standard Minimum Rules for Non-custodial Measures (the 'Tokyo Rules') of 1990 and the accompanying explanatory notes, it has to be concluded that any decision to seek to criminalise non-compliance with special conditions attached to the ending of pre-trial detention or to a suspended sentence must be taken with great care.

Based on the horizontal comparative law analysis and the criteria for criminalisation, we conclude that it is doubtful whether criminalisation of non-compliance with special conditions attached to the ending of pre-trial detention or to a suspended sentence can be justified. Non-compliance with the special conditions applying to pre-trial detention or a suspended sentence can be regarded as behaviour justifying a response in criminal law. In those of the selected countries that have criminalised such behaviour, their reason for doing so was found to be motivated by the adverse impact that the behaviour has on the integrity of the legal system and the authority of the court. However, the empirical element relativises the harm such behaviour causes to third parties and society. Doubts can be expressed, particularly in the case of minor breaches of conditions, as to whether such behaviour genuinely harms the integrity of the legal system. Although the type of behaviour that would constitute an offence can be clearly described, that does not in itself constitute grounds for criminalisation.

Viewed from a different perspective, such criminalisation could constitute an excess infringement of individual freedom. This, in turn, could constitute an argument for tolerating such behaviour. As in Canada, criminalisation could have a net-widening effect, whereby offenders could end up being prosecuted only for non-compliance with special conditions owing to there being insufficient evidence to prosecute (or continue prosecuting) them for the offence for which they were taken into pre-trial detention. There is also a risk of criminalising behaviour that would otherwise not be considered worthy of criminal prosecution. Given the existing, and less drastic, opportunities to respond to such behaviour, seeking to criminalise it would seem both unjustified and disproportional. Consideration could instead be given to making greater use of the opportunities for suretyship, or bail in return for surety, as a means to ensure compliance with conditions attached to pre-trial detention or a suspended sentence. Criminalisation of non-compliance with special conditions attached to pre-trial detention or to a suspended sentence can also result in prosecution and in punishments accumulating to an extent that is disproportional to the harm the behaviour actually causes. Lastly, we conclude that it is doubtful whether criminalisation of non-compliance with special conditions attached to the ending of pre-trial detention or to a suspended sentence would be practical or effective in the Netherlands. As well as the risk of the judicial enforcement system becoming overburdened, doubts exist as to whether criminalisation would be likely to influence behaviour and, specifically, have a deterrent effect.

With regard to the criminalisation of non-compliance with special conditions attached to a conditional release, the principal research question can be answered by our concluding from the vertical comparative law analysis that criminalisation would not seem an appropriate way forward. While the ERCSM 2017 require an adequate response to non-compliance, a distinction is made between serious breaches (which can lead to the release being revoked (possibly automatically) or to amendment of the sanction) and minor breaches (where the preference is for an alternative response). Neither the ERCSM 2017 nor Recommendation Rec(2003)22 on conditional release make any mention of the possibility of criminalising non-compliance with parole conditions.

It can be concluded from the horizontal comparative law analysis and the criteria for criminalisation that criminalisation would not seem an appropriate way forward. None of the countries examined has criminalised non-compliance with special conditions attached to a conditional release. It should not automatically be concluded from this, however, that non-compliance with special conditions attached to a conditional release does not cause harm. Indeed it could be claimed with regard to the Netherlands that non-compliance with special conditions attached to a conditional release adversely impacts on the integrity of the legal system by disregarding a decision by the Public Prosecution Service (which is part of the Dutch judiciary). The fact that special conditions attached to a conditional release are aimed at reintegrating and rehabilitating offenders would seem to mean, however, that non-compliance with special conditions attached to a conditional release has to be tolerated. Viewed from a principle of practical applicability and effectiveness, criminalising non-compliance with special conditions attached to a conditional release could also prove counterproductive to the aims of reintegration and rehabilitation and result in a disproportional response by the authorities. The fact that offenders who fail to comply with conditions can be ordered to serve the rest of their

sentence is intended solely as a stick (in the carrot and stick approach) to help them comply with the conditions imposed. Criminalising failure to comply with such conditions would not be compatible with this underlying idea. There are also other, less drastic ways to respond to non-compliance with special conditions attached to a conditional release, including changing the conditions or making them stricter, imposing additional conditions and/or extending periods of probation. In the extreme case (and as a last resort), it is possible to revoke the conditional release. Criminalisation could also represent a disproportional response to the harm caused by such behaviour, particularly given the range of other responses available to the authorities.

With regard to the criminalisation of non-compliance with special conditions attached to measures designed to influence behaviour and to restrict freedom under Section 38z of the Dutch Criminal Code, the principal research question can be answered by stating that we conclude from the vertical comparative law analysis that criminalisation would not seem an appropriate way forward. The main argument for this view is that, under the applicable international regulations, the behaviour-influencing and freedom-restricting measure (TBS) can be regarded as an alternative to detention and that criminalising non-compliance with the applicable special conditions would run counter to the spirit of these regulations.

The conclusion from the horizontal comparative law analysis and the criteria for criminalisation is that here, too, criminalisation would not seem an appropriate way forward. As in Canada, the adverse impact that such behaviour has on the integrity of the legal system and on the authority of the courts could be regarded, from the perspective of the harm caused, as possible arguments for criminalisation in the Netherlands. The behaviour that would be criminalised in this way can also be clearly described, while criminalisation is also likely to be feasible in practice, particularly given that the behaviour-influencing and freedom-restricting measure is applied to only a limited category of offenders.

On the other hand, however, criminalisation could constitute an excessive infringement of individual freedom. In view of the unlimited duration of the supervision and also, therefore, the risk of prosecution in the event of non-compliance with the conditions, some offenders may become trapped in a vicious circle, in which they remain continually subject to supervision and are repeatedly prosecuted for the offence of not complying with the terms of the supervision. In addition, the Netherlands has an alternative response – the possibility of civil imprisonment (as used, for example, to enforce payment of fines) – in the event of non-compliance with conditions. Whether, however, this alternative is less drastic for the offender than criminalisation remains open to question. And whether criminalisation would be effective is also unclear, given that the research found insufficient reference points on which to base any such conclusion.

With regard to criminalising non-compliance with electronic supervision orders used as a means of control, we can answer the principal research question by concluding from the horizontal comparative law analysis and the criminalisation criteria that criminalisation would not seem an appropriate way forward. In Canada (the only one of the selected countries to criminalise this behaviour), the harm seen as being caused by non-compliance is closely related to the fact that electronic supervision imposed as a special condition of bail or a suspended sentence can be stipulated in a court recognizance order or probation order, respectively. As

non-compliance with such a court order constitutes an offence, failure to comply with the related electronic supervision is also regarded as an offence. From a normative perspective of the harm principle, it can be argued that non-compliance with electronic supervision adversely impacts on the integrity of the legal system and that, from this perspective, criminalisation in the Netherlands can be justified. The behaviour that would be criminalised in this way can also be clearly described. On the other hand, however, special conditions are always attached to the use of electronic supervision as a means of control in the Netherlands. In view of the aim of electronic supervision – i.e. to increase the effectiveness and credibility of the conditions imposed – it could be claimed that if non-compliance with electronic supervision does not breach any conditions, failure to comply with such supervision simply has to be tolerated. Furthermore, criminalisation would be disproportional if no special conditions have simultaneously been breached. The Netherlands also has other (less drastic) ways to enforce desired behaviour and so can provide an adequate and appropriate response, as referred to above, where non-compliance with electronic supervision also results in failure to comply with special conditions. If non-compliance with electronic supervision involves an offence being committed (such as the sabotaging of an ankle tag), the offender can be prosecuted and convicted of that offence. Lastly, criminalisation would not only not help to keep people in rather than outside society, but could even be counterproductive to that aim.

Escaping or absconding from detention

With regard to criminalising escaping or absconding from detention, our answer to the principal research is that, in view of the harm it causes, this can be regarded as behaviour justifying a response in criminal law. In those of the selected countries that have criminalised such behaviour, their reason for doing so was found to be motivated by the harm that this has on the integrity of the legal system and/or the risk that the offender presents to society. In Germany and Belgium, by contrast, criminalisation is regarded as undesirable because escaping or absconding from detention is seen as an expression of the natural desire, present in every person, for freedom. In the Netherlands, too, this view has to date been seen as a reason not to seek to criminalise such behaviour, although we would note that, these days, this argument has become less significant and is in any event not respected everywhere.

Based on the findings of the comparative law analysis it can also be concluded that the extent to which criminalisation actually has a preventive and deterrent effect is unclear. The selected countries were also found not to regard escaping or absconding from detention as an urgent societal problem, in view of the relatively limited number of occasions on which they occur. The fact that escapes and abscondments do not regularly occur is attributed to the availability and success of other possible responses, particularly the preventive security and risk management measures in place.

As a result, given also the principles of subsidiarity and proportionality and the extent to which criminalisation could be expected to be effective, we should question whether the Netherlands would be justified in criminalising escapes or abscondments from detention, alongside the existing opportunities for responding to such behaviour. The comparative law analysis gives grounds in any event for a negative response to the idea of criminalising the escaping or absconding from detention.

Lastly we would point out that if it is decided to criminalise such behaviour, attention will certainly need to focus on the proportionality of any accumulation of responses to escapes or absconding in concrete cases. That is primarily a task for the Public Prosecution Service, which could, for example, introduce policy on prosecuting such behaviour, and also for the public prosecutor in view of the need to assess whether prosecution in concrete cases would be opportune.