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Langdurige(r) detentie na recidive van ernstige gewelds- en zedenmisdrijven

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Summary

Preface

The reason for this research lies in a motion by members of parliament Van der Plas (BBB) and Eerdmans (JA21) that requests:

> '*to map out the possibilities for imposing long-term detention after three serious violent crimes and what legislative changes are needed for this.*' (*Parliamentary Acts II* 2021/22, 27-12-35 and *Parliamentary Papers II* 2021/22, 35 925-VI, no. 105).

It follows from a response by the Minister for Legal Protection to this motion that the core of the research lies in the question of whether recidivism in serious violent and sexual offences leads to an increase in sentence.

The investigation specifically examines the following eight serious violent and sexual offences: rape (Article 242 of the Criminal Code), murder (Article 289 of the Criminal Code), manslaughter (Article 287 of the Criminal Code), qualified manslaughter (Article 288, 288a of the Criminal Code), robbery with violence (Article 312 paragraph 1 of the Criminal Code), public violence (Article 141 paragraph 2, sub 2 and 3 of the Criminal Code), arson, flood and explosion (Article 157, paragraphs 2 and 3, Sr), aggravated assault (Article 302 Sr). These offences were chosen because, according to the legislator, these are the most serious violent and sexual offences in view of the threat of punishment.

Research aim and research questions

The aim of this research is to determine whether recidivism in serious violent and sexual offences leads to the actual imposition of a heavier sentence by criminal courts, and whether this leads to long(er) detention.

The main research question is as follows:

> *To what extent do criminal courts impose heavier sentences for recidivism in serious violent and sexual offences compared to first offenders? Specifically, what does the increase in sentence entail of and how often does it result in long(er) detention?*

This main question will be answered based on the following sub-questions:

1. Is the special and specific recidivism sufficiently apparent in the criminal file to be taken into account by the criminal court in sentencing?
2. Is the special and specific recidivism sufficiently apparent at the hearing to be taken into account by the criminal court in sentencing?

3. What is the motivation of criminal judges to increase or not to increase the sentence of different types of repeat offenders?
4. What is the threshold for recidivism in terms of time elapsed without committing a crime, beyond which judges no longer consider previous offenses?
5. To what extent does the criminal court refer in its motivation to the special and specific recidivism in order to substantiate the type of sentence imposed?
6. To what extent does the criminal court refer in its motivation to the special and specific recidivism in support of the sentence?
7. To what extent do criminal courts increase the sentence when they convict an offender for the first time, second time, third time or more compared to first offenders of serious violent and sexual offences?
8. What is the difference between repeat offenders of serious violent and sexual offences and first offenders with regard to:
    a. the main category(ies) (measures restricting liberty, unconditional custodial sentences, community service, suspended custodial sentences and fines) in which the sentence imposed falls;
    b. the median, average and modal penalty expressed in penalty points;
    c. To what extent are differences observable between first, second, third or more often conviction?
9. If heavier or more extensive penalties are imposed on first and repeat offenders:
    a. What does the increase in sentence consist of?
    b. To what extent does this lead to the imposition of long(er) detention?
    c. How can it be understood that harsher penalties are imposed?

Research Methods

Various research methods were used for the study. Triangulation makes it possible to compare the results resulting from the use of different research methods and to obtain additional results if necessary. In this way, the validity and reliability of the results are increased.

Based on a literature review of Dutch and international literature on sentencing in the event of recidivism and a study of case law, in particular on judgments of the Supreme Court, it has been explained how recidivism is standardized in sentencing. A literature review has also been conducted on the question of how comparable national sentencing research deals with the complexity of sentencing in criminal cases and to determine in a responsible manner how sentences can be compared with each other by expressing them in penalty points.

For the study, a quantitative and qualitative analysis of case law of court judgments published on rechtspraak.nl was also carried out. Through rechtspraak.nl, case law has been collected regarding the eight serious violent and sexual offences mentioned above, in principle from the past three years. The rulings have been recorded in an Atlas.ti database. In the end, a total of 766 judgments were selected.

If the quantitative analysis showed that heavier or more extensive penalties are imposed on repeat offenders, or lighter sentences, a qualitative analysis was carried out to determine which contextual factors this was related to. With regard to contextual factors, the seriousness

of the underlying facts and the background and characteristics of the perpetrators (gender, psychological condition, socio-economic factors (e.g. having a job), addiction problems and family situation were examined. Information from the selected judgements was also used to investigate how the criminal court refers in its motivation to the special or specific recidivism in order to substantiate the type of sentence imposed and the level of punishment (sub-questions 5 and 6). From the qualitative coding and analysis of judgements, it follows how differences in sentences imposed and sentencing between first offenders and repeat offenders can be understood (sub-question 9). In this way, it was not only determined whether there are differences between first offenders and repeat offenders, but also to what extent these differences can be attributed to decisions by judges to impose a heavier sentence for recidivism.

By means of a file analysis of 32 selected criminal files, the verdict was analysed to see whether the recidivism was mentioned in the sentencing justification. In addition, the extract from the judicial documentation (of the date as stated in the documents presented at the hearing) and any probation report were examined. In this way, it was investigated whether special and specific recidivism is sufficiently evident in the criminal file to be taken into account by the criminal court in the sentencing (sub-question 1) and to what extent the criminal court refers in its motivation to the special and specific recidivism in order to substantiate the type of sentence imposed (sub-question 5) and the level of punishment (sub-question 6).

Finally, focus groups were held in which 27 people participated: three groups of judges from three courts (Amsterdam (4), Zeeland-West-Brabant (3) and Midden-Nederland (3)), justices from a court of appeal (The Hague) (4), public prosecutors from various district prosecutor's offices (Noord- Nederland, Zeeland-West Brabant and Noord-Holland) (4), advocates general from a district public prosecutor's office (district prosecutor's office Amsterdam, one of which is affiliated with the National Committee on Criminal Procedure Guidelines of the Public Prosecution Service) (2), criminal lawyers (4) and policy officers of the three probation organizations (3). The focus groups were conducted based on a semi-structured questionnaire based on sub-questions 1-7 and 9 of this study and supplemented with information obtained from the desk research, the analysis of case law and the file analysis (see Appendix 3). By means of the focus groups, it was investigated to what extent recidivism emerges in the criminal file and on the investigation at the trial (sub-questions 1 and 2), what the motivation is of judges to decide whether or not to increase the sentence in the event of recidivism (sub-question 3), what recidivism period they use (sub-question 4), to what extent the judge refers to the recidivism in the sentencing justification to substantiate the type of sentence imposed (sub-question 5) and the level of punishment (sub-question 6), the extent to which judges increase the sentence in the event of a one-off or multiple recidivism (sub-question 7) and, if they increase the sentence, what the increase in sentence consists of, the extent to which this leads to the imposition of long(er) detention and how it can be understood that heavier sentences are imposed (sub-question 9).

Answering the research questions

In the criminal file, recidivism is first and foremost reflected in the judicial documentation. Judges have access to the judicial documentation of the suspect and base their judgement on

recidivism. The information is sufficient to determine whether there has been a repeat offence, and which offences. However, judicial documentation does not always contain sufficient information to assess the seriousness of the offences committed previously. Judges indicate that they experience this as a shortcoming, but also indicate that they usually estimate the seriousness of the previously committed offences based on the previously imposed sentence (type). Probation and behaviour reports are also used to give colour to the facts from the judicial documentation. In addition, the hearing is used to obtain information on this matter.

Recidivism will also be discussed at the hearing. Judges experience sufficient opportunities to discuss recidivism in court and this happens. Lawyers, however, have the impression that judges are mainly guided by judicial documentation when determining recidivism. This is striking in view of the observation that judges themselves indicate that the judicial documentation offers few starting points for determining the seriousness of previous facts and that they experience this as a shortcoming.

The imposition of a higher sentence is the starting point for judges in the event of recidivism. An increase in the sentence is also the starting point in the LOVS guidelines and the criminal procedure guidelines of the Public Prosecution Service, which (indirectly) have a normative effect on the sentencing decision. However, there may be reasons not to impose a higher penalty in the event of a repeat offence. These reasons are strongly determined on a case-by-case basis. Reasons that emerged are the time lapse between the commission of the offence and the handling of the case in court and in connection with this the changes that have occurred in that time in the personal circumstances of the suspect, the psyche of the suspect and what has been written about this in the behavioural reports, the personal circumstances of the suspect (e.g. his health, distressing family circumstances, whether the imposition of a sentence would interfere with treatment for addiction, or the suspect would lose his home or job as a result of the imposition of a certain sentence (duration)), the context of the offence, the circumstances under which the offence was committed, the defendant's conduct in the proceedings (right to remain silent) and whether a suspect is aware of guilt. In addition, the extent to which the above circumstances are considered depends on the seriousness and type of offence: the circumstances of the offence and the context play a much greater role in the offences of robbery with violence, public violence, arson and aggravated assault and, to a lesser extent, in the offences of rape, murder, manslaughter and aggravated manslaughter. Moreover, the type of recidivism, in particular previous conviction(s) for violent crimes, is an important consideration for taking recidivism into account in an aggravating sentence. Other types of recidivism can also be held against suspects if a pattern of professional crime emerges. In cases of (serious) multiple recidivism, criminal courts are also inclined to increase the sentence.

The period up to which judges increase the sentence was also examined. In this context, this period refers to the number of years after which recidivism is no longer invoked without a criminal offence. The investigation into this question showed that judges sometimes allow themselves to be limited in sentencing because of a misinterpretation of the general recidivism provision of Section 43a of the Dutch Penal Code. This provision allows the court to exceed the maximum penalty imposed for the offence in question and to increase the prison sentence for the offence by up to one third. However, this is only possible if, at the time the (new) offence was committed, less than five years have elapsed since the offence was previously sentenced to

a term of imprisonment for a similar offence which has become final. The five-year period referred to in Section 43a of the Dutch Penal Code is sometimes wrongly applied to all cases of recidivism, including cases where increasing the bandwidth is not an issue. This could mean that judges do not take recidivism of offences committed more than five years ago into account in an aggravating sentence, because they are under the impression that this is not possible. At the same time, it has also been indicated that recidivism is sometimes considered in those cases. The respondents who indicate this seem to be under the impression that they are going against the law, while in fact they are staying within the framework of the law. Judges also indicate that they find it difficult to give an abstract period within which previously committed offences should still be considered when sentencing a new offence.

In the criminal judgment and in the sentencing reasons, the judge usually indicates that he has considered the judicial documentation or the criminal record. However, there is often no justification for how (the absence of) a criminal record played a role in determining the punishment modality and sentencing. This is in line with the case law of the Supreme Court, on the basis of which it must be assumed that the recidivism in those cases has been included in an aggravating sentence. If this is made clear, the criminal court usually limits itself to general wording that indicates that the recidivism has been considered in an aggravating sentence. The reverse also occurs, that judges indicate that the clean criminal record has been considered in a mitigating sense of punishment or that for this reason a largely suspended prison sentence or community service is chosen. Only in a few cases is it made concrete and explained in the case of recidivism that this time an unconditional prison sentence is appropriate, or that the pattern that emerges from the history of the offence is heavily charged to the suspect. Recidivism is usually one of the many sentencing factors on which the decision for a type of sentence is based, which means that it is possible for a first offender for the same offence to receive a heavier sentence than a repeat offender.

The study also shows that criminal courts increase the sentence when convicting repeat offenders compared to first offenders. They impose a significantly higher penalty on repeat offenders of serious violent and sexual offences. This does not mean, however, that a repeat offender for a serious violent offence will necessarily receive a heavier sentence than a first offender. There are enormous differences in the seriousness of the offences committed and the circumstances of the defendants, and of course the judge must also take these aspects into account when determining both the type of sentence, the modality of the sentence and the amount of the sentence. Such other aspects of a case sometimes carry so much weight that a repeat offender still receives a relatively low sentence, and a first offender receives a very high sentence.

Unconditional imprisonment is by far the most common main punishment imposed for serious violent and sexual offences for both first offenders (89%) and repeat offenders (92%). The criminal courts are also slightly more likely to impose suspended prison sentences or community service as a main punishment on first offenders compared to repeat offenders. However, the differences are not great and vary by type of offense. It is therefore not the case that a repeat offender always receives an unconditional prison sentence as the main penalty. Sometimes the judge chooses to impose a suspended sentence, for example because of the personal circumstances of the convicted person, or a limited unconditional prison sentence in

combination with extensive community service. The probation report plays an important role in this, in particular in the choice of the type of sentence and the question of whether part of the prison sentence is suspended.

On average, 1,014 days (2.8 years) in prison were imposed on first offenders, and 1,348 days (3.7 years) on repeat offenders for serious violent and sexual offences. In terms of penalty points, the median number of penalty points for first offenders was 585 and for repeat offenders 720, and the mode was 405 for first offenders and 1825 for repeat offenders. However, because sentences imposed vary widely and the exact same sentence is not often imposed, the mode is not a good measure to compare the sentences imposed on first offenders and repeat offenders.

It was not possible to specify the extent to which differences can be observed between a first, second, third or more recidivism, because the sentences do not sufficiently show how often a defendant has committed an offence before. Moreover, it is difficult to specify what the increase in the penalty consists of in specific cases, because, as mentioned above, judges do not always explain whether and, if so, why they take recidivism into account as an aggravating sentence. Judges generally appear to increase the sentence in the event of multiple recidivism. This is also the starting point in the *Aanwijzing kader voor strafvordering meerderjarigen* (Sentencing Guidelines for Adult Offenders) of the Public Prosecution Service and the *LOVS-oriëntatiepunten* of the courts and this is only deviated from in special cases. In particular, judges hold multiple similar recidivism charges heavily. The same applies to other types of (general) recidivism when a pattern of professional crime emerges. The increase in the sentence may consist of a choice for a larger unconditional part of the prison sentence and/or a prison sentence of a longer duration. However, this is an average picture. In some cases, the increase in the penalty will be higher and in the special circumstances of the case there may also be reasons to refrain from increasing the sentence. In the case of multiple recidivism, judges often also opt for a measure such as *terbeschikkingstelling* or *plaatsing in een inrichting voor stelselmatige daders*. So, it is not always a question of harsher punishments, but mainly of different punishments. The basis for the imposition of a heavier punishment seems to be found mainly in the punitive goals of retribution and special prevention, more specifically incapacitation.

The answer to the main question of the study is as follows. The analysis of case law, case files and focus groups shows that criminal courts impose heavier sentences on repeat offenders than on first offenders after finding recidivism in serious violent and sexual offences. This increase in the sentence consists only to a small extent of the choice of the main penalty, because in the case of serious violent and sexual offences, an unconditional prison sentence is usually imposed anyway (in 91% of cases). However, first offenders are relatively more likely to choose to impose a larger part of that prison sentence conditionally, or to impose community service. The increase in the penalty for recidivism probably consists largely of the imposition of more days of unconditional imprisonment. In terms of penalty points, repeat offenders are on average sentenced to 334 days more unconditional imprisonment than first offenders. Based on the median, one comes to 135 days more unconditional imprisonment.

Discussion

A first important observation of this study is that recidivism is generally associated with a heavier sentence, but that there are also cases in which the court does not increase the sentence in the event of recidivism.

A second important observation is that the conclusions regarding the analysis of case law say something about the judgments analysed. Although these are likely to be quite representative of general legal practice in the case of serious violent and sexual offences, this cannot be established with certainty. However, there are several indications that the studied judgements give a very representative picture. For example, in the case of serious violent and sexual offences, it is customary to publish judgments on rechtspraak.nl. In addition, for the chosen serious violent and sexual offences, we analysed all sentences that met our inclusion and exclusion criteria during the chosen research period.

A third observation is that the quality of the data in the analysis of case law left much to be desired in some respects. For example, it turned out that judges do not always clearly motivate or explain in their judgments whether there is recidivism, and if so, what kind of recidivism it is. It is also not always clear whether and how recidivism is considered, in accordance with the case law of the Supreme Court. As a result, certain aspects of a not inconsiderable number of judgments are categorised as 'unknown'. Future research could show whether there is a systematic bias in this. It also turned out that there was sometimes concurrence with other offences. Most of these were minor offences, so this probably did not have a major impact on the data. However, there were also several exceptional cases where there was concurrence with a very serious offence. In the present investigation, the categorisation of rechtspraak.nl has been maintained. It is advisable to investigate or – if already known – to publish how this categorisation is established in practice to provide insight into this point in subsequent case law. In the qualitative analysis, however, the exceptional cases are sufficiently explained.

Fourthly, by combining different forms of data and applying different analytical methods, a valid picture was formed of the legal practice regarding the increase of sentences in the event of recidivism. These perspectives do not contradict each other in any way, but instead confirm and complement each other.

A (legal-normative) conclusion of this investigation is that the general recidivism rule of Articles 43a and 43b of the Dutch Penal Code – which is general because it applies to all crimes – is hardly applied. The main reason for this is that the range within which the judge has discretion in sentencing is generally considered to be wide enough. It can be deduced from this fact that the situations in which Article 43a of the Criminal Code is applied are exceptions. In current legal practice, therefore, there seems to be sufficient bandwidth for a proportionate punishment for recidivism. In exceptional cases where there is a need to further broaden the bandwidth, the court will make use of the possibility offered by law.

It also follows from the investigation that the period within which recidivism may be considered is interpreted as unnecessarily restrictive as a result of an incorrect – because too broad – interpretation of the five-year limitation period referred to in Article 43a of the Dutch Penal Code. It is recommended that the Instruction Framework for Criminal Procedure for

Adults of the Public Prosecution Service and legal practice in this respect be brought in line with the intention of the legislator.

A final point relates to the court's justification for the sentence. The research shows that there is often no justification for how the (absence of) a criminal record played a role in determining the punishment modality. Although this is in line with the case law of the Supreme Court that if the court mentions an offence that has not been charged in connection with the sentencing, it may be assumed that that circumstance is included in the sentencing in an aggravating sense, but it does raise the question of how comprehensible the court's reasoning is (for the defendant and the wider public). This line of jurisprudence does not relieve the criminal court of its responsibility to explain whether and to what extent previous offences have been considered in sentencing in the present case. Moreover, this is in line with the Modernisation of Criminal Procedure Bill, in which the starting point for the decision to impose a sentence seems to be that broad interpretation of that decision must be provided and that it must be explained to the parties to the proceedings and society which factors played a role in the sentencing.

Bijlage 2 Vonnissen ten behoeve van dossieranalyse

ECLI:NL:RBLIM:2020:832
ECLI:NL:RBDHA:2020:5737
ECLI:NL:RBOBR:2021:4902
ECLI:NL:RBAMS:2022:3030
ECLI:NL:RBLIM:2020:6962
ECLI:NL:RBLIM:2021:770
ECLI:NL:RBMNE:2021:1139
ECLI:NL:RBNNE:2021:1734
ECLI:NL:RBNHO:2021:2185
ECLI:NL:RBMNE:2020:1548
ECLI:NL:RBOVE:2020:2008
ECLI:NL:RBZWB:2021:270
ECLI:NL:RBNNE:2021:674
ECLI:NL:RBGEL:2020:1966
ECLI:NL:RBOVE:2021:3115
ECLI:NL:RBDHA:2020:10197
ECLI:NL:RBOVE:2020:794
ECLI:NL:RBROT:2018:5509
ECLI:NL:RBROT:2018:5498
ECLI:NL:RBAMS:2022:534
ECLI:NL:RBGEL:2022:1454
ECLI:NL:RBDHA:2020:4678
ECLI:NL:RBAMS:2022:1485
ECLI:NL:RBAMS:2020:392
ECLI:NL:RBZWB:2020:872
ECLI:NL:RBROT:2020:10949
ECLI:NL:RBROT:2022:4633
ECLI:NL:RBDHA:2022:13645
ECLI:NL:RBAMS:2020:3129
ECLI:NL:RBOBR:2021:1921
ECLI:NL:RBLIM:2020:4534
ECLI:NL:RBDHA:2021:221

Bijlage 3 Vragenlijst

1. Op welke wijze stelt u/de rechter vast of er sprake is van recidive? Bent u bekend met het onderscheid tussen speciale en specifieke recidive? Wat houden deze begrippen volgens u in? Bent u bekend met het onderscheid tussen andersoortig en gelijksoortig? Wat houden deze begrippen volgens u in?
2. Op wat voor manier komt recidive naar voren in het strafdossier? Komt recidive volgens u voldoende in het dossier naar voren om door u/de rechter te kunnen worden meegewogen bij de strafoplegging? Biedt het dossier voldoende aanknopingspunten om het onderscheid tussen speciale en specifieke recidive (andersoortige/ gelijksoortige recidive) te maken?
3. Op wat voor manier komt recidive op de zitting naar voren? Komt recidive volgens u voldoende naar voren ter zitting om door u/de rechter te kunnen worden meegewogen bij de strafoplegging?
4. Wat zijn redenen voor u/de rechter om wel of niet tot strafvermeerdering over te gaan aan verschillende typen recidivisten?
5. Tot welke termijn dient er volgens u over te worden gegaan tot strafvermeerdering, met andere woorden na hoeveel jaar zonder delict zou recidive niet meer moeten worden tegengeworpen? Waarom die termijn?
6. In hoeverre verwijst u/de rechter in uw motivering naar de speciale en specifieke recidive ter onderbouwing van het type opgelegde straf? Onder welke omstandigheden doet u/de rechter dat wel/niet?
7. In hoeverre verwijst u/de rechter in uw motivering naar de speciale en specifieke recidive ter onderbouwing van de strafmaat? Onder welke omstandigheden doet u/de rechter dat wel/niet?
8. In hoeverre gaat u/de rechter over tot strafvermeerdering bij veroordeling van de eerste keer, tweede keer, derde keer of vaker recidivisten in vergelijking met die van first offenders van ernstige gewelds- en zedenmisdrijven? Waarom? In welke omstandigheden? In hoeverre gaat u/de rechter over tot strafvermindering bij veroordeling van de eerste keer, tweede keer, derde keer of vaker recidivisten in vergelijking met die van first offenders van ernstige gewelds- en zedenmisdrijven? Waarom? In welke omstandigheden?
9. Zijn er punten niet aan de orde geweest tijdens dit interview die nog aan de orde dienen te komen volgens u?

Bijlage 4 Begeleidingscommissie

Voorzitter

Prof.mr. G.P.M.F. Mols	Em.hoogleraar straf- en strafprocesrecht, Universiteit Maastricht

Leden

Mw. mr. W.M. de Jongste	Senior projectbegeleider, WODC
Mr. M. Hasanian	Beleidsmedewerker, Directoraat-Generaal Rechtspleging en Rechtshandhaving, Ministerie van Justitie en Veiligheid
Mw. dr.mr. S.G.C. van Wingerden	Universitair hoofddocent Criminologie, Universiteit Leiden
Mr.dr. R.S.T. Gaarthuis	Universitair docent straf(proces)recht, Universiteit Utrecht