

Life is life in the Netherlands

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How long will a person sentenced to life in the Netherlands actually have to spend in detention? Internationally, the Netherlands was renowned for its mild sentencing climate: life sentences were imposed rather seldom and life wasn't actually life. This paper will show that the times have changed. Over the last years, the number of life sentences has increased exponentially and it looks as if today life imprisonment does indeed mean permanent confinement. The only possibility of having a life sentence commuted to a fixed term is through a pardon. This paper will discuss the legal framework and the development of the Dutch pardon policy, concluding that a policy to pardon life prisoners in due course no longer exists. The enforcement of lifelong imprisonment aims to prevent the prisoner's return to society. This approach means the Netherlands is no longer in step with Strasbourg.¹

Legal framework

In the Netherlands, a pardon is granted by the Crown and may, according to the Pardons Act, be based on two separate grounds. The first is a circumstance which was not, or insufficiently, considered or unavailable for consideration by the judge at the time of his ruling, and which, had it been (sufficiently) known at the time, would have led him to impose a different punishment or to not impose one at all. A pardon may also be granted if it has been credibly established that enforcement of the judicial ruling or its continuation in reason does not serve any of the goals aimed at in the application of criminal law. The function of a pardon is to rectify or alleviate absolute injustices or ineffectiveness in the criminal law system. Pardoning life prisoners will, in most cases, be based on the second ground. However, there is no separate procedure for petitioning for pardon in case of life imprisonment. Neither the Pardons Act nor any other ministerial decree or decision gives specific attention to the possibility of pardon for life prisoners.

Pardon policy on life prisoners

Mapping the Dutch pardon policy on life prisoners has turned out to be difficult, since relevant figures are scarce. It is clear that for a long time life prisoners, in principle, did not have to die in their cell. Since the introduction of lifelong imprisonment in 1886 until about 1965, approximately 75 per cent of life prisoners became fixed-term through pardon. Of the remaining

25 per cent, some died early, one escaped and two were transferred to a mental hospital where they subsequently died. Until the seventies it was standing practice that a life prisoner would in the end be released. This policy corresponded with the legislator's evident intention when introducing this punishment and was in line with the policy views of the respective Ministers of Justice in the fifties, sixties and seventies.

The last commutation of life imprisonment to fixed-term dates back to 1986. One of the reasons for the fact that no pardon was granted to life prisoners since then, is that in the seventies life sentences were not imposed at all. Only in 1982 was such a sentence imposed again. The absence of life sentences over a period of more than 13 years obviously meant that pardoning life prisoners was not an issue for quite some time. This apparently resulted in the pardon policy on life sentences disappearing into oblivion.

This lack of life sentences over many years is not the only reason that a pardon policy was no longer in place. Also, a clear political shift can be observed. While the Minister of Justice in 1972 still thought that enforcing life imprisonment 'until death' was incompatible with the principles of our judicial system, in 2004 the Minister stated that a pardon policy on life prisoners did not exist and that lifelong 'is simply for the rest of your life'. This position didn't turn out to be an intermediate status quo but is by now widely supported by the Government, as is demonstrated by the fact that the three persons sentenced to life in the eighties have not yet been released. At the moment, they have been in detention for 26, 25 and 21 years respectively, without any prospect of (staged) release. This teaches us that at the moment there is no legislation nor a practice-based policy on this matter.

In 1978, a Ministerial directive 'for the selection and detention support of long-term inmates and of persons sentenced to imprisonment and placed at the disposal of the government' came into effect. This was the so-called 'monitoring procedure long-term inmates'. This procedure involved regular reviews to establish whether there was reason for granting a pardon, ex officio or not, in the case of long-term inmates (sentenced to six years or more). It had been decided that a prisoner, sentenced to imprisonment for six years or more, having served one third of this sentence would (again) be submitted to a clinical psychological assessment. This assessment would subsequently establish the results of the penitentiary treatment thus far, the current state of mental health, the prognosis

from a penitentiary and rehabilitation point of view and recommendations which could be made based on this. The purpose of the procedure therefore was the structural monitoring of the detention situation and giving instructions on the content of the enforcement. The possibility of a pardon was explicitly incorporated in the questions which had to be answered in the advice. This shows that this 'monitoring procedure' did justice to the idea of rehabilitation, firmly embedded in our criminal law system. Despite the fact that the monitoring procedure painted all those sentenced to six years or more with the same brush, this procedure clearly contained policies which applied to life prisoners as well. But since 1998, the 'systematic monitoring' of long-term inmates has come to an end. The high work pressure on institutional psychologists, the large increase in the number of long-term inmates and the ongoing decrease in possibilities to put the time spent in detention to use, apparently contributed to abolishing the monitoring procedure. Although the monitoring procedure in theory did not rule out the possibility of lifelong remaining lifelong, its abolition meant that an essential part of the pardon policy up to that moment was lost. Apparently, the increasingly harsh sentencing climate affects the approximately 100-year-old '*communis opinio*' that lifelong does not mean 'until death'.

The Governmental Council for the Application of Criminal Law and Youth Protection too, assumes that lifelong must be interpreted as permanent and that there is no longer any policy on pardoning.² Judging by the most recent verdicts, the Dutch judges also seem to regard lifelong imprisonment as permanent confinement and hence seem to rule out the existence of a pardon policy. The Supreme Court also took this position: in a case of March 2006 it considered that the judge, in imposing a lifelong prison sentence, aims to prevent the prisoner's return to society. And so lifelong imprisonment has, in principle, become a dead-end situation.

In the meantime, all arrows point in the same direction: the rehabilitation principle is no longer adhered to in life cases. A person sentenced to life can only hope for a future assessment policy, but has no certainty whatsoever that the possibility of a pardon will indeed exist in twenty or thirty years time. Life prisoners therefore are not entitled to the processing of a possible request for pardon. The life sentence aims at permanent removal from society. The question arises if this situation is compatible with Article 5 paragraph 4 of the European Convention of Human Rights (ECHR).³ I suggest it is not. The Dutch policy on life prisoners is in stark contrast with that of other Western European countries and I doubt whether the way in which this punishment is currently enforced in the Netherlands can bear the Strasbourg test.

Article 5 paragraph 4 ECHR (art 5(4) ECHR)

Art 5(4) ECHR reads:

'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

In the ECHR's case-law, this right has been specified as a right to periodic review, which – with a certain regularity in a sufficiently safeguarded procedure – has to assess whether the grounds which at the time led to the deprivation of liberty continue.

In the 1981 case of *Winterwerp v the Netherlands*,⁴ the ECHR already acknowledged that the nature and purpose of art 5(4) ECHR imply that detention, if and when the original deprivation of liberty is based on a court order, is subject to further examination of its lawfulness. In another case that same year (*X v United Kingdom*)⁵, this system is further specified. The Court ruled that if the legal system in question does not provide for an automatic periodic review of the detention, at least the right to legal redress at the request of the person in question should exist. In the cases of *Van Droogenbroeck v Belgium*⁶ and *Weeks v United Kingdom*⁷ the Court provided a further interpretation of the terms 'lawfulness' and 'by a court'. The latter term, according to the Court, means that the decision whether the continued detention is lawful must be made by a judicial body independent of the parties. In 2002, the ECHR, in *Benjamin & Wilson v United Kingdom*,⁸ ruled that the decision whether or not the prisoner must be released shall not be made by a body which is part of the executive power even though this is advised by a judicial body. The Court arrived on a violation of art 5(4) ECHR and considered:

'(...) Article 5 § 4 presupposes the existence of a procedure in conformity with its provisions without the necessity to institute separate legal proceedings in order to bring it about. Similarly, although both parties appear to agree that the Secretary of State, following entry into force of the Human Rights Act 1998, would not be able lawfully to depart from the Tribunal's recommendation, this does not alter the fact that the decision to release would be taken by a member of the executive and not by the Tribunal(...)'

One of the most important rulings with regard to the interpretation of art 5(4) ECHR is *Thynne, Wilson and Gunnell v United Kingdom*⁹ in which case the ECHR held that the periodic review as determined by art 5(4) ECHR is not encompassed by the British judge's decision to impose the life sentence. Before reaching the conclusion that art 5(4) ECHR had been violated, the Court considered:

'Article 5 para. 4 (art. 5-4) does not guarantee a right to judicial control of such scope as to empower the "court" on all aspects of the case, including questions of expediency, to substitute its own discretion for that of the decision-

making authority; the review should, nevertheless, be wide enough to bear on those conditions which, according to the Convention, are essential for the lawful detention of a person subject to the special type of deprivation of liberty ordered against these three applicants.'

In *Wynne v United Kingdom*,¹⁰ the Court provided an explanation with regard to the applicability of art 5(4) ECHR in, on the one hand, 'mandatory' and, on the other hand, 'discretionary' life sentences.¹¹ According to the Court, a convict serving a so-called 'mandatory' life sentence is not entitled to a review by virtue of art 5(4) ECHR, since 'the nature and the purpose' of the punishment are *solely punitive* and the detention is therefore sufficiently justified by the underlying verdict. However, in the 'discretionary' life sentence, the right to periodic review does exist, because this sentence is imposed to *protect* society. The implied dangerousness or mental instability of the convict may change over time. For that reason, the continued existence of the grounds for the punishment *should be regularly reviewed*. In more recent cases against the United Kingdom, the Court repeated and tightened this position. For instance, in *Stafford*¹² and *Hutchinson Reid*¹³ the Court again ruled that if over time the possible dangerousness of the convict serves as ground for detention (in this case, once the 'tariff' has expired), there must be a periodic review *because the dangerousness may cease to exist* and with it the basis for detention. In *Easterbrook v United Kingdom*¹⁴ the Court subsequently ruled that the British judge was not at liberty to refrain from fixing the 'tariff'. In this case, only the 'mandatory life sentence' had been imposed. Given the circumstances, this did not constitute a violation of art 5(4) ECHR but of Article 6 paragraph 1 ECHR.¹⁵ In 2006, in *Léger v France*,¹⁶ the ECHR again issued an important ruling on the compatibility of the life sentence with the fundamental safeguards in the ECHR, among those art 5(4) ECHR: the Court refers to the 'Stafford case' and considers that from the moment the retaliatory part of the sentence has been served, the need for continued detention based upon risk and dangerousness of the convict must be assessed. The Court ruled that in this particular case Article 5 was not violated, because in France sufficiently safeguarded procedures for reviewing the continued usefulness for the detention were open to the plaintiff. In France, there is a procedure for early release, a procedure to suspend the sentence and the possibility of a pardon for life prisoners.

Significance of ECHR case law for the Netherlands

How does this case law affect the Dutch situation? Despite the fact that formally we do not distinguish between 'mandatory' and 'discretionary' life sentences, Strasbourg case law is of great importance in the Dutch administration of criminal justice. An analysis of judgments issued over the past couple of years and

imposing a life sentence, shows that in approx 90 per cent of the cases this sentence was imposed, on the one hand, in view of the severity of the crime and, on the other hand, to protect society. In other words, Dutch case law demonstrates a clear line whereby, in order for a life sentence to be imposed, there must be both a retaliatory and a preventive aspect. The number of rulings imposing a life sentence solely based upon the severity of the crime can be counted on the fingers of one hand. The vast majority of life sentences in our country is therefore partially based upon the dangerousness of the convict, which however, given ECHR case-law, is subject to change *and should therefore be periodically reviewed* (in an adequate manner through a sufficiently safeguarded procedure).

The question that arises is whether the enforcement of life sentences in the Netherlands meets this requirement. The last time the Supreme Court reviewed whether a life sentence could bear the ECHR test was in 1999. In that case, one of the grounds for appeal for the Supreme Court argued that art 5(4) ECHR was being violated by the absence from our system of a periodic assessment whether the grounds which, at the time, led to the deprivation of liberty continued. The Supreme Court rejected that assertion and held that our legislator not only fully acknowledges the interests of prisoners as explicated by the European Court, but has indeed also explicitly met these. A reference was made to the possibility of (ex officio) pardon and the 'monitoring procedure long-term inmates' which implies an ex officio review of the continued usefulness of the detention. The Court also referred to the possibility of filing a petition for early release with the civil court; however, this possibility has turned out to be mere theory.

Conclusion

There is hardly any need to explain that the Supreme Court's position is no longer tenable. For that matter, I doubt whether in fact the periodic review as set forth by the ECHR in view of art 5(4) was sufficiently safeguarded in our country at the time of the Supreme Court's judgment. As previously explained, the pardon procedure for life prisoners in particular had never been codified and the procedure to be followed was apparently to a large extent shaped in practice, imbued with the spirit of the times. One must wonder whether this pardon procedure, swayed by the political issues of the day, meets the standards of the 'sufficiently safeguarded' procedure as required by the ECHR.

Furthermore, case law with regard to art 5(4) ECHR shows that this periodic review must be carried out by a *judicial* body. Although in our country the pardon procedure involves obtaining advice from the court which imposed the life sentence, the decision on pardon is made by the Crown. In 1999, the Supreme Court wrongly ignored these aspects. Meanwhile, the

ECHR has decided that the periodic review may not be carried out by the executive power; even though it is based upon a judicial advice.

While the Dutch Supreme Court's 1999 judgment also showed that the Dutch interpretation of art 5(4) ECHR hung entirely on the pardon procedure for life prisoners, since then our pardon policy has only continued to erode. Today there is no longer such a thing as a pardon policy, the 'monitoring procedure long-term inmates' has been abolished and both in politics and the judiciary, the opinion appears to take root that our life prisoners are not allowed the prospect of a return to society. It seems as if we have lost sight of art 5(4) ECHR. Therefore, the time has come that our highest court of justice again speaks out on the Dutch practice of enforcement of the life sentence, a practice that, to me, constitutes a patent violation of art 5(4) ECHR.

Notes

- 1 The European Court of Human Rights is based in Strasbourg.
- 2 Advice dated 30 November 2006.
- 3 The European Convention of Human Rights is the European equivalent of the International Covenant on Civil and Human Rights. (www.echr.coe.int/echr/).
- 4 ECHR 24 October 1979, Application no 6301/73
- 5 ECHR 5 November 1981, Application no 7215/75.

- 6 ECHR 24 June 1982, Application no 7906/77.
- 7 ECHR 2 March 1987, Application no 9787/82.
- 8 ECHR 26 September 2002, Application no 28212/95.
- 9 ECHR 25 October 1990, Application no 11787/85; 11978/86; 12009/86.
- 10 ECHR 18 July 1994, Application no 15484/89
- 11 In the United Kingdom there is a difference between 'mandatory' and 'discretionary' life sentences. The mandatory sentence is a life sentence which must be imposed by law and is of a solely punitive and retaliatory nature. Whereas in the discretionary sentence the preventive element plays an important role. If life is imposed for both punitive and preventive reasons, it may be that the convict receives a much harsher punishment than he deserved, given his crime. Therefore, in such cases the English judge must include in his ruling the time the convict would have had to serve, had only the retaliatory aspect been considered. This period is called 'tariff'.
- 12 ECHR 29 May 2002, Application no 46295/99.
- 13 ECHR 20 February 2003, Application no 50272/99.
- 14 ECHR 12 June 2003, Application no 48015/99
- 15 Article 6 paragraph 1 ECHR holds: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'
- 16 ECHR 11 April 2006, Application no. 19324/02.