# "AT THE GOVERNMENT'S PLEASURE"

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## Trends and developments in the compulsory treatment of mentally disturbed offenders in The Netherlands.



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CONTENTS

## 1 INTRODUCTION

"Detention at the government's pleasure" is a measure that can be ordered by the court for so called "Criminal psychopaths". The Dutch criminal code provides this possibility for people who:

- committed an offense,
- are considered not or only partially responsible for their acts because of a serious impairment of their mental faculties,

and who:

- are considered to be a danger to the community.

A TBR-order, as it is called in Holland, is never given without a psychiatric report, which is usually and preferably made by a multi-disciplinary team after an observation in a special hospital. The order may be combined with a prison sentence (in case of partial responsibility). Other possibilities in dealing with offenders who are considered "not responsible": they may be discharged from prosecution (which actually hardly ever happens) or they may be committed to a psychiatric hospital. Several combinations of measures are possible as well.

A TBR-order is initially given for a maximum of two years, but can be extended several times. At this moment the total length may be indefinite, but according to a new Bill, that is now pending discussion in the First Chamber of the Dutch parliament, the indefinite length will be only possible in case of offenses which include violence. Although there has been much debate about this change, in practice it will not be of very much weight as most TBR-orders are given for felonies including violence *).

Execution of the order is usually carried out in so-called TBR-institutions. Special forensic-psychiatric hospitals, some of them run by the State. Most of the TBR-institutions, however, are run privately (but fully subsidized by the Government).

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*) For further details about the judicial rules, see e.g. Beyaert (1980), Schnitzler (1983), Krul-Steketee (1979), Koenraadt (1983) and/or Krul-Steketee and Zeegers (1981).

*This has historical reasons. In former times all kinds of social work, education and care of the sick was carried out by the churches. Later these tasks were performed by private organisations who originated from these same churches. The Christian Democratic Party, which has a very strong position in Dutch politics, still clings to this principle of private organisations taking care of people in need. Apart from the ideological reasons, there were also financial reasons: the private organisations used to have resources in the community and were therefore cheaper for the state.*

Although the institutions are rather autonomous in their ways of treatment, the Minister of Justice, bearing the ultimate responsibility, sets the limits in terms of safety, leaves etc. The TBR intends to meet two distinct needs. Firstly, the need of the society to be protected against serious crimes, and secondly, the right of the mentally ill offender to a suitable treatment. In the long run, this treatment is supposed to contribute also to the protection of the community, as a cured offender hopefully does not commit any more offenses, or at least less or less serious ones.
The TBR-institutions also admit other persons from the correctional system, e.g. people who were convicted to a prison sentence only and who later (e.g. in the prison) turn out to suffer from mental disturbances.

The treatment provided by the institutions is of high quality and is generally regarded as being of a higher standard than in psychiatric hospitals for non-offenders (Beyaert, 1980). Several forms of therapy, e.g. psychoanalysis, psychotherapy and socio-therapy are available and most institutions can offer a rather wide variety in work-shops, creative therapy, sport facilities, etc. Psychopharmaceutics and isolation are used as little as possible. Within the institutions the aim is to create a "therapeutic environment", where the concepts of free activities, responsibility, social awareness, etc. are applied as much as possible.
Security is realised in two ways. The outside security is mainly physically: high walls, electronic monitoring, etc. Safety

within the institutions is realised by a combination of physical and social measures, the last group involving group-leaders and other professional staff.

As a consequence of the kind of treatment, the type of patients (understandably not the easiest ones to handle) and the needs of security, TBR-institutions are heavily staffed, the rate being (approx.) 3 (personnel): 1 (patients).

Part of the treatment in all TBR-institutions is the system of progressive freedom. Depending on the patient's progress in the treatment, carefully dosed steps into freedom will be granted. Usually the first step will be an escorted short visit, e.g. to relatives or to a nearby town. Further steps may include longer visits with or without escort, the last stage consisting of a conditional release, during which the patient lives on his own in the community. During this last stage he is considered to be an out-patient of the institution. He will normally be in contact with the institution and/or with the rehabilitation (probation and parole) service. After the final discharge the rehabilitation service will continue the contact with the (then ex-)patient *).

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*) For a more detailed description of treatment principles, see Niemantsverdriet en Van der Plaats (1981), who provide an overview of these principles as applied in the "Van der Hoeven Kliniek".

## 2 SOME FIGURES

Starting in the 70ies the number of TBR-orders given per annum is slightly less than a hundred. A few other data may give an idea of the meaning of this figure.
The total population in Holland is about 14,000,000. Consequently a hundred TBR-orders annually equals 0.007 promille. Another comparison may involve the total of crimes recorded by the police per annum. This number is about 1 million; eventually slightly less than 100,000 of these cases reach the courts. A hundred TBR's annully means that in one of every thousand more serious cases a TBR is ordered.
As can be concluded from these figures, the frequency of TBR-orders is not high. It is an order that is not lightly given and it is generally seen as a heavy sentence (although technically speaking it is "only" a measure). TBR is ordered only when it is considered absolutely necessary.
This has not always been the case. Formerly more TBR-orders were given and long prison sentences were relatively rare. Only recently the share of longer prison sentences is increasing. This is partly due to an increase of offenders against the drugs-act and probably also partly due to a decrease of the number of TBR-orders. Table 1 presents an overview of the number of TBR-orders over the last forty years.

Table 1: Development of the number of TBR-orders per year, including orders to execute a conditional TBR *).

| | | |
|---|---|---|
| 1946 - 1960, average | N | 314 |
| 1961 - 1970, average | N | 167 |
| 1971 - 1980, average | N | 101 |
| 1980 | N | 85 |
| 1981 | N | 79 |
| 1982 | N | 97 |
| 1983 | N | 94 |
| 1984 | N | 90 |

*)Source: Ministry of Justice (Jaaroverzicht 1986a, b, Enkele cijfers,1984).

There are several explanations for the reduction of the amount of

TBR's. According to the results of a research project carried out by our Research- and Documentation Centre (RDC; van Emmerik, 1984) important reasons for the judiciary to demand (prosecutors) or to order (judges) a TBR less frequently are:

- less confidence that the safety of the public is sufficiently quaranteed by a TBR-order
- a more strict application of the criterion that the interest of public order and safety particularly requires this TBR;
- less optimism on a positive result of the treatment.

The problems of safety and rehabilitation will be discussed in a further part of this paper. Now restricting to the second reason given: the question when a TBR order, being a measure in the interest of the community, is absolutely necessary. As mentioned before, over the years a stricter interpretation has been given to this criterion and this has led most prosecutors and judges to the conclusion that in the case of property offenses (whithout violence) a TBR is only very seldom adequate. The changing opinions of the judiciary can be clearly seen from table 2.

Table 2: Development of type of offenses for the total of TBRs in treatment: perc. for the years '71, '77 and '83*)

| Offenses: | Year 1971 | 1977 | 1983 |
|---|---|---|---|
| Property (e.g. theft) | 43 | 19 | 4 |
| Property with violence (e.g. burglary) | 11 | 27 | 29 |
| Aggressive | 14 | 29 | 38 |
| Sexual | 14 | 5 | 3 |
| Sexual with violence | 13 | 14 | 22 |
| Other | 5 | 6 | 4 |
| | 100% | 100% | 100% |

*) Source: Ministry of Justice (Jaaroverzicht 1986a).

As a consequence of the stricter application of the criteria for TBR, the population of the TBR-institutions has decreased in size. However, being a much more selected group, the current population of the TBR-institutions is increasingly more difficult to handle. This also results in a longer period of

treatment within the institutions. According to data from the Ministry, the average treatment period in 1976/1977 was about 35 months and in 1981/1982 46 months. In 1984 the average length of treatment within the institutions was estimated to be more than 50 months. There are, however, important differences, some patients being (conditionally) released rather quickly (e.g. after 2 years) and some others staying in one or more institutions for 5 years or more (which is, by Dutch standards, very long).

Finally, some figures should be given about the institutions. If the average number of commitments is slightly less than 100 and the average treatment in the institutions about 4 years or more, there should logically be about 400 places. By and large this is the case, the actual number in 1985 being 421. It should be kept in mind, however, that some patients may be elsewhere (e.g. in a psychiatric hospital) and that the institutions also treat other people who are passing trough the correctional system (table 3).

Table 3: Average population of the TBR-institutions during 1985 *)

| | |
|---|---|
| TBR-orders | 325.8 |
| Prison sentence + TBR | 22.6 |
| Prison sentence only | 17.1 |
| Others | 52.5 **) |
| Average population | 418.0 |
| Total of places | 421 |

*) Source: Ministry of Justice (Jaaroverzicht, 1986b).
**) This high number is caused by a special institution which serves a larger variety of purposes.

It may come as a surprise for many readers who are not acquainted with the Dutch correctional system, that the 421 places are to be found in 8 institutions (7 for treatment and 1 for selection). So the average size is about 50 places. Apart from two very small institutions, the more usual size is somewhere between 50 and 100 places. Because of lack of capacity some institutions will be enlarged, although staffs of most institutions will insist that they cannot continue their mode of treatment when the institutional population increases too much.

## 3 EFFECTS: PROBLEMS DURING TREATMENT, RECIDIVISM AND PERSONAL WELL-BEING.

Of course the question about the results of the TBR is a very important question, and difficult to answer, the biggest problem being the use of the proper criteria. What may be considered a success? Is it a success when an ex-TBR-patient feels well, or when he does not commit further crimes? Or is it already to be seen as a success if no serious crimes occur after his dismissal? It is difficult, if not impossible to set the answer to these questions.
Nevertheless, as the aim of the TBR is to protect the community, some data on the aforementioned questions could be collected from a study of our research centre in one of the TBR-institutions, conducted in the second part of the seventies (see Van Emmerik, 1982 and 1986a). Then a more complete study on recidivism was conducted, checking the recidivism of all people who had been dismissed from the TBR between the 1st of July 1974 and the 30th of June 1979 and whose data were available *) (see Van Emmerik, 1985 and 1986b). Some of the results of these studies are summarized in this section.

Offenses and other problems during the execution of the TBR
In the first section of this paper it was already pointed out that the modes of treatment in the Dutch TBR-institutions are to some extend based on the ideas of the therapeutic community.
This implies that some form of responsibility is given to the patient. It was also explained that the treatment includes a system of progressive freedom, giving the patient a chance to get accustomed to freedom and a chance to show he can handle it. Of course these ways of treatment involve risks, and things do sometimes go wrong, although fortunately seldom very wrong. In

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*) Which was the case with most of them. Judicial records in The Netherlands are destroyed however when the ex-offender dies. Aliens and women, because of their small numbers, were left out of the research.

his recidivism study, Van Emmerik collected data on some of these problems. See table 4.

Table 4: Irregularities during treatment *) N=589

| | |
|---|---|
| Absent without leave for at least 24 hours | 62% |
| Same, 4 times or more | 25% |
| At least one offense (without violence) | 33% |
| At least one offense, including violence | 11% |

*) Source: Van Emmerik (1985, 1986b).

The figures about absence without leave seem to be rather high, but one has to realise that quite a few of these absences are the result of not (in time) returning to the institution after a leave or running off during a supervised visit. Which is to say that the patient, according to the institution, had progressed enough in his treatment to grant him some form of freedom. By lack of the suitable data, distinguishing between this kind of illegal absence and the more spectacular form of breaking out of or escaping from the clinic was not possible. According to at least one expert (Haffmans, 1984) this rarely happens. My personal idea is that this may be true for the eighties, but not for the seventies: during the last decade security measures have been strengthened rather continually.
Quite some patients committed offenses while being in treatment but the majority of the offenses did not include violence and those that did were not always very serious. Still there seems to be a definite amount of irregularities during the in-patient treatment period. This is also true for the out-patient treatment period. Of those who where conditionally released one quarter was reconvicted for an offense and of one third the release was withdrawn (which is the responsibility of the TBR-institution).

Recidivism

Data on recidivism covered the period from final discharge of the patient to December 1982. This means that the ex-TBR-patients were completely discharged at least 3 1/2 years earlier, and at

the utmost 8 1/2 years earlier.

The figures of recidivism vary enormously according to what is defined as recidivism. This is illustrated by table 5.

Table 5: Recidivism during 3 1/2 - 8 1/2 years after final discharge *) N=589

| | |
|---|---|
| Committed one or more offense(s) | 63% |
| Reconvicted | 51% |
| Reconvicted: custodial sentence and/or new TBR | 33% |
| Reconvicted: custodial sentence of at least six months**) and/or a new TBR | 16% |
| Same, for an offense including serious violence | 9% |

*) Source: Van Emmerik (1985, 1986b).
**)Six months is in Holland considered a rather high sentence.

The conclusion may be that there is a rather high rate of recidivism, but a much lower rate of serious recidivism. As pointed out earlier, it is very difficult to decide if this is a good or a bad result or whatever qualification one might think of. Therefore a comparison was made with a group of ex-inmates who had served a prison sentence of at least 2 1/2 years during the same period as our TBR-group. The data-collecting was not as extensive as for the former TBR's but the data from table 5 can also be given for the ex-long-term prisoners (see table 6).

Table 6: Recidivism of ex-TBR-patients and ex-long-term-prisoners (LTP's) during 3 1/2 - 8 1/2 yrs after final discharge*).

| | ex-TBR's N=589 | ex-LTP's N=373 |
|---|---|---|
| Committed one or more offense(s) | 63% | 68% |
| Reconvicted | 51% | 60% |
| Reconvicted: custodial sentence and/or TBR | 33% | 44% |
| Reconvicted: custodial sentence of at least six months and/or TBR | 16% | 28% |
| Same, for an offense including serious violence | 9% | 10% |

*) Source: Van Emmerik (1985, 1986b).

At first sight, the TBR-group did slightly better than the group of longtermers. Getting more into detail, however, it turned out that both groups were of a different composition.

*One might argue that of course by definition the groups are different. The criteria for giving a TBR, especially the criterion about mental illness would imply this. However, at least one very well known Dutch expert suggested that in practice the differences are very small as the group of long-termers would contain quite a lot of people who suffer from mental disorders (Mulder, 1982). Although there may be a group of prisoners with mental problems, at least our groups turned out to be different.*

The group of long-term-prisoners contained more offenders convicted for property-offenses and offenses against the drug-act (mostly dealing). The group of TBRs contained more persons sentenced for aggressive and sexual offenses. As it is known from criminological studies that generally speaking people who commit property- and drug-offenses have a much higher rate of recidivism than aggressive and sexual offenders, a check for at least this variation was imperative. When we did so, however, there were still differences. The ex-TBR-group committed less serious offenses than the group of ex-long-term-prisoners. Still, there may be other differences between the two groups. We do not know. The only conclusion that can be drawn is that the ex-TBRs as a group may still be a nuisance to society but as a whole they do not seem to be a serious risk for the safety of the public.

Personal well-being

Part of van Emmerik's study on the "Van der Hoevenkliniek" consisted of interviews with ex-patients. For various reasons not all ex-patients could be interviewed, but the researchers succeeded in interviewing 331 of them who were (completely) discharged between 1955 en 1977. Compared with a sample of the Dutch population as a whole, less ex-patients had a job, incomes were lower and the ex-patients were more frequently living alone. This can hardly be a surprise as the possibilies of this group were of course much more restrained than for the random sample of the Dutch population.

Nevertheless only 10% was "not content" with their daily pursuits, while the remaining were "not discontent" (22%) or "really content" (65%). Although there were of course complaints about the period they had been in the clinic, 65% of the ex-patients agreed that in hindsight they had needed some form of

treatment and 46% said that the treatment received was linked-up with their personal problems. On the other hand, 51% said that they also experienced damaging effects.
Comments on open questions also varied. Some said they had really learned in the institution, learned to handle problems, to keep track of themselves etc. Others said it the institutions was chaotic, they were forced to adopt "another personality", staff was incompetent etc.
When asked to compare their situation before their stay in the institution with their situation at the time of the interview, however, respondents mentioned much more changes for the better then for the worse (see table 7).

Table 7: Respondent's comparison of their situation before treatment with that at the time of the research *). N=331

| | |
|---|---|
| Five areas most mentioned for changes for the better: | |
| Dealing with problems | 78% |
| Relationship with partner | 74% |
| Attitude to onself | 68% |
| Leisure pursuits | 55% |
| Attitude to environment | 53% |
| Five areas most mentioned for no change: | |
| Health | 68% |
| Alcohol and drugs | 63% |
| Education | 59% |
| Handling money | 57% |
| Relations with family | 50% |
| Three areas most mentioned for changes for the worse: | |
| Health | 24% |
| Work | 19% |
| Alcohol and drugs | 10% |

*) Source: Van Emmerik (1982 and 1986a).

On the whole this indicates an improvement of the situation although this is not the case for the more concrete items like health and money.
Like with the rates of recidivism, it is difficult to draw a conclusion on this subject-matter. I personally think the results are not too bad, but much depends on the expectations one has of the treatment.

## 4 OPINIONS AND ATTITUDES OF THE JUDICIARY

Changing opinions

Because prosecutors demand and judges order the TBR, their opinions about the necessity, usefullness and effects of the TBR is of major importance. There are several indications that the Dutch judiciary was (shortly after the war) very enthousiastic about the TBR and the expanding treatment possibilities, but that starting from the sixties, this enthousiasm has been diminishing up till the eighties. By now, it seems to be settling down at a much lower level than where we started after 1945. A first indication can be found in the already presented tables 1 and 2. As we have seen, the total amount of TBR-orders has been decreasing steadily. All parties concerned, i.e. the judiciary, the institutions, scientists, the ministry, etc., agree that this can not be the result of a decrease in the number of people who commit crimes and who can be considered mentally ill. This was also demonstrated in table 2, which shows that the number of orders for property offenses have sharply diminished. In former times it could happen that e.g. a vagrant who was for the tenth, twentieth or thirtieth time brought before the court for stealing cattle, laundry or something else was given a TBR. The judge in case would reason that a prison sentence clearly did not help and that maybe a TBR-institution could do "something" with the man. Today this would be unthinkable.

But there are other problems too. Every now and then prosecutors or even judges may lash out in public against the TBR, complaining that institutions are like sieves, with inmates going in and out as they want and saying that the hardened criminals can be seen on the streets within half a year after their conviction. These of course are gross exaggerations, but they do indicate that some people are worried about the safety measures of the institutions. In a more restrained way this worry also shows up in the so-called "combination-sentences", which means that next to the TBR-order a (sometimes high) prison-sentence is given. In this way the judiciary tries to guarantee

that the offender will be confined "behind walls" for a certain, predictable time.

On the other hand advices from the institutions for renewal of the order are sometimes turned down by either the prosecutor or (usually) the judge. Reasons may be that there is little hope that the treatment may still open new possibilities and/or the proportionality between the seriousness of the (original) offense and the time already served.

This does not mean that the judiciary does not have any confidence in the work of the institutions. It only means that they are seeing things from a different point of view. But taking that different view may be considered as a definite change from previous years. Before elaborating on this change, we present some data on the above mentioned problems, taken from a survey held among prosecutors and judges (see table 8).

Table 8: Opinions of prosecutors and judges on various aspects of the TBR*)

| | Prosecutors N=122 | Judges N=168 |
|---|---|---|
| Diminishing number of TBR's due to: | | |
| Less confidence in safety TBR-institutions | 89% | 78% |
| More strict opinions on necessity TBR | 75% | 79% |
| Less confidence in resocialisation | 69% | 67% |
| More attention for motivation offender | 59% | 63% |
| . | | |
| . | | |
| . | | |
| Less mentally ill offenders | 2% | 4% |
| Reasons for non-renewal contrary to advice of clinics | | |
| Patient is already conditionally released | 63% | 71% |
| Patient has been interned long enough for this offense | 57% | 62% |
| Patient wants to stop treatment | 57% | 66% |
| On treatment and safety: | | |
| Generally speaking TBR-institutions do their work scrupulously | 81% | 82% |
| The judge should be consulted before taking steps in the system of progressive freedom | 68% | 39% |
| A real dangerous criminal should -for safety reasons- not be given a TBR | 38% | 38% |

*) Source: Van Emmerik, 1984.

Changing moods

The change in the opinions of the judiciary is by no means an isolated phenomenon. After world war II, in Holland there was as in other European countries, an atmosphere of optimism. Rehabilitation theories flourished in this atmosphere. The so-called medical model, meaning that much deviance could be explained by personal factors and consequently cured by treatment, was fairly generally accepted.

This climate was not only to be found in The Netherlands or in Europe. The reader may recall that in the U.S. this model was one of the most important reasons for accepting the indeterminate sentences, meaning that in many cases the inmate had to stay in prison until he was considered rehabilitated. The reader may also recall Martinson's outcry that "nothing works" and the subsequent disillusions with the possibilities of treatment, followed by changes which led eventually to the "justice-model" and the fixed sentences. Without going into detail this change seems to underline a shift from a medical way of thinking to a more judicial one.

Although in The Netherlands, again as in most European countries, the changes were not as large as in the U.S. -we e.g. never had indeterminate sentences- a certain shift from the medical model to a more judicial way of thinking can be distinguished. The changes which occurred with the TBR-treatment seem to fit in with this general change in climate.

## 5 CONCLUSION

Taking into account the ways of thinking of lawyers and of psychiatrists, I think the conclusion should be that after world war II (1945) the psychiatric way of thinking was very dominant in everything that had something to do with TBR. Expectations of medical interventions were high, maybe much too high. The results of the TBR-treatment are not that bad, but they do probably fall short of the original expectations. When this disillusion with the model started, other values which had been

more or less suppressed were gaining dominance. It was not any longer considered sufficient that the psychiatrist acted for the best of the patient. The good intentions were not misunderstood, but the belief that the psychiatrist really knew best faded. This led e.g. to much more formalised procedures for renewals. Formerly, a written statement from the institution was usually enough for the court; by now the renewal proceeding is a complete session with the patient, lawyers, pschiatrist and everybody present. Gradually the influence of the psychiatrists decreases and the influence of the judiciary is growing: they will set the conditions within which the psychiatrist may operate. We have seen that the new law will maximize TBR for non-violent offenders; in practice judges are often using the criterion of proportionality when they decide to discharge a patient. This forms what can be called an upper limit of the treatment-period. It is my opinion *) that in practice there is also something of a lower limit and that much of the noise about patients "walking the streets within six months" has to do with this lower limit, meaning that the patient should be kept inside the institution for a decent amount of time. This in turn raises the question of mixing up punishment and measures, which relates to the ethical question of guilt and responsibility.

In the meantime this trend will probably continue for some time to come. Steps to improve the legal status of the patients are presently taken. There will be boards who will hear complaints about some of the decisions of the staff. Patients will have the right of evaluation at least once a year, and other rights are also debated. That psychiatrists do not like this development is to be understood. It robs them of part of their power and most people don't like that, irrespective of the question wether it is used rightly or wrongly. But at this moment they cannot do very much about it. The legal way of thinking will probably win more ground before the trends reverse and the psychiatrists once more gain dominance.

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*) Also Haffmans'

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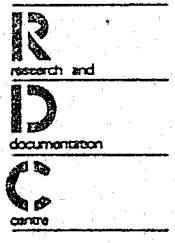


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