September 2006

Dear Sir/Madam,

I hereby enclose our response to the Third Study Commission questionnaire 2006 pertaining to the way the Dutch criminal system deals with those who are mentally ill or mentally handicapped.

Firstly we will cover the way the punishment and measures system is set up in the Dutch Criminal Code, this being necessary to understand the Dutch Entrustment Act (TBS). Then - as the Dutch Entrustment Act is, compared to other legal systems rather unique - we will address TBS in detail to ensure a better understanding of this measure in relation to the questions. Finally we will answer the questions posed.

Introduction

TBS can to a certain level be compared with the way other countries treat offenders with a personality disorder or a mental disorder. Internationally we could say that the measure is rather unique. This of course taking into consideration that although the arrangements differ, principal elements like medical assessment procedures, court orders and so on are comparable .
The Dutch situation differs in that sense that motivation is not necessary for attending the treatment programs of the TBS. The first six years of treatment are offered to all TBS detainees within a secure environment so they can demonstrate their response and progress in therapy to the Courts. When a detainee remains a severe risk for society, her/his TBS sentence will be prolonged as long as necessary. TBS as care in a maximum security hospital or intensive surveillance following discharge, is considered the basic condition for forensic mental health care.

Punishments and Measures

The Dutch Criminal Code contains three main punishments: imprisonment, the fine (money) and community service. Besides this a public prosecutor can ask a court judge to impose a measure. This can be removal of certain goods from the public domain (such as drugs or weapons) or the payment of compensation to a victim or the imposing of surrender of illegal gains. Another special measure is "terbeschikkingstelling"[1] (further TBS).

This measure is requested[2] (article 37a Dutch Criminal Code) at the trial by the Public Prosecution Service (in fact a Public Prosecutor) when roughly speaking a crime suspect is suffering from a mental disorder and needs specific medical attention. Special TBS hospitals and forensic psychiatric hospitals have been instituted for this specific purpose.

After a person is arrested for a crime, the police collect evidence to prove the case and write official reports on their findings. The public prosecutor decides his/her point of action based on these findings. If there is a suspicion that a person is suffering from a mental disorder or mental illness that has lead to the crime committed it can be deemed necessary to have the person accessed by a psychiatrist. Most times a suspect is held in

[1] Terbeschikkingstelling (TBS) translated literally, "at the discretion of the state" The Dutch Entrustment Act /or: detention at the government's pleasure.
[2] Article 37b Sr pertains to imposing TBS by a judge by the state (not requested by the prosecution) (TBS met dwangverpleging) the same conditions are in place as under 37a. the danger criterion is larger.

an institution for preventive custody awaiting this assessment.
Although reports by behavioral experts are possible in all criminal cases, Dutch Penal Law demands that the offence in question is a serious one punishable with a prison sentence of at least four years in order to open the possibility of imposing TBS.

To be able to impose a TBS measure the Court has to possess expert reports. This entails the founded advice of at least two independent behavioral experts, one of them a psychiatrist. The other person usually is a(forensic) psychologist. In most cases these experts are appointed by the investigating Judge.

This examination is done through the FPD (Forensic Psychiatric Service).A regional organized Public Institution that coordinates the assessments on behalf of the Courts, providing psychiatrists and psychologists on a free lance basis. In a number of cases the FPD first compiles a short psychiatric report of this examination. The FPD advises the Court if the suspect needs further examination and how this should take place. If a non ambulant examination (on a closed ward) is deemed necessary other than the FPD can perform, the person is sent through to the PBC (Pieter Baan Centrum) or another closed psychiatric ward. The PBC has the status of a preventive custody institution. Preventive custody is then continued at the PBC. During 7 weeks of observation in preventive custody an extensive report is compiled of the suspect (being a cooperative effort between psychologists, psychiatrists and social workers) all questions posed by the courts must be addressed in their report.

The following questions are in principle taken into consideration in the report of the expert :

1. Does the suspect show any signs of inadequate development and/or pathological disorder of the mind?

2. If so, is there a relationship between this inadequate development and/or pathological disorder and the crime of which he or she is accused?

3. If so, what is the nature of the relationship and to what extent does it exist?

4. To what degree can the suspect be said to be accountable for his or her actions?

5. Do you have any advice concerning the choice of treatment that may prevent a repeat of the crime of which he or she is accused?

On the basis of their findings, therefore including the diagnosis of the mental disorder, an opinion on the degree of diminished accountability and the risk of re-offending the experts give an advise. Both experts must agree if they advise the Court that a TBS order is necessary to protect society.

They advise in other words the judge if TBS is an appropriate measure to take and in what kind of form (conditions to impose for example or compulsory admission) it should take place
The advice is not binding for the deciding Court.

Gradations of responsibility[3]/ accountability.

There are five levels of responsibility ranging from fully responsible to not responsible (unfit to plead). At the fifth level the offense is believed to have been caused entirely by the mental condition of the perpetrator.
A distinction is drawn in the gradations of diminished responsibility in relation to the role played by the mental disorder in the offense. A prison sentence is imposed for the part the perpetrator is deemed culpable. The greater the culpability attributed by the court, the longer the prison sentence can be. TBS is always enforced after the prison sentence has been served. This need not, however, be served in full[4].

The Dutch Entrustment Act (TBS)

TBS is a judicial instrument set out in the Dutch Criminal Code that works in combination with a prison sentence. The prison sentence is enforced first and then followed by TBS[5]. TBS is not a punishment; it is an entrustment act for mentally disordered offenders. Its main goal is not to seek retribution by taking away a persons freedom, but to protect society in the short term by detention, and in the long term, by treatment that reduces risk. TBS means that society can be shielded from a dangerous, mentally disordered individual for as long as is necessary.

The TBS order remains in force as long as the person is considered dangerous. Hence it is crucial to establish again and again that a person is dangerous whenever a TBS order is issued or renewed.

History

When the Psychopath Act came took effect in 1928, people were judged dangerous if they were considered a threat to public order. In those days, TBS (or TBR as it was then called, “at the discretion of the government”) could be imposed on persons for any type of deviant behavior such as theft, exhibitionism, or violence. In 1988, under the influence of social change and the growing number of TBS detainees, this was narrowed down to “a danger to others and/or to the general safety of persons and property” (art. 37a Criminal Code). An offence that leads to a TBS sentence nowadays must be highly serious. (punishable with a prison sentence 4 years or more).

Since 1988, the Ministry of Justice still regulates the placements and the parole-based release policy but it is the Court that decides whether the TBS may be lifted. The

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3 The area between total culpability versus no culpability is referred to as *diminished responsibility* (similar to the concept of *diminished capacity* in Anglo-American law). This term does not appear in the Statute Book, but comes from Article 37a of the Dutch Criminal Code, which states that a person may be sentenced to TBS when he or she commits an offense while suffering from “developmental deficiencies and pathological mental disturbance.”

4 The provisions of September 26, 1997 for prison sentences and TBS state that only 1/3 of the prison sentence need, in principle, is served and that this period may even be shortened due to unsuitability for detention or a serious medical need for treatment.

5 TBS model provides a means whereby mentally disturbed and dangerous individuals can be removed from society for an indefinite period of time, while a judicial review is carried out by the criminal court every two years to determine whether the threat to society warrants further incarceration. It is immaterial to the court whether or not this person is treatable. What matters is the combination of dangerousness and a psychological or psychiatric disorder.

Minister of Justice is, however, responsible for enforcement by means of adequate legislation and funding for TBS maximum security hospitals.

Originally, TBR was considered necessary by legal experts because a gap had appeared in the criminal legislation around the turn of the 20th century.
On the one hand, prison sentences were passed on offenders who were fully responsible when committing a crime. On the other hand, people who committed a crime because they had a serious mental illness were considered unfit to plead. They were then forcibly imprisoned in the state asylum under the Lunacy Act of 1884. Besides this a middle group fell outside this system: people who suffered from mental disorders with impaired control but not to the extent that rendered them non-culpable. This applied to, among others, people with personality disorder or mental retardation.

This group presented the courts with a dilemma, for although they did not have full "control" as it were when they broke the law, they were only partially under the influence of the mental disorder.

The prior implied a shorter prison sentence because culpability was diminished (according to the Dutch legal principle, "punishment to match the level of guilt"). The latter implied placement in an asylum, which was virtually incapable of treating such individuals, given the treatment available at that time. A compromise was found in the form of TBR. The new legislation of 1928 enjoyed popularity, given the fact that the Judiciary had long awaited such a measure.

The Dutch Supreme Court also stipulated that a causal connection should exist between the disturbance and the offense. Hence, in a TBS case, the disorder— which must be ascertained by experts—must be one of the factors that led to the offense. This necessary connection between the disturbance and the offense means that an extensive examination must be carried out by two experts (including a psychiatrist) before the court can pass sentence. The behavioral experts submit their assessments on how far the court can hold a suspect responsible for his or her acts. The stronger the connection between the disorder and the offense—that is, the greater the influence of the disorder on the offense—the lower the responsibility.

The Court may renew the TBS by a period of one or two years.
The director of the TBS-hospital must submit well-substantiated recommendations to the court on the behavior and the progress of the patient when the TBS is due for review. Renewals must then be requested by a Public Prosecutor who has given due consideration to these recommendations. Otherwise, the TBS will be automatically terminated. Usually, the Public Prosecution Service acts in accordance with the director's recommendations. The court reaches a decision after hearing the detainee in the presence of his or her lawyer. In far most of the cases, the hospital that submits the recommendations is asked to elaborate on the report at the public hearing.
The legal rights of the patient are protected by regular evaluations to help the Court to determine if the patient still poses a danger to society. These evaluations take place every two years, at the end of each extension period. Every six years an extra assessment by independent experts is obligatory. But for instance if after the first two years the disorder of the patient is still present, but the risk of recidivism has considerably decreased there are no grounds for extension on the TBS.

The Court may also decide on a provisional termination of the TBS (Art. 38g Criminal Code). This may not last longer than three years. Each year, the court must be advised on the desirability of renewal by another year. The responsibility for this decision rests with the court. In that case, the Probation Services in the Netherlands supervises the detainee after conditions have been drawn up in consultation with the hospital and the probation services and approved by the court. If the detainee breaches these conditions or is at risk of doing so, the probation officer may apply to the Public Prosecution Service, who will assess whether the detainee should be removed from society and placed again in custody. The provisional termination may be lifted and the TBS resumed after a court hearing.
Given the seriousness of these decisions, the court can take extra time to reach a conclusion by deferring its decision on termination or renewal for a maximum of three months. The session is then adjourned for this period. In the meantime, mental health professionals from the hospital and the resettlement services can consider ways of arranging aftercare.

By the revision TBR act in 1997 TBS and “Conditional TBS” was introduced (Art. 38 Criminal Code), which made it possible to sentence people to TBS without necessitating direct admittance to a maximum-security hospital. The legal criteria are the same for a conditional TBS as for a TBS with a care order.

A conditional TBS order may be imposed for, say, non-violent sex offenders, perpetrators of domestic violence, repeated and intensive stalking, and seriously disturbed psychiatric patients who can get the best treatment in a mainstream psychiatric hospital as long as they do not abscond.

TBS is a judicial measure that is imposed on offenders whether they want it or not. Or : involuntary admission to a special TBS hospital. This does not, however, imply that people can be compulsorily treated under TBS, as constitutional rights protect the detainee against this. As a rule, compulsory treatment is only possible if patients are a threat to themselves or other people in the hospital. Though the aim was initially to change the personality or cure the psychological disorder, it is now generally accepted that the primary aim of the treatment is to prevent recidivism.

Priority is therefore given to aspects of mental disorder[6] that present a direct threat of recidivism. Each of these indicates a specific program of treatment.

Accordingly, there are treatment programs for patients suffering from addictions, personality disorder, psychosis, and mental retardation, as well as patients with problems related to aggression and sexual deviation. These programs are provided in the hospital and the outpatient department. The success of the treatment depends, in large measure, on the patients.

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[6] The risk factors can be divided into four categories
• Dispositional (inherent) characteristics, especially personality factors, cognitive factors plus gender, environment, and hereditary defects;
• Previous history, especially the socialization, psychiatric and criminological history;
• Situational factors, especially subjectively experienced stress, the support from society and the means of violence; and,
• Psychiatric characteristics, such as the presence and seriousness of psychological symptoms (delusions, hallucinations, violent fantasies)
Substance use and degree of psychosocial function.

Placement

Originally, detainees were referred to a specific hospital after they had been examined at a special Institute, and the best treatment program for their needs had been decided. In this way data could be collected and used for further research. A diagnostic period was necessary to determine further treatment because each TBS hospital had its own theories in this respect. The Institute then submitted its recommendations to the Ministry of Justice because the Minister of Justice was—and still is—responsible for the placement of these patients. Nowadays the TBS hospitals decide themselves on the treatment program.

Each hospital has a unit for patients with personality disorders and another for patients with psychosis. At the moment, the Department allocates patients for Individual TBS cases at the Ministry of Justice on the basis of the reports compiled by the multi-disciplinary teams of psychiatrists and psychologists for the court hearing. Selections are no longer made according to the hospital but according to the vacancies for the categories listed above. This allocation method makes a separate selection institute redundant. The hospitals are more dependent on one another than ever before for support and back up. This is stimulating cooperation.
A study is currently underway to test the application of the Dutch instrument in the various decisions taken in the criminal justice chain: the Pro Justitia report for the hearing, at entry, for parole, and at the end of the intramural TBS, and resocialization under the supervision of the resettlement services. The aim is also to apply it in the prison system, especially in the case of parole or conditional treatment.

Like in former days some TBS-detainees will not be released into the community, often due to several failed attempts at leave or at parole.
When someone is designated as a constant criminal threat, then treatment ceases. From then on, he or she is provided with care in certain detention units (long stay institutions). This started in 2000. The Ministry of Justice has, mainly for political reasons, built two long stay units for those patient who have been unsuccessfully treated in TWO different TBS hospitals during at least six years and pose a high risk for re-offending. The sole aim is to prevent the disorder from degenerating further and to enable these patients to live (work, recreation and hobbies) as realistically as possible.
The accent is on care and security.
The long-standing aim of TBS is to remove dangerous individuals with a personality disorder from society. These individuals may then receive treatment in a TBS hospital. Admittance to TBS is not a question of whether the individual is treatable, but rather according to the Dutch criminal law he or she should be dangerous to other people. This dangerous, personality disordered individual needs a special nursing environment to prevent the disorder from degenerating further and to prevent or reduce the threat that he or she poses. In this way facilities can be created for dangerous persons that remove them from society for a long time and allow them to retain their dignity.

In reference to the above the answers to your questions is as follows:

1. Are there rules which provide that someone who has a very serious mental illness or handicap cannot be tried by the ordinary criminal court process? If so, is the decision that he cannot be so tried, made by doctors or judges? What is the test to be applied when considering that question? What happens to a person who commits a serious

crime but cannot be tried by an ordinary criminal court? Is there any court procedure available for deciding if the accused person did the act alleged?

Ad 1: In the system of the Dutch Criminal code a suspect who suffers from a very serious mental illness or handicap is tried by the regular (ordinary) criminal courts. There are no specially appointed courts that take on this task nor tests to determine that a "special court" must take on the case nor a special court procedure to decide if the accused committed the act. (these "special courts do not exist in the Dutch system nor "doctors" to establish the decision set out in your question).

A team of professionals as set out above do advise the judge in the form of a report. Their advise is not binding.

Court judges impose punishments and measures. In the Netherlands every person who commits a serious crime and is found guilty is sentenced by a regular criminal court. One of the measures that can be imposed is specifically aimed at the problem of mental illness is the so called TBS.
TBS is a judicial instrument set out in the Dutch Criminal Code that works in combination with a prison sentence. The prison sentence is enforced first and followed by the TBS measure. Gradients in accountability determine the balance between the length of the prison sentence and the start of TBS treatment. Criminal Law makes no distinction in the degree of diminished responsibility, slightly diminished and severely diminished can be found on either side of diminished responsibility.

2. Assume that a mentally ill or mentally handicapped person is not so ill that he cannot be tried in an ordinary court and is found to be guilty. What powers does your system have for sending him for treatment in hospital or in the community for his illness rather than punishing him by sending him to prison? What evidence is required for such an order? If such a criminal is sent to hospital rather than to prison, for how long is he detained in hospital? Is his release decided by doctors or judges? If his mental health recovers, can he then stand trial in the ordinary court process?

The situation discussed in your question does not exist in the Netherlands. A regular criminal court always hears the criminal case involved. The court assesses what the level of responsibility is of the suspect (advised by a team of specialists). There are five levels of responsibility ranging from fully responsible to not responsible (unfit to plead). At the fifth level the offense is believed to have been caused entirely by the mental condition of the perpetrator. A distinction is drawn in the gradations of diminished responsibility in relation to the role played by the mental disorder in the offense. A prison sentence is imposed for the part for which the perpetrator is deemed culpable. The greater the culpability regarded by the court, the longer the prison sentence. The power to send such a person for treatment is set out in the Dutch Entrustment Act jo article 37a/b of the Dutch Criminal Code. To help the courts decide on the level of responsibility the suspect is assessed and a report is entered into the court file. A (outpatient style) suspect is examined by the FPD (Forensic Psychiatric Service). They compile a short psychiatric report of this examination. The FPD advises the court if the suspect needs further examination and how this should take place.

If a more extensive examination (on a closed ward) is deemed necessary, the person is sent through to the PBC (Pieter Baan Centrum) or another closed psychiatric ward. The PBC has the status of a preventive custody institution. Preventive custody is then continued at the PBC. During 7 weeks of observation an extensive report is compiled of

the suspect (a cooperation of psychologists, psychiatrists and social workers) any questions posed by the courts must be addressed in the report.

Article 37 of the Criminal Code gives a ruling for the situation in which there is total absence of all accountability. There is no relationship between the disorder and the (charged) crime so that the person involved can bear no responsibility for his crime due to the influence of the disorder. The then existing irresponsibility means that the person involved has no free will at all with which to choose at the time of the crime with which he or she is charged. In that situation there is no place for criminal law and comes psychiatric treatment in view. In order to decide on this question the Court demands forensic behavioral experts (at least two) for advice. The person can be placed in a psychiatric hospital for a period for a maximum of one year, but only if the Court comes to the decision that the person involved is dangerous for himself for others or dangerous to the general safety of persons or goods.

3. Are there any schemes to divert mentally ill or mentally handicapped people who offend from the criminal court process? If so how do there operate?

As a court judge is the only institution who is able to impose the measure of TBS. such a scheme does not fit in with the way the Dutch system regarding this issue is set out.

TBS is a judicial measure that is imposed on offenders whether they want it or not. This does not, however, imply that people can be compulsorily treated under TBS, as constitutional rights protect the detainee against this. As a rule, compulsory treatment is only possible if patients are a threat to themselves or other people in the hospital. Though the aim was initially to change the personality or cure the psychological disorder, it is now generally accepted that the primary aim of the treatment is to prevent recidivism. Priority is therefore given to aspects of mental disorder[7] that present a direct threat of recidivism. Each of these indicates a specific program of treatment.

Accordingly, there are treatment programs for patients suffering from addictions, personality disorder, psychosis, and mental retardation, as well as patients with problems related to aggression and sexual deviation. These programs are provided in the hospital and the outpatient department. The success of the treatment depends, in large measure, on the patients.

4. What happens to a criminal serving a sentence of imprisonment who becomes seriously mentally ill or handicapped whilst in prison?

The size of mentally disturbed inmate population (of which also drug addicts) is large and still growing within the Dutch prison system. Also the seriousness of their conditions has grown. The prison service has special units for the mentally ill detainees, such as the IBA (individual guidance department), BIBA (guarded IBA's for aggressive and

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[7] The risk factors can be divided into four categories
• Dispositional (inherent) characteristics, especially personality factors, cognitive factors plus gender, environment, and hereditary defects;
• Previous history, especially the socialization, psychiatric and criminological history;
• Situational factors, especially subjectively experienced stress, the support from society and the means of violence; and,
• Psychiatric characteristics, such as the presence and seriousness of psychological symptoms (delusions, hallucinations, violent fantasies)
Substance use and degree of psychosocial function.

psychiatric patients requiring maximum security) and BZA (special care departments aimed at improving the psychiatric state of the patient by providing intensive guidance and, if necessary (medicinal) treatment).

The Minister of Justice acknowledges the problem and has determined that guidelines should be set up (detention and care plans) for after care. The prison service can solve any rising problems with mental health quite adequately. The PMO (Psychiatric Medical Consultation Group) in which the prison psychologist participates, discusses the mental welfare of the detainees that have special needs. Together with the FPD the mental problems are taken on board. Outside help can also be implemented (for example by the consultation bureau for drug and alcohol abuse). Of course there are emergency situations where a detainee has to be transferred to a psychiatric ward of the GGZ (local health care institute). To assess this the term “medical necessary care” was introduced. The psychiatrist who is treating the detainee decides if a person needs to be transferred to a psychiatric ward of the GGZ. This sometimes can be a problem due to lack of capacity at the psychiatric institution.
If a handicapped person can not stay in a prison due to the fact that special facilities in order to cope with the handicap are not available in some cases the imprisonment is suspended by order of the Public Prosecutor who is in the end responsible for the execution of the sentence.

Yours sincerely

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For more information:
Int. Journal Of Law and Psychiatry 29(2006)
vol 23,No 5/6 .2000.pp515-531
27/2004(79-85)
see: www.sciencedirect.com

Met dank aan Eurojust Rotterdam.