

12. The Meaning of ‘Appropriate Treatment’ for Children Placed in a Closed Institution in the Netherlands.

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Abstract

Children who are deprived of their liberty in an institution for closed youth care in the Netherlands are placed with the aim to receive the care and treatment they need. This study aims to investigate to what extent children’s judges judge the appropriateness of the (not) received treatment in closed youth care and which consequences are given to alleged inappropriate treatment. Dutch case-law provides us with examples of judges who are critical on the aspect of appropriate treatment in closed youth care. But more reflection on the aspect of treatment is needed, seen the severe problematic group of children in closed youth care (‘stability and regularity’ could not be considered as appropriate treatment for most of these children) and the positive obligations of the State to realize appropriate, tailor-made treatment.

Introduction

Very good reasons are needed for the state to deprive a child of his or her liberty for the sole purpose of providing the child with the care and treatment he or she needs. Proportionate reasons to deprive a child of his or her liberty are not enough; the advantages of the care and treatment should be balanced against the disadvantages of being locked up too. Placement in a closed institution for youth care is intended to provide care and treatment for children. Dutch law makes it possible to place children in closed institutions for reasons of child protection; there is not necessarily a connection with the juvenile justice system. In the Netherlands, the juvenile justice system and the child protection system are two separate fields of law. According

to the Dutch government, these goals (care and protection) are in line with Article 5(1)(d) of the European Convention on Human Rights (ECHR or the Convention) which allows Member States to deprive children of their liberty for the purpose of educational supervision.¹ In this contribution the starting point is that the term 'educational supervision' includes, inter alia, the duty to provide children with 'adequate treatment' (which is a more common term in the Netherlands). It can be stated that a child who stays in a closed setting should receive appropriate treatment, otherwise his or her placement may turn out to be unlawful. What happens if no treatment takes place or if the child is provided with inappropriate treatment? In practice, the question whether the treatment given was appropriate will not arise at the initial decision to place the child in a closed setting, but will be addressed when the juvenile judge has to decide an application for prolongation of the placement.

International law and standards set minimum norms regarding deprivation of liberty of children for educational supervision. This frame will be described first. After this, Dutch law and practice will be studied. I will describe briefly what placement in a closed institution for youth care means, the different types of children placed in these closed institutions, what kind of day care and treatment is given, and what we know about the effectiveness of placement in a closed setting. The study then focuses on what juvenile judges do when the treatment offered turns out to be inappropriate. What judicial instruments do the judges have for critical review and which problems are encountered when it comes to court assessment of appropriate treatment in closed institutions for youth care? Finally the question will be answered whether our judicial review system guarantees serious assessment of the appropriateness of the given treatment.

International Standards Regarding Placement in a Closed Institution for Youth Care

Articles 5 and 8 ECHR require that the deprivation of a child's liberty must be conducted in accordance with the ECHR and with national law because placement in a closed institution for youth care infringes the right to freedom and safety as well as the right to respect for family life. Article 5 ECHR explicitly mentions 'the detention of a minor by lawful order for the purpose of educational supervision' (Article 5(1)(d)) as one of the

1 *Parliamentary Documents II* 2005/06, 30 644, no. 3, p. 15.

exceptions to the prohibition on deprivation of liberty.² In order to be lawful, the deprivation of liberty should be in keeping with the purpose of the restrictions permissible under Article 5(1) ECHR.³ Article 37(b) of the UN Convention on the Rights of the Child (CRC) requires that placement in a closed institution for youth care shall be used only as a measure of last resort and for the shortest appropriate period of time. This is also emphasized by Article 20(3) CRC which says that placement in an institution should only be considered 'if necessary' and should be carried out in suitable institutions for the care of children (Cantwell and Holzscheiter, 2008). In other words, placement in a closed setting should be 'for the child's own good' and only because there is no other – less far-reaching – alternative form of treatment. Article 8 ECHR requires that removal from the parents should be more beneficial to the child than staying at home.⁴

Article 25 of the CRC requires that States Parties [should] recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement. In order to ensure the effectiveness of this provision, the Guidelines for the Alternative Care of Children oblige States to 'ensure the right of any child who has been placed in temporary care to regular and thorough review – preferably at least every three months – of the appropriateness of his/her care and treatment ...'.⁵ Cantwell and co-authors explain that the Guidelines have been created to ensure respect for two basic principles of alternative care for children, namely that such care is genuinely needed (the 'necessity principle'), and that,

2 This provision seems to be aimed at detaining children in order to remove them from harmful surroundings and to protect them against any harm and to prevent them from 'sliding into criminality' (Bleichrodt, 2006: 476; Kilkelly, 1999: 44-45). Van Bueren more fundamentally criticizes the rationale of Article 5(1)(d) ECHR: '[t]he Convention seeks to protect human rights, yet it enshrines a specific ground of deprivation of liberty under which only children can be detained' (Van Bueren, 2007: 95).

3 ECtHR, Judgment of 29 February 1988, Series A. No. 129 (*Bouamar v. Belgium*), § 50.

4 According to the ECtHR, 'the mere fact that a child could be placed in a more beneficial environment for his or her upbringing does not on its own justify a compulsory measure of removal': ECtHR, Judgment of 24 January 2003, Appl. No. 27751/95 (*K.A. v. Finland*), § 92; see also Huijjer and Weijers (2012).

5 UN General Assembly, *Guidelines for the Alternative Care of Children*, A/RES/64/142, 24 February 2010, § 67.

when this is so, care is provided in an appropriate manner (the 'suitability principle') (Cantwell et al. 2012: 22).

Bearing in mind all these provisions together, the child should be deprived of his or her liberty lawfully and non-arbitrarily (aimed at educational supervision) and the placement should be based on the principles of necessity (the requirements of proportionality and subsidiarity) and suitability (in a suitable institution where the child receives a form of tailor-made treatment which meets his or her specific needs).

Case-law on Article 5(1)(d) ECHR

The European Court of Human Rights (ECtHR or the European Court) has formulated some conditions under which detention of minors could be lawful under Article 5(1)(d) ECHR. The primary objective must be the child's education (Liefwaard, 2008: 183). As said before, it should be considered whether a minor's detention is 'for the purpose' of education supervision.⁶ According to the European Court, Article 5(1)(d) ECHR does not preclude an interim custody measure being used as a preliminary to a regime of supervised education, without involving any supervised education itself. In such circumstances, however, placement in a closed setting must be speedily followed by the actual application of such a regime in a setting (open or closed) designed and with sufficient resources for the purpose, according to the European Court.⁷ The Court accordingly concludes that the nine placement orders in the case of *Bouamar*, taken together, were not compatible with Article 5(1)(d) ECHR. 'Their fruitless repetition had the effect of making them less and less "lawful" under sub-paragraph (d).'⁸

In *D.G. v. Ireland* a 17-year-old boy was placed in the St Patrick's Institution in Dublin, waiting for a place where he could receive adequate treatment. In this case, educational supervision was missing because '(t)he educational and other recreation services were entirely voluntary and the applicant's

6 According to the ECtHR, education is much broader than 'notions of classroom teaching': educational supervision must [in the context of a young person in local authority care] embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person concerned (ECtHR, Judgment of 12 October 2000, Appl. No. 33670/96 (*Koniarska v. United Kingdom*); see also Liefwaard, 2008: 183.

7 ECtHR, Judgment of 29 February 1988, Series A. No. 129 (*Bouamar v. Belgium*), § 50.

8 ECtHR, Judgment of 29 February 1988, Series A. No. 129 (*Bouamar v. Belgium*), § 53.

history was demonstrative of an unwillingness to cooperate with the authorities: indeed the Government accept that he did not avail himself of the educational facilities'.⁹ Also in *Ichin and others v. Ukraine*, the European Court considered that the applicants' detention did not fall under the permissible exception of Article 5(1)(d) because 'it does not appear from the case-file materials that the applicants' detention was anyhow related to any such purpose or that the applicants participated in any educational activities during their stay in the holding facility'.¹⁰ In *Bouamar v. Belgium*, the European Court decided that the placement of a 17-year-old boy in a closed institution with the intended aim of education supervision was unlawful, because '[t]he detention of a young man in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering any educational aim'.¹¹ In *D.G. v. Ireland* the European Court decided that 'if the Irish State chose a constitutional system of educational supervision implemented through Court orders to deal with juvenile delinquency, it was obliged to put in place appropriate institutional facilities which met the security and educational demands of that system in order to satisfy the requirements of Article 5(1)(d)'.¹² The European Court regarded St Patrick's Institution as 'a penal institution and the applicant was subjected to its disciplinary regime' and the institution was not considered as an 'appropriate institutional facility'.¹³

Thus in order for a closed placement to be lawful, it is important that the purpose of educational supervision is pursued in an appropriate institution. This means, amongst other things, that the staff should be trained pedagogically, that 'virtual isolation' is detrimental to educational supervision and that children in these institutions should actually participate in educational and other recreation services. Despite the more narrow interpretation of the European Court of Article 5(1)(d) ECHR, the European Court has not really provided for specific guidance regarding the implications and objectives of deprivation of liberty for education supervision (Liefwaard, 2008: 184-185). Has more guidance been given by Dutch juvenile judges when it comes to the substantive interpretation of 'appropriate institutional facilities'?

9 ECtHR, Judgment of 16 February 2002, Appl. No. 39474/98 (*D.G. v. Ireland*), § 80.

10 ECtHR, Judgment of 21 December 2010, Appl. Nos. 28189/04 en 28192/04 (*Ichin and others v. Ukraine*), § 39.

11 ECtHR, Judgment of 29 February 1988, Series A. No. 129 (*Bouamar v. Belgium*), § 52.

12 ECtHR, Judgment of 16 February 2002, Appl. No. 39474/98 (*D.G. v. Ireland*), § 79.

13 ECtHR, Judgment of 16 February 2002, Appl. No. 39474/98 (*D.G. v. Ireland*), § 80.

Closed Treatment for Children in the Netherlands: New Institutions since 2008

Children in the Netherlands may be deprived of their liberty for different reasons in different contexts. One of these 'contexts' is civil child protection. This form of closed treatment is called 'placement in a closed institution for youth care'. Until 2008, children under child protection law were placed in closed institutions together with children detained under juvenile criminal law.¹⁴ The UN Committee on the Rights of the Child commented critically on the practice whereby '[j]uvenile offenders, in the Netherlands, are sometimes detained with children institutionalized for behavioural problems'.¹⁵ Therefore, the Committee recommended the Netherlands to '[a]void detention of juvenile offenders with children institutionalized for behavioural problems'.¹⁶ Among other reasons, this resulted in the termination of this historical practice during a transition phase from 2008 to 2010. New closed institutions were realized or old Youth Institutions were turned into closed institutions for youth care. At present, there are 16 closed institutions for youth care with a capacity of 1,324 beds available;¹⁷ 3,261 minors were placed in closed institutions for youth care in 2011 for an average period of eight months.¹⁸

The Closed Placement in Youth Care Act entered into force on 1 January 2008 and amended the Youth Care Act to provide a legal foundation for placement of children in closed facilities for youth care.¹⁹ Article 29(b)(3) of the Youth Care Act provides that the placement must be necessary for the care and upbringing of the child or for the examination of the child's physical or mental state and can only be ordered if the child has serious developmental

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- 14 This was common practice from when the Civil Law Children's Act entered into force in 1905.
 - 15 *UN Committee on the Rights of the Child: Concluding Observations: The Kingdom of the Netherlands (Netherlands and Aruba)*, 26 February 2004, CRC/C/15/Add.227, § 58(c).
 - 16 *UN Committee on the Rights of the Child: Concluding Observations: The Kingdom of the Netherlands (Netherlands and Aruba)*, 26 February 2004, CRC/C/15/Add.227, § 59(d). See also the Guidelines for the Alternative Care of Children, § 124 which says that '[m]easures should be taken so that, where necessary and appropriate, a child solely in need of protection and alternative care may be accommodated separately from children who are subject to the criminal justice system'.
 - 17 Letter of the State Secretary of Health, Welfare and Sport, dated 27 September 2011, regarding 'Kamerbrief capaciteit jeugdzorgplus 2012-2014'.
 - 18 Jeugdzorg Nederland (2013), *Brancherapportage jeugdzorg 2011*, Utrecht.
 - 19 Act of 20 December 2007, *Bulletin of Acts and Decrees 2007*, 578.

or educational problems which hamper his development towards becoming an adult. In addition, given these serious problems, closed placement must be necessary to prevent the child from evading or rejecting the care he needs or because there is a risk that he or she will be withdrawn from this care by others (Liefwaard, 2008: 381-382). One of the legal requirements is that a behavioural scientist agrees with the placement in a closed institution for youth care (Article 29b(5) Youth Care Act).²⁰ This person must underpin his or her consent statement by arguing that the legal ground for placement is applicable. This implies that a behavioural scientist also formulates the goal of the placement in a closed setting. As a starting point, the Explanatory Memorandum of new Youth Act²¹ says that it should be clear at an early stage after the closed placement what the treatment programme will look like.²²

Defining Three Different Groups of Children in Closed Institutions for Youth Care

After having introduced closed institutions for youth care in the Netherlands, the question arises if the day care and treatment offered are appropriate for these children. Do they legitimize closed placement in the opinion of juvenile judges? For this analysis, I will consider three groups of children in closed institutions for youth care: (1) children placed for observation or on an interim basis; (2) children who are indicated to be in need of care and treatment which have been defined; and (3) children who are placed without a clear indication of the treatment they need.

The first group of children are those placed in a closed setting for observation or placed on an interim basis, waiting for a suitable follow-up placement. Placement for observation means that it is not clear yet what kind of treatment these children need. These children get extensive screening by an external psychologist (personality research) during their stay in a closed institution for youth care. Interim placements could also be intended for

20 According to the Court of Appeal of Arnhem-Leeuwarden, the law does not require that a behavioural scientist advises on the length of the placement. He or she only has to declare if the child's situation could be brought under the legal ground for placement (Article 29b(3) Youth Care Act). The juvenile judge is in charge of deciding on the length of the placement in a closed institution for youth care (ECLI:NL:GHARL:2013:BZ5584).

21 Expected to enter into force in January 2015.

22 Explanatory Memorandum by the Youth Act, 1 July 2013, p. 48. See also Article 37(b) CRC and the Guidelines for the Alternative Care of Children § 60.

children who are on a waiting list for specialized treatment because the right form of treatment is not yet available.

Second, for some children it is clear what kind of special treatment programme is appropriate for them before their actual closed placement. The juvenile judge, for example, may declare that this child has severe aggression problems and problems in the autistic spectrum so that he or she should obtain this or that particular treatment. Ideally, we would know this about every child who enters a closed institution for youth care.

In many cases, however – the third group – it is evident that a child is in need of care and treatment but it is not exactly clear what kind of treatment he or she needs (crisis care treatment). Many children enter a closed institution with huge problems like substance abuse, severe behavioural problems, running away, truancy and substantial conflicts with their families, but it is not clear yet what their exact treatment should be.

Day-to-day Practice and Treatment in Closed Institutions for Youth Care

What kind of facilities and interventions are created for these children in order to give them the care and treatment they need? First, it is compulsory to make an individual care plan for each child who enters a closed institution for youth care. Such a care plan contains, for example, (compulsory) treatment programmes (Article 29(p) Youth Care Act) but also medical treatment (compulsory medication if necessary) and, if necessary, disciplinary measures or instruments of restraint and force which can be applied for an individual child. These measures can be applied if the child withdraws from the care he or she needs, for their own safety or the safety of others, or if the house rules need to be maintained (Article 29(o-r) Youth Care Act). Besides, every child who is obliged to go to school should be offered education while placed in a closed institution for youth care (Article 29(m) Youth Care Act). Next to these basic facilities, various acknowledged individual or group treatment interventions are offered in closed institutions for youth care.²³ Children generally live in groups of eight to twelve children under the supervision of pedagogically skilled staff (on

23 These interventions have been acknowledged by a State Commission (www.erkenningscommissie.nl).

average, ten pedagogical workers per group who are working in shifts) and a behavioural scientist. This is, broadly speaking, the daily routine of a child in a closed institution for youth care. In summary, children live on a group, go to school and have the opportunity to participate in treatment programmes (everybody is following the basic methodology 'YOUTURN', for example²⁴).

Insight into the Practice of Closed Institutions for Youth Care

What more do we know about the day-to-day reality and treatment provisions in closed institutions for youth care from 2008 onwards? Unfortunately there is only a limited amount of studies on treatment in closed institutions for youth care. Of course, closed institutions for youth care pretend to be well aware of the impact of deprivation of liberty on children and therefore they claim to make high demands on the quality of treatment.²⁵ But Van der Helm writes that '[t]reatment in institutional youth care (...) is still considered a "black box" that has not been opened yet' (Van der Helm, 2011: 54). In 2011, three dissertations about the placement of minors in closed institutions (for youth care) were defended.²⁶ These studies give some insight into the population characteristics of children in closed institutions, existing treatment provisions and success and failure factors. Nijhof studied population characteristics of children placed in a closed setting and her results indicated that those children admitted to the new residential treatment programme comprised of a severely problematic group. One of the results from this study indicated that almost all adolescents demonstrated externalizing problems and the comorbidity rate between externalizing and internalizing problems was 67%. Being classified with a DSM-IV classification and engagement in risky behaviours (e.g., alcohol, drugs use) was also common. In addition, 20% of adolescents, mostly girls, were victims of forced prostitution or were at risk to becoming a victim (Nijhof, 2011: 189). These results justify the plea for intensive treatment provisions in closed institutions for youth care. Harder's study gives insight

24 The basic methodology [YOUTURN] aims to help the youngsters by (1) developing competencies and learning skills to fulfil tasks which they encounter in daily life and (2) developing a moral awareness and responsible behaviour and helping each other within this process. In YOUTURN, two existing methodologies are integrated: the Social Competency Model and EQUIP (Hendriksen-Favier et al., 2010: 15).

25 http://www.jeugdzorgplus.jeugdzorgnederland.nl/UserFiles/Witboek_def.pdf

26 Harder, 2011; Nijhof, 2011; Van der Helm, 2011. The latter emphasizes the importance of creating an open living climate instead of a repressive climate (see also Van der Helm and Hanrath, 2012);

into factors that are of importance for successful residential treatment for adolescents with serious behavioral problems. She recommends that, next to creating a pedagogical climate, specific treatment arrangements should be offered which focus on the child's individual needs (Harder, 2011: 209).

One effectiveness study gives the initial results of treatment in a closed setting for youth care which seems to be encouraging. It turned out that almost all (126) children received additional individual intervention and two-thirds of children had a family intervention. Also the follow-up interviews – carried out half a year later – showed quite good results: 82% of the (301) children did well on the nine measured follow-up indicators (Van Dam et al., 2010). The Inspectorate for Youth Care is currently monitoring the quality of treatment in closed institutions for youth care, the results of this study are to be expected in 2014.

The evidence of these studies together supports the conclusion that it is not plausible that appropriate individual treatment takes places in all cases when children are in need of this. This is also signalled in the literature and Dutch case law. How has this practice been reviewed?

What Juvenile Judges Do When the Offered Treatment Turns Out to Be Inappropriate

It has been suggested by some authors that juvenile judges critically review the appropriateness of treatment during a child's stay in a closed institution for youth care. Huijjer and Weijers (2012) mention case law from which it appears that juvenile judges are critical of the actions of youth care offices when it comes to finding a place where the child is provided with adequate treatment (waiting lists or failed to take concrete steps to provide a child with adequate treatment). The authors criticize the quality of treatment in closed institutions and they write that placement for a long period in a youth care institution without adequate treatment is no exception. They recommend attention to the horrible dilemma that return to the care of the child's family is often not one of the possibilities, but purposeless deprivation of liberty cannot be intended at all. How do judges deal with this? Cerezo-Weijnsfeld and Klaas (two child attorneys) indicate that many judges are willing to accept the argument that deprivation of liberty in a place with structure and

regularity is a form of treatment.²⁷ They give an example of a view of a family guardian who is in favour of a closed placement because of this will offer 'structure and regularity', notwithstanding the fact that no therapy adapted to the child's individual problems takes place. The authors strongly reject this point of view: this may possibly be considered as a form of treatment if the child's only problem is that his family situation offers no structure and regularity. But it is an illusion to think that this is often the case (Cerezo-Weijnsfeld and Klaas, 2012: 162-163). Bruning and Van der Zon (2010) deduced from several judgments that juvenile judges feel discontent with the practice of closed institutions for youth care and the lack of appropriate treatment. Odink (2013) points out that Dutch juvenile judges are often critical of requests for prolongation of authorizations for placement in a closed institution for youth care: has the child received the type of treatment that he or she really needs? Despite their modest role when it comes to the execution of child protection measures, juvenile judges have shown that they sometimes shorten the length of the requested prolongation or reject a prolongation of the closed placement because of alleged inappropriate treatment.

Judicial Instruments for Critical Review

Case law provides some insights into the practice of judicial review of the appropriateness of treatment and judicial tools to react on treatment which is below the bottom line.

One of the juvenile judge's options is to monitor the placement strictly by authorizing a placement only for a limited duration. The Court of Appeal in 's Hertogenbosch limited the duration of the prolongation of treatment in the case of a nine-year-old girl who was placed in a closed institution for youth care for observation. She had stayed in a closed setting for a period of six months but no personality research had been carried out and no care plan had been prepared. In order to monitor if these things were put to rights with diligence, the Court of Appeal limited the placement to a period of six months instead of nine months by reasoning that Article 37(b) and Article 25 of the CRC were violated.²⁸

27 Cerezo-Weijnsfeld and Klaas here define treatment as help with the child's underlying problems, and troublesome behaviour should not be the starting point.

28 Court of Appeal's Hertogenbosch, 19 September 2012, ECLI:NL:GHSHE:2012:BX8451.

The second option is to reject a request for prolongation of the placement. The Court of Appeal in The Hague argued that it is not enough that a child 'benefits' from a closed placement, for example, because such a placement creates a calmer and more transparent environment for the child.²⁹ The Court judged that due diligence requirements had been breached in case of a situation where no suitable (individual) treatment had been proposed.³⁰ Quite similar to this argument is that it is disproportional to place a child in a closed setting but withdraw him or her from the care and treatment he or she needs. On 19 March 2012 the Court in The Hague decided that the legal requirements for placement in a closed setting were met, but that the youth care office again did not conduct any additional research (after three prior reminders). This made the juvenile judge declare he no longer had confidence in the child getting the care he needed. Because of this, his stay in a closed institution for youth care had the character of youth detention, instead of youth care, according to the juvenile judge. The placement was not extended.³¹ The Court of Appeal in 's Hertogenbosch judged that youth care services failed to take clear and concrete measures for further treatment which led to closed placement for almost a year. The child was deprived of its liberty for an unnecessarily long period of time. According to the judges, this placement could not be legitimate because this period was too long to be possibly regarded as a 'bridging period' which is possible under Article 5(1) (d) ECHR. The authorization for closed placement was ended immediately by order of the court.³² The Court of Appeal in Leeuwarden considered placement in a closed setting to be disproportionate because the aim of deprivation of liberty – educational supervision – could not be met in the short period until the girl turned eighteen (also because of her resistance to closed treatment, which was weighed as an important factor because of her

29 Court of Appeal The Hague, 4 November 2011, ECLI:NL:GHSGR:2009:BK3510. Unfortunately the Supreme Court of the Netherlands decided differently. The Court decided that in this case there was no violation of Article 5(1)(d) ECHR because the girl was on a waiting list for a specific treatment programme and was placed in a closed institution for youth care as an interim measure. A discussion between the child and the pedagogical workers about whether group therapy or individual therapy would be better is not very important in light of the question whether this placement was unlawful, according to the Court. The Court considered it sufficient that the closed institution could offer a place for this child. The type of therapy was not important, according to the Court (High Court, 22 October 2010, ECLI:NL:PHR:2010:BO1245).

30 Court of Appeal The Hague, 4 November 2011, ECLI:NL:GHSGR:2009:BK3510.

31 Court The Hague, 19 March 2012, ECLI:NL:RBSGR:2012:BW1418.

32 Court of Appeal 's Hertogenbosch, 4 May 2011, ECLI:NL:GHSHE:2011:BQ3575.

age).³³ The legal ground for placement in a closed setting (Article 29(b)(3) Youth Care Act) was fulfilled in these three cases but these examples show that the execution of such a profound measure is not proportionate to the intended aim when no adequate treatment is given.

A third, less common, reaction could be that a juvenile judge interferes with the execution of a measure; for example, which particular therapy should be given in the closed institution. The Court of Groningen for example, authorized a closed placement on the condition that the child received a specific type of treatment.³⁴ The Court of Maastricht decided on 6 July 2010 that a one-and-a-half-year placement of a 15-year-old in a closed institution for youth care was a breach of Article 20 CRC because this was not an appropriate institution for the child and the treatment given turned out to be unsuccessful. The juvenile judge authorized a placement under the condition that the boy should be placed in another closed institution for youth care specialized in treating children with mental retardation.³⁵ Given the modest role of the juvenile judge in the execution phase the question remains whether the judge exceeded his powers, but this might be an effective way to enforce appropriate treatment.

The Critical Assessment of the Courts: Two Problems

All in all it seems plausible that the quality of the treatment received 'counts' when judging the lawfulness of placement in a closed setting. Before describing how the juvenile judge deals with the issue of treatment in closed institutions for youth care, two problems will be discussed. In the first place, treatment is not a very important issue in deciding on the initial placement in a closed institution for youth care. At that time of course, the *need* for closed treatment plays a key role in the decision-making process but the *quality* of the treatment can only be judged after treatment has taken place. And this is only the case when judicial approval for prolongation of the authorization of closed treatment is at issue. Odink proposes that Dutch juvenile judges are often critical of requests for prolongation of authorizations for placement in closed institutions for youth care in cases where there was no appropriate individual treatment (Odink, 2013: 15). At the time of a first request the only thing the juvenile judge can do when he or she wants to monitor carefully

33 Court of Appeal Leeuwarden, 6 March 2012, ECLI:NL:GHLEE:2012:BW0207.

34 Court Groningen, 7 November 2012, ECLI:NL:RBGRO:2012:BY7884.

35 Court Maastricht, 6 July 2010, ECLI:NL:RBMAA:2010:BN2472.

the child's stay in a closed setting is to grant the request for placement for a shorter period of time.³⁶ Unfortunately, the average length of first authorizations is unknown – this needs to be studied.

The second problem is related to this problem: in the Dutch system juvenile judges are 'reticent' when it comes to the execution of out-of-home placements. Juvenile judges are responsible for making a good decision; that is what the law asks of them. A juvenile judge, for example, does not have the competence to designate a specific residential institution. He can only opt for a specific type of out-of-home placement: foster care, residential care or residential care in a closed setting. Until 1995 juvenile judges in the Netherlands also functioned as supervisors of the execution of child protection measures.³⁷ There remains the question of how well informed juvenile judges are about the ins and outs of daily practice in closed institutions and the treatment provisions that are provided.

Conclusion: Are Juvenile Judges Doing Well?

Individual treatment in closed institution for youth care is imperative. This could be derived from international law and standards as well as the narrow interpretation of Article 5(1)(d) ECHR by the ECtHR. The state has a strict positive obligation to put in place appropriate facilities, according to the case law of the European Court as well as Dutch case law. Juvenile judges in the Netherlands seem to give more guidance regarding the implications of the requirement of 'appropriate institutional facilities' than do international standards. Dutch case law shows that juvenile judges in the Netherlands in individual cases strictly review the appropriateness of the treatment received. It can be concluded that placement in a closed institution for youth care during some months without starting diagnosed treatment or without being diagnosed could be in line with the legal ground for placement (Article 29b(3) Youth Care Act) but is considered to be disproportionate or in violation of

36 A juvenile judge can authorize a placement for the maximum length of one year and can prolong the authorization every year until the child reaches the age of majority at 18.

37 The amended Civil Law Act (1995) was intended to improve the legal status of minors and their parents and was motivated by the right to an impartial judge (Article 6 ECHR) and practice showed that great emotional involvement could pose a risk to the juvenile judge's independence (Verberk and Fuhler, 2006).

the principle of accuracy in several cases. This could be considered to be the bottom line.

'Structure and regularity' does not constitute sufficient treatment for most children in closed institutions for youth care, according to some juvenile judges. Children who are indicated to be in need of a particular type of treatment especially should be provided with the right form of treatment. Also, treatment should be realized within a reasonable period of time and within the shortest appropriate period of time. Given the duration of placements in the case law discussed above, it is striking that children stay in closed institutions for a considerable period of time before juvenile judges draw the conclusion that the alleged treatment did not meet the child's individual needs. This raises the question whether this practice is compliant with the right of a child to a periodic review of the treatment provided (Article 25 CRC) and if the requirement of placement for the shortest appropriate period of time (Article 37) is met.

The degree of critical judicial review should not be exaggerated. There is only a handful of cases in which inappropriate treatment has really led to unlawfulness of the placement. This is remarkable, given the signals that the offered treatment in closed institutions sometimes fails to meet the needs of the severe problematic group of children in a closed setting. It is a missed opportunity if the aim of a first closed placement has not been described explicitly. It is not enough to prove that a closed placement is necessary, it has to be recommended also that what kind of care and treatment the child needs will be described very precisely.³⁸ Especially the role of a behavioural scientist lends itself to investigating what kind of treatment should be used to meet the child's needs. A child who is indicated to be in need of individual treatment can claim his or her right to treatment, but a child who is not, has few arguments left. A request for prolongation could be considered as the moment to critically review what has happened during the first placement, but in these situations children have stayed in a closed setting for some months already. More clarity is needed about the appropriate treatment at the start of a child's placement in a closed institution for youth care. A behavioural scientist, for example, should set clear treatment goals by giving his or her consent.

38 According to the Guidelines for the Alternative Care of Children, '[t]he plan should clearly state, inter alia, the goals of the placement and the measures to achieve them' (§ 62).

Besides this, the passive role of the juvenile judge (he or she only determines cases on request and can only choose from a limited set of measures and is not involved in the execution phase of the measure) raises the question whether a juvenile judge is able to guarantee adequate legal protection for children and their parents who are of the opinion that the offered treatment was inappropriate. The child's lawyer plays an important role here, but it has to be recommended that a juvenile judge should make him- or herself familiar with the practice in closed institutions for youth care and that the advantages and disadvantages of a closer involvement of juvenile judges in the practice of out-of-home placements in closed institutions for youth care should be studied thoroughly.

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