Summary

Termination of the Dutch TBS order by court against the advice of the institution treating or supervising the patient – frequency, nature, causes and relationship with subsequent criminal recidivism

Introduction and research questions

The subject of the present study is the court’s termination of the Dutch measure of ‘Terbeschikkingstelling’ (TBS) against the advice of the TBS-hospital or other advisory institution. TBS is a hospital order that can be imposed upon mentally disordered offenders (see explanation below). The Research Centre of the Dutch Ministry of Justice (WODC) was asked to conduct this study because previous research showed a relationship between those TBS measures terminated against the prosecutor’s application or against institutional advice and subsequent criminal recidivism. A higher percentage of former TBS patients relapsed after a ‘contrary ending’ than when the TBS measure was terminated otherwise.

The TBS order (art 37 a, b of The Netherlands Criminal Code) is a penal measure. It can be imposed by the court upon mentally disordered offenders who are considered not to be responsible or to have diminished responsibility for their offence. The TBS measure is reserved for offenders who have committed serious, usually violent, offences. A legally defined further condition is that the offender is considered by the court to be dangerous to others or to the general safety of persons or goods. The TBS measure has to be imposed for two years. It is possible thereafter for the court to review the measure with one or two years each time. TBS with mandatory hospitalization is in principle not time restricted; however as soon as the risk of criminal recidivism has diminished to a level considered acceptable, the TBS measure must be terminated.

The prosecutor has to apply for the TBS measure to continue. The application must be coupled with an advisory report of the institution treating or supervising the patient. The district court decides whether or not the TBS measure is to be continued. Appeal against this decision is possible with a special section of one of the courts of appeal. The TBS measure ends when the prosecutor does not apply for the measure to be continued, or when the court rejects the requisition to prolong TBS.

The inpatient facilities for mandatory hospitalization of mentally disordered offenders in the Netherlands consist of nine judicial maximum security TBS hospitals. In addition to these, the mental health sector has three maximum/medium security forensic psychiatric hospitals and nine medium security forensic psychiatric units within general psychiatric hospitals.
The objectives of the present study are to assess the numbers and the nature of the TBS measures that were ended by court, contrary to the advice of the hospital or other institution treating or supervising the patient. Furthermore, we investigate the judges’ arguments not to follow advice. Finally, the relationship between these ‘contrary endings’ and subsequent serious criminal recidivism is studied.

The decision to prolong or discontinue the TBS measure is regulated as a judicial decision and the risk of criminal recidivism is the central criterion for this decision. Behavioural expertise is necessary for the criminal recidivism risk assessment. Therefore it is defined in penal law that the court should be advised by behavioural experts about the desirability of prolonging the TBS measure. In the case of the decision as to whether to prolong the TBS measure with mandatory hospitalization, advice is provided by the hospital treating or supervising the patient. Once the mandatory hospitalization has been conditionally removed, an independent psychiatrist together with a probation service worker will advise. In the present study we therefore define the contrary ending of the TBS measure as follows:

Contrary ending is the termination of the TBS measure by the court, against the advice of the hospital or other institution treating the patient.

The research questions are:

1. In how many cases is the TBS measure terminated contrary to the advice of the institution in the years 2001-2004? What is the number of contrary endings for each district court, for the court of appeal and for each TBS hospital?
2. In how many of the cases terminated contrary to institutional advice, does the prosecutor appeal against the decision of the district court?
3. In how many cases is the TBS ended contrarily whilst the patient is still in custody within the (maximum security) hospital and in how many cases when the patient is living under supervision in the community?
4. In how many of the TBS cases that were terminated against the advice of the institution treating or supervising the patient, do the institution and the court assess the risk of criminal recidivism differently?
5. Which are, according to judges and behavioural experts, the most important arguments not to follow the advice to continue the TBS measure?
6. Does a higher proportion of former TBS patients relapse with a serious (violent or sexual) offence after the measure was terminated contrarily, than when the TBS measure was terminated otherwise?
Methods and sources of data

The numbers and the nature of TBS measures that were terminated by court contrary to advice were assessed quantitatively using the database Monitoring System TBS of the National Agency of Correctional Institutions (DJI), and by studying court decisions retrieved from the courts.

In addition, in order to attain more in depth insight into the arguments and more general causes with respect to termination of the TBS measure contrary to advice, we interviewed officials with relatively much experience in ‘contrary ending’. We selected seven judges of district courts, four judges of the penitentiary section of the Court of Appeal Arnhem and five behavioural experts. This concerns qualitative data: perceptions and insights of a limited number of - very experienced - officials.

The 6th research question was answered using the WODC Recidivism Monitor.

Results

Number of TBS measures terminated contrary to the advice

In 2001-2004 a total of 112 TBS measures were registered by the National Agency of Correctional Institutions (DJI) as terminated contrary to the advice of the institution treating the patient or contrary to the application of the prosecutor. We received the court decision of 95 of these 112 cases (Table 1).

Four court decisions contained no information about the advice of the institution treating or supervising the patient.
Table S1  Number of TBS measures terminated contrary to advice in 2001-2004, based on court decisions studied

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<tr>
<th>Number of court decisions</th>
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<tr>
<td>Court decisions registered by DJI</td>
<td>112</td>
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<tr>
<td>Court decisions received</td>
<td>95</td>
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<tr>
<td>Court decisions lacking information about the advice</td>
<td>4</td>
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<td>Court decisions analysed</td>
<td>91</td>
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<th>Special categories</th>
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<td>Termination of TBS because of deportation as illegal immigrant</td>
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<td>Termination of TBS because of civil hospital order</td>
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<th>Contrary ending by the court: attrition according to different definitions</th>
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<td>TBS measures ended contrary to written application of prosecutor</td>
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<td>TBS measures ended contrary to application of prosecutor in court</td>
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<td>TBS measures ended contrary to written advice of institution treating the patient</td>
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<td>TBS measures ended contrary to the advice in court of the institution treating the patient (the definition chosen in the present study)</td>
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The remaining 91 cases included two special categories: termination of the TBS measure in order to remove the TBS patient from the country as an illegal immigrant, and termination of the TBS measure because of an intended placement with a civil hospital order. Because of the specific aim of termination of the TBS measure, and because the decision was in the end usually taken by the TBS hospital, prosecutor and court in concert, we consider these cases as special categories.

In the 75 remaining cases the court terminated the TBS measure against the written application of the prosecutor for continuation. In 14 of these 75 cases however, the prosecutor changed the application, and - in contrast to the written application - applied in court for termination of the TBS measure. In 61 cases the court terminated the TBS measure contrary to both the written application and the application in court. The number of TBS measures ended by the court against the advice of the institution treating the patient is lower: 47 cases. In two of these cases the written advice was to continue while the advice of the institution in court was to end the TBS measure. This results in 45 cases in which the TBS measure was terminated against the written advice and the verbal advice in court of the institution treating the patient. These 45 cases were analysed with respect to their content.
The number of TBS measures that were ‘ended contrarily’ according to the definition employed in the present study is circa 50 percent lower than the numbers that were published by the Dutch ministry of justice in 2004 (Kamerstukken II, 2003-2004, 29 452, nr. 1). The percentage of TBS measures terminated contrary to the advice of the institution would then be 14-24% of the total number of TBS measures ended in 2001-2004 instead of the earlier published percentages (28-48%).

The Netherlands count about 1700 TBS-patients. Each of them has to go through a prolongation procedure every one or two years. This means that in 2001-2004, in each year 850-1700 decisions to prolong or discontinue the TBS measure have been taken.

Not all of these are however submitted to the court, because the prosecutor does not in all cases apply for prolongation. In 2004 for instance, 57 TBS measures were terminated without the court. There were eleven cases per year during 2001-2004 that were terminated against advice. These are only a small percentage of the total yearly number of prolongation procedures. This indicates that the courts are not likely to decide against the advice of the institution treating the patient.

Content of court decisions

In 38 of the 45 cases the court decision mentioned how the risk of criminal recidivism was assessed by the institution treating the patient. In seven out of 38 cases the risk was assessed as high (two cases), or medium or unclear (5 cases). In the remaining 31 cases the institution considered the recidivism risk to be low.

This means that only a minority of the cases that were terminated contrary to the advice in the formal sense – according to the definition –, can also be considered intrinsically contrary to advice. The seven cases are only a fraction of the total number of prolongation procedures in 2001-2004, given that there are circa 1700 TBS patients each of whom undergoes a prolongation procedure every one or two years.

The court’s arguments not to follow advice

The following main themes emerge from the interviews with judges and behavioural experts with respect to the court’s arguments not to follow the advice of the institution treating the patient, and more general causes of termination of the TBS measure contrary to advice.

1 Differences in emphasis between judicial and behavioural criteria

According to the interviewees, behavioural experts are more likely to consider the continuation of the TBS measure necessary for the completion of the rehabilitation process in order to diminish the risk of criminal recidivism in the long term. Judges also consider this necessary,
but do not in all cases find enough base for continuation of the TBS measure. In some cases, according to the interviewees, the advice relies relatively heavily on treatment considerations and the judicial criterion of risk of criminal recidivism is not sufficiently underpinned.

2 The uncertainty in risk assessment
In some cases, also after further inquiry by the court, the advice does not have sufficient base to convince the court with respect to the risk assessment.
In some cases it is, according to the institution treating the patient, doubtful whether the risk of criminal recidivism is to be considered unacceptable. A considerable degree of uncertainty is inherent to risk assessment. The question is how courts deal with this. We can cautiously deduce from the interviews that the reaction in some cases is that there is not enough underpinning for the recidivism risk to be unacceptable and therefore insufficient base to prolong the TBS measure.

3 Judges’ conception of their duties
Some interviewees perceive the advice of the institution treating the patient as the base for the court’s decision. Others emphasise that the decision to prolong or discontinue the TBS measure is a judicial decision, and although the advice is important input, the decision should be based on judicial arguments.
A judge who perceives the latter vision as his or her own is probably more likely to, in a given case, decide against the advice than a judge who recognizes the first vision as his or her own.
According to the interviewees, the decision to prolong or discontinue the TBS measure is also used by courts to adjust the execution. Courts sometimes instruct the hospital with respect to the pace or content of treatment and rehabilitation process. It seems likely that the more judges consider inference with the execution of the TBS measure their task, the less they will be inclined to rely exclusively on the expertise of the hospital, and they may therefore be more likely than other judges to decide against the hospital’s advice in certain cases.

4 Strategic advice by TBS-hospitals
According to the interviewees TBS hospitals advise strategically in some cases. This means to reach an effect that is beyond the legally defined objective of the advice. These additional aims are:
- Not to take responsibility for the advice to discontinue the TBS measure. According to the interviewees TBS hospitals are sometimes too cautious, and advise prolongation, even while they consider it safe to terminate the TBS measure.
- To terminate the TBS measure of patients who are difficult to rehabilitate and are not easily placed elsewhere. The context of the
decision to prolong or discontinue the TBS measure is not only a judicial one but also has a political and financial context. The TBS hospitals experience political pressure not to take risks in advising to discontinue the TBS measure. This promotes a cautious attitude. On the other hand they are subject to financial pressure to rehabilitate patients or let them move on to general psychiatry as soon as possible.

5 Proportionality of the TBS measure
In the early nineties the improved judicial position of TBS patients was identified as one of the possible causes of an increase in TBS measures that were terminated against the advice of the institution treating the patient. Due to the ameliorated legal position of TBS detainees, judges paid more attention to the duration of the TBS measure in relation to the offence for which the TBS was imposed. This is called the proportionality argument.

In the current study the proportionality argument is rarely explicitly mentioned in the judicial decision, neither does it appear from the interviews to be an important factor in terminating the TBS measure contrary to the advice of the institution.

Compared with the seventies and eighties TBS has in later years been imposed for increasingly serious offences. Possibly, the current TBS population includes less TBS patients on whom TBS was imposed for a relatively mild offence. This decreases the chance the court will involve the proportionality argument in the decision to continue or terminate the TBS. In addition the present political emphasis on public safety in the sense of reduction of criminality may play a role.

So what is important in several of the causes mentioned above, is to what extent the advice offered provides the court with a sufficiently well founded argument for an unacceptable risk of criminal recidivism. Not only is the foundation of the advice important, but the same is true for the court’s decision. In twenty out of 45 cases that were terminated contrarily, the judicial decision is motivated with a standard phrase, without explicitly balancing arguments and underpinning the decision. Disadvantages of using standard phrases are that the decision is inscrutable for those involved and that few or no leads are offered for professional discussion.

Relationship between termination of the TBS measure contrary to advice and subsequent criminal recidivism
Because we are interested in the number and nature of TBS cases recently terminated contrary to the advice of the institution, we studied the judicial decisions in such cases ended in 2001-2004. Since the follow up period is too short, no data on relapse were gathered in these cases, but
we could investigate relapse data in earlier cohorts using the WODC Recidivism Monitor. In cohorts of former TBS patients who moved out of the system in 1974-1998, a larger proportion of former TBS patients relapsed with a serious offence after the measure was terminated contrary to advice than when the TBS measure had ended otherwise (in the 1994-1998 cohort for instance the relapse rates ten years after termination of the TBS were 40% versus 25% respectively).

How can the relation between a ‘contrary ending’ and later criminal recidivism found in the 1974-1998 cohorts be brought in line with the finding in the 2001-2004 cases that the institution treating the patient assesses the risk of criminal recidivism as low in the majority of cases that were ended by court contrary to their advice?

Firstly, we assumed that the populations of former TBS patients whose TBS ended in 1974-1998 and 2001-2004 respectively are comparable. Perhaps the cases that were terminated in 2001-2004 nevertheless differ from the cases that ended earlier in characteristics related to later criminal recidivism. For instance, the institution treating the patient may have assessed the risk of criminal recidivism as low in more cases in the years 2001-2004 than in the earlier years.

Secondly, the relationship between a ‘contrary ending’ and later relapse is complex. More detailed analyses reveal a difference in background characteristics such as criminal history and absence without leave, between former TBS patients whose measure was terminated against the advice and former TBS patients whose TBS ended otherwise. Furthermore, in spite of the fact that the institution assesses the recidivism risk as low in the majority of cases, the question as to whether the TBS measure should be prolonged or not is subject to doubt and discussion in cases in which the TBS measure was terminated contrarily. Our advice is to gather follow up data on criminal recidivism (from 2007 on) by the former TBS patients whose measure ended in 2001-2004.

By relating the relapse data to the way in which the TBS measure was terminated, and to intrinsic characteristics of cases terminated contrary to advice, such as the perception of the recidivism risk by the institution treating the patient and the knowledge on which the assessment was based, may lead to more insight in the way the relationship between a ‘contrary ending’ and later criminal recidivism comes about.

**Registration of information about TBS measures**

DJI registered all TBS measures that were terminated by the court contrary to the application of the prosecutor or to the advice of the institution treating the patient as ‘ended contrarily’ in 2001-2004.
The present study shows that within this category further differentiation is warranted.

Firstly, a distinction can be made between termination of the TBS measure contrary to the application of the prosecutor and termination contrary to the behavioural advice of the institution treating the patient.

Secondly, it is useful to distinguish between the written application or advice and the application or advice made in court. This is important because the prosecutor or institution may reconsider their previous written application or advice.

Thirdly, it should be taken into account that the legally defined advisory institution differs depending on whether the mandatory hospitalization has been conditionally removed or not.

Furthermore, two special categories are distinguished among the cases registered as ‘ending contrarily’, firstly the TBS measures that were terminated in order to deport the patient involved as an illegal immigrant and secondly those patients placed in the general mental health sector under a civil hospital order.

Based on these suggestions DJI is developing a new way of categorising these ‘contrary endings’ of the TBS measure within the monitoring system MITS.

The present MITS has already proved its usefulness as a monitoring system with respect to the execution of the TBS measure. By developing the system further however, the information on the TBS system could be substantially improved and enriched. Not only would scientific research benefit from this, it would also serve the business processes of the TBS sector and its accountability to government and public.

Conclusions

The following conclusions can be drawn from the present study.

1. TBS measures that were terminated by court contrary to the advice of the institution treating the patient in 2001-2004, are 14-24% of the total number of TBS measures ended, and only a fraction of the total number of prolongation procedures (11 out of circa 850-1700).

2. In the majority of cases that were terminated contrary to the advice of the institution treating the patient, the institution assesses the risk of criminal recidivism as small.

3. Judges and behavioural experts perceive the following as important causes of terminating the TBS measure against the advice of the institution treating the patient.
   - Differences in emphasis between judicial and behavioural criteria.
   - The margin of uncertainty in the risk assessment of criminal recidivism.
The former two aspects may lead to a ‘contrary ending’ because the presence of an unacceptable risk of criminal recidivism is insufficiently underpinned in the court’s perception.

- The extent to which courts see inference with the execution of the TBS measure as their duty. The more they do so the more they may be prepared to decide independently of the advice.

- Strategic advice by TBS hospitals, especially caution in advising discontinuation may lead to termination contrary to advice.

4 The finding based on the study of TBS cases terminated in 2001-2004 contrary to the advice of the institution treating the patient, that the institution assesses the risk of criminal recidivism as low in the majority of cases, is difficult to harmonize with the finding in earlier cohorts of former TBS patients, that a higher proportion relapses with a serious offence after a ‘contrary ending’.

This shows preference for follow up research to gather data on recidivism rates of former TBS patients whose measure was discontinued in 2001-2004. Relating the relapse data to the way in which the TBS measure was terminated, and to intrinsic characteristics of cases terminated contrary to advice, such as the perception of the recidivism risk by the institution treating the patient and the knowledge on which the assessment was based, may lead to more insight into the mechanisms by which the relationship between a ‘contrary ending’ and later criminal recidivism comes about.