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'Met zachte drang' : uitgangspunten voor jeugdhulpverlening op het snijvlak van vrijwilligheid en dwang

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Summary

‘With gentle pressure’

Principles for youth care within the legal twilight zone between the voluntary and compulsory framework

Background, research question and research methods

Currently, the Dutch youth care system comprises a voluntary and a compulsory framework. Next to that, in some local municipalities a so-called ‘coercive framework’ (*‘drangkader’*) has emerged which sits between the existing voluntary and compulsory frameworks. In this ‘coercive framework’, also known as ‘coercive procedures’ (*‘drangtrajecten’*), professionals encourage families to ‘voluntarily’ accept youth care as a last chance to prevent compulsory or forced youth care. However, this coercive framework has no legal basis. It is criticised because there is a lot of uncertainty regarding the rights and obligations of the minors and the parent(s) as well as the responsibilities of the professionals.

Ultimately, this research aims to provide insight into the twilight zone between the existing voluntary and compulsory framework of youth care and to further investigate and clarify existing issues with regard to the ‘coercive framework’ of ‘coercive procedures’. The central questions of this research are therefore:

1. *What is the position of the coercive framework within the Dutch youth care system and how does this framework relate to the fundamental principles that (should) underlie this youth care system on the basis of legal history and international and European children’s and human rights?*
2. *Do the findings under question 1 call for adjustments to the coercive framework and the legal status of the minors and parents involved and the responsibilities of the professionals involved in legislation, policy and/or practice? And if so, in what way?*

To answer these questions, traditional legal methods were used and included the analysis of national legislation and regulations, international and European law, case law, parliamentary history, municipal bylaws, rulings in disciplinary proceedings, relevant scientific literature and other relevant documents. This research covers the period until June 2022. Additionally, qualitative empirical research methods have been used to answer the second research question. The analysis of case studies provided in-depth insight into the phenomenon of ‘coercion’ within the youth care system of three Dutch municipalities in various youth regions. It included observations of case consultations during which, inter alia, the decision could be taken to start a coercive framework. In addition, interviews were conducted with professionals involved in these case consultations (for research methodical account see Section 7.2).

The legal design of the Dutch youth care system

The first part of this research sets out the legal design of the Dutch youth care system in detail (Chapter 1). It makes clear that the compulsory framework of the youth care system starts with a youth court judge enforcing a family supervision order (*'ondertoezichtstelling'*). As long as this compulsory framework has not been applied, youth care is provided within a voluntary framework. The rights and duties of the parents and the minors involved depend on the particular framework in which the youth care is provided. Both the voluntary and the compulsory framework have been juridified to a large extent.

Principles of the Dutch youth care system

The legal design of the Dutch youth care system has its roots in the 'Children's laws' (*'Kinderwetten'*), which entered into force in 1905, and ensuing developments which – also as a result of international and European children's and human rights (including the ECHR and UNCRC) – contributed to further juridification of the youth care system. The following overarching objective of the youth care system can be derived from the research into the legal history of the Dutch youth care system and the international and European children's and human rights framework:

to protect the human dignity of the minor and to facilitate the development of the minor to the maximum extent possible.

Various essential minimum requirements for the national youth care system can be distilled from the international and European framework for children's and human rights (Chapter 4). Furthermore, the Dutch legal history yields certain principles which flesh out the international essential minimum requirements (Chapter 3). The research has resulted in the formulation of the following six fundamental principles:

1. In principle, every minor is entitled to the quiet enjoyment of the company of his family members and every minor has the right to autonomy.
2. Parents have the primary responsibility for the upbringing and development of their minor children.
3. In the context of the secondary responsibility for the upbringing and development of minors, the government supports parents to secure the necessary conditions for the development of minors.
4. The secondary responsibility of the government for the upbringing and development of minors entails the obligation to protect minors against violence and child maltreatment. Prevention of violence and maltreatment is paramount.
5. A forced separation of the minor from his or her parents must be prevented as much as possible.
6. Minors and their parent(s) must be involved in making decisions relating to help, support and interventions. In case of an alleged violation of their rights, they are entitled to an effective remedy.

These underlying principles aim to contribute to achieving the overarching objective of the youth care system mentioned above. They have consequences for the rights and responsibilities of the minors, parents and professionals involved (Chapter 5).

A legal twilight zone between the voluntary and compulsory framework

The first part of the study also revealed that an 'unregulated twilight zone' has existed since the introduction of youth protection legislation. Within this legal twilight zone, care or assistance is offered to families in situations in which voluntary youth care does not get off the ground or does not suffice, but a compulsory framework created by an involuntary child protection order is considered too strong a measure. Several Dutch municipalities have seen the rise of the so-called 'coercive procedures' or 'coercive framework' within this twilight zone.

Coercion within the Dutch youth care system

The second part of this research (Chapters 6 and 7) studies the 'coercive framework' within the Dutch youth care system. It shows that there is no such thing as 'a coercive framework'. There are major differences between municipalities and professional also have different views on coercion. Also, the decision-making process prior to the start of a coercive procedure can differ per municipality. In several municipalities, the decision-making process takes place at a so-called 'youth protection table' or similar case consultations in the presence of various authorities or organisations. Therefore, rather than speaking of 'a coercive framework', it is preferable to speak of 'coercive procedures', the design of which may vary between municipalities and across periods of time. On the basis of the research findings such a procedure can be described as

a procedure prior to or at the end of a child protection order in which professionals offer families a last chance to accept the help or support that these professionals deem necessary for the child. At the start of a coercive procedure, conditions are set or arrangements are made which are binding for the family members involved. This is supervised by a professional. If it appears that the family members do not comply with the arrangements or conditions, a professional can decide to request the Child Protection Board to execute a child welfare investigation, which can ultimately lead to a request to a juvenile court to impose an involuntary child protection order. In case a child welfare investigation is already conducted, the professional can decide to inform the Child Protection Board about the noncompliance with the arrangements or conditions.

This procedure should be distinguished from coercion as an approach or method used by certain professionals within the youth care system.

The position of coercive procedures in the Dutch youth care system

The second part of this study reveals that in the municipalities that were investigated coercive procedures and case consultations take place in the legal twilight zone of the Dutch youth care system discussed earlier. No child protection measures have been imposed by the court, as a result of

which coercive procedures are legally positioned in the voluntary framework. At the same time, the help and support are not entirely non-committal. As mentioned before, in the context of a coercive procedure, arrangements are made or conditions are set that are supervised by a professional. If these arrangement or conditions are not or not sufficiently met, further steps (such as the start of a child welfare investigation or even an out-of-home placement of a minor) can be considered by the professionals. Moreover, in terms of enforcement, the coercive procedures do not differ much from family supervision orders. This leads to the conclusion that coercive procedures precede the compulsory framework as a last resort.

Consequences of this position for the rights, duties and responsibilities of parties concerned

The twilight zone in which coercive procedures take place, is positioned in the Dutch youth care system which has a rich history and which in turn has its place in a state based on the rule of law that forms part of an international legal system. Consequently, the overarching objective of the Dutch youth care system to protect the human dignity of the minor and to facilitate the development of the minor to the maximum extent possible should also be pursued in the twilight zone. Furthermore, the fundamental principles of this system should be taken into account as much as possible. This has consequences for the design of (the decision-making process regarding the start of) coercive procedures and the legal protection of the minor and their parents. First of all, it means that a voluntary 'coercive procedure' and the youth care provided during this procedure can only take place on the basis of informed consent obtained from the parent(s) and the minor, depending on his or her age and maturity. If this consent is not given, there is an infringement on the right of respect for private and family life (Article 8 ECHR). This infringement can only be justified if the requirements of a legal basis, proportionality, subsidiarity and diligence are met. Moreover, the minor and their parent(s) are entitled to an effective remedy in case of an alleged violation of their rights. The research concludes that the fundamental principles of the Dutch youth care system require adjustments to the legal status of minors and parents and the responsibilities of professionals involved in coercive procedures.

Informed consent without pressure

The provision of youth care requires that informed consent is obtained from the parents and the minors, depending on their age and maturity. This consent should be given freely, without pressure. This entails that no conditions may be attached to whether or not permission is given. Within the voluntary framework, which according to the findings of this study also includes the coercive procedures, professionals are completely dependent on the cooperation of parents and minors. However, it is highly questionable whether these – mostly vulnerable – parents and minors are sufficiently aware of this and whether they actually experience it that way. In the context of coercive procedures, the often-used phrase 'voluntary, but not noncommittal' (*'vrijwillig,*

maar vrijblijvend'), gives rise to questions relating to the freedom to grant or refuse permission. In a situation of inequality of power, attaching consequences to (not) consenting and (non) cooperation, implies that the care and assistance is no longer 'non-committal' and therefore no longer voluntary.

Youth care is voluntary when it is provided on the basis of a request for care from parents and/or minors. As soon as professionals add any conditions to that request, while they are in a position of authority that allows them to upscale the care (potentially leading to an involuntary child protection measure), it becomes debatable if the parents and minors can freely give their consent. Further research into this area by disciplines other than the legal one is recommended.

In line with this conclusion, it is recommended to regulate 'case management procedures' (in which context the term 'coercion' is no longer mentioned) as facilities of youth care in municipal bylaw. In doing so, it will become clear that, amongst other things, the consent of the parents and minors is required and that the legal guarantees of the voluntary framework for the parents and minors receiving help, apply in full. Furthermore, it is recommended to ensure that an out-of-home placement of the child in the voluntary framework, is or can be reviewed by a juvenile court at all times in cases where it is not entirely clear whether the parents and minors can actually give consent in a voluntary and noncommittal manner. At present, this cannot be guaranteed.

Legal basis, proportionality, subsidiarity and diligence

When starting a 'case management procedure' without informed consent of the parents and minors, the requirements of a legal basis, proportionality, subsidiarity and diligence must be observed. This entails that it must have a basis in an accessible, foreseeable and clear national law. Therefore, this research recommends creating a legal basis for case management procedures in which the requirements of proportionality and subsidiarity must be taken into account. These requirements imply that interference by means of a case management procedure is necessary, that it is in reasonable proportion to the aim of the procedure and that there are no available alternatives that form a smaller infringement on the rights of the parents and minors. Where the enforcement of a case management procedure is concerned, the requirements of proportionality and subsidiarity mean, for example, that the agreements and their ensuing consequences are as minor as possible and effectively contribute to protect the human dignity of the minor and to facilitate the development of the minor to the maximum extent possible.

Finally, the decision to initiate a case management procedure must carefully and transparently weigh up the interests of all involved. The best interests of the minor may override those of their parent(s). The views of the minor and their parent(s) must be taken into account in order to determine and balance all interests. The older the minor gets, the more they will participate in the decision-making process with regard to case management procedures. Conversely, the degree of involvement of parents during this decision-making process will gradually decrease. This research shows that

the way in which and the extent to which parents and minors are involved in decision-making can differ per municipality. Furthermore, the research shows that important decisions regarding, for example, the persons who are invited for the case consultation and the processing of personal data before and during the case consultation are made by professionals, and not by the parents and/or minors. It is particularly in the area of protecting the privacy of those involved, that there is ample room for improvement. Adequate training of professionals and the appointment of a responsible data protection officer to safeguard the privacy of parents and minors will lead to improvements in this area.

An effective remedy

At present, the remedies for parents and minors in case of an alleged violation or their rights during case consultations, the coercive procedures, and the provision of relevant information in this context seems limited. Moreover, independent supervision of the case consultations and the coercive procedures is not provided. In view of the doctrine of the separation of powers and checks and balances, it is important that this is properly arranged. In this context, the application of the expedient definition of 'decision' by an administrative court judge (*'strategisch besluitbegrip'*) or civil liability proceedings may be helpful.

Final remarks

In an ideal situation, the distinction between the voluntary and compulsory framework of the youth care system is clear and no legal twilight zone in which unregulated 'coercive procedures' can flourish, exists. Regulation is recommended to ensure that case management procedures only start after obtaining informed consent from the parents and minors and to create a legal basis for case management procedures without informed consent. Terminology such as 'coercive framework', 'coercive procedures' and 'voluntary, but not noncommittal' should be avoided. However, it is highly questionable whether an ideal situation in which the distinction between the voluntary and compulsory framework is entirely clear, is feasible. Taking into account, amongst other things, the legal history, the margin left to states by the international and European framework for children's and human rights and the variety in family situations, it is to be expected that there will always be a twilight zone. In the light of what has been discussed, it is desirable though that this twilight zone is as small as possible. Conditions should be created for the provision of youth care within the remaining zone between the voluntary and compulsory framework that allow for the constitutional principles and the legal protection of parents and minors to be guaranteed. The minimum core obligations regarding the right to youth care should be taken into account as much as possible. Above all, the overarching objective of the youth care system to protect the human dignity of the minor and to facilitate the development of the child to the maximum extent possible should be paramount.