



Universiteit
Leiden
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**Radicalisering bij minderjarigen en
overheidsingrijpen: over de interactie van
rechtsgebieden en een kinder- en
mensenrechtenconforme inzet van juridische
instrumenten**

Capelleveen, N.U. van

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Summary

Radicalisation of children and government interference
The interaction between areas of law and a children's and human rights compliant application of legal instruments

Problem statement, research question and research methods

Under Dutch law, various legal instruments can be imposed on children who show signs of radicalisation. These instruments have a legal basis in different areas of law, ranging from criminal and administrative law to child protection law. Common to the legal instruments is that they intervene to a far-reaching extent in the personal lives of children, infringing their fundamental rights and freedoms. The increasing pressure on individual fundamental rights and freedoms to ensure public safety in the context of radicalisation has been a recurrent topic of debate in academic discourse. In these discussions, the specific position of children and the application of in particular child protection law have largely been overlooked. However, the unique legal position of children and the additional possibility of invoking legal instruments based on child protection law makes children especially vulnerable to government interference. Furthermore, children seem particularly vulnerable to radicalisation.

In the context of radicalisation, international children's and human rights law not only protect children from government intervention. Children's and human rights also emphasise the need for special protection of the well-being and development of children. The UN Committee on the Rights of the Child explicitly identifies radicalisation as a risk in the child's development. Government intervention in response to signs of radicalisation among children is therefore particularly complex. Nevertheless, it is currently unclear how the exercise of fundamental rights and freedoms, the protection of the development of the child, and the protection of public safety should be balanced under international children's and human rights law. In this regard, the choice of a legal instrument that is deployed in an individual case appears to have a substantial impact on how this balance is struck at the national level. In-depth legal research on the government's response to radicalisation among children is therefore necessary. The following research question is central to this study:

How does Dutch law, policy and practice concerning the use of legal instruments for the tackling of radicalisation of children relate to an international children's and human rights perspective and the underlying interests? Does the law, policy and/or practice need amendment, and if so, in what way?

The main objective of this research is to provide an analysis of the Dutch response to radicalisation in which multiple areas of law are examined,

and to consequently offer recommendations to improve conformity with the children's and human rights perspective. As a final outcome of this research, it is aimed to develop a decision-making framework for a children's and human rights compliant application of legal instruments based on youth justice, administrative, and child protection law.

To answer the research question, a combination of traditional legal research methods and qualitative empirical research methods have been used. Through desk research, a normative children's and human rights framework has been developed, and national law and policies concerning the use of legal instruments for the tackling of radicalisation at the national level have been analysed. The application of the legal instruments in practice has been examined through 43 semi-structured interviews with professionals involved in the tackling of radicalisation of children (see Chapters 1 and 7).

The children's and human rights framework

The first part of this research focuses on the international children's and human rights perspective on the use of legal instruments for the tackling of radicalisation. Chapter 2 shows that the government's response to radicalisation is constrained by various fundamental rights and freedoms enshrined in the ECHR, ICCPR, and CRC. The right to freedom of thought, conscience and religion, and the freedom of expression of the child lie at the core of this children's and human rights perspective. The use of a legal instrument in response to radicalisation leads in principle to an infringement of (one of) these rights. In addition, the application of a legal instrument in response to signs of radicalisation may as well infringe upon the right to respect for private and family life, freedom of movement, and/or the right to personal liberty.

From the international children's and human rights framework, several principles for the use of legal instruments in the government's response to radicalisation can be derived. These principles include in short: (a) the principle that any limitation on the fundamental rights and freedoms of the child must be proportionate to the pursued aim (proportionality) and that no less restrictive alternative should be available (subsidiarity). Building on this principle, (b) legal instruments that result in the separation of a child from parents or that involve deprivation of liberty should be applied with extreme caution. Additionally, (c) the use of a legal instrument must never lead to torture or inhuman or degrading treatment or punishment, coercion to adopt or renounce a belief or conviction, or discrimination in the protection of fundamental rights and freedoms. Specifically in relation to youth justice, (d) legal instruments should be applied with great restraint, and when their application is unavoidable, (e) specific procedural safeguards must be guaranteed and consideration must be given to the child's age and the desirability of promoting the child's reintegration. Finally, (f) a fair trial and careful decision-making process must be ensured, also outside the context of youth justice, and (g) access to the court must be guaranteed.

The analyses of the international children's and human rights framework shows that in this framework various clusters of interests are protected: the interest of the exercise of fundamental rights and freedoms by the child, the interest of protecting the child's development, and the interest of protecting public safety. Since the international children's and human rights framework provides only limited guidance for weighing these interests at the national level, a legal-theoretical framework for assessing and balancing interests in a children's and human rights context has been developed in Chapter 3. This chapter shows that a children's rights focused approach requires that in a specific case where a decision is made on how to tackle radicalisation, the interests of the child must first be determined, whereby the individual interests of the child are weighed. The weighing of the individual interests of the child in the context of the government's response to radicalisation fundamentally comes down to establishing a balance between respecting the autonomy and self-determination of the child and protecting the child's development. This relationship between autonomy and protection is, however, complex, as the exercise of autonomy – up to a certain extent – contributes to a child's development, and protecting that development is necessary for exercising autonomy. The principle of the evolving capacities of the child serves in this context as an important guideline to ensure that children can increasingly express autonomy and self-determination, while simultaneously providing an appropriate level of protection.

Once the interests of the child in the specific case have been determined, these individual interests can be weighed against the interest of protecting public safety. For both these balancing of interests, in Chapter 3 concrete principles are established for a children's rights compliant balancing when deciding about government intervention in the context of radicalisation. These principles for a children's rights compliant balancing of interests can complement the principles derived from the children's and human rights framework. By integrating these principles, in the first part of this research a concrete analytical framework was developed to assess the use of legal instruments at the national level from a children's and human rights perspective, ensuring that all relevant interests are comprehensively weighed to decide whether and what government action is needed (see figure 3.1).

Legal instruments and the tackling of radicalisation at the national level: law, policy and practice

The second part of this research describes the national context of the use of legal instruments for the tackling of radicalisation of children. Chapter 4 outlines the Dutch system of the tackling of radicalisation, as the context in which legal instruments can be employed. The tackling of radicalisation in the Netherlands takes mainly shape at a municipal level, but national policy has been established to guide the municipal approach. This national policy deals with the tackling of radicalisation of both children and, mostly, adults. A characteristic feature of the Dutch system in this regard is formed by so-

called multidisciplinary case conferences, where signs of radicalisation are discussed, evaluated, and tailored action plans are made.

Chapter 5 analyses youth justice, administrative, and child protection law as the basis for the legal instruments that can be used for the tackling of radicalisation. Among other measures, criminal or administrative contact bans, obligations to report, location bans or criminal treatment obligations, deprivation of liberty, internet bans, or mandatory meetings with experts can be employed in response to signs of radicalisation. Additionally, an administrative ban of leaving the country or passport measure, as well as a child protection measure or secure residential care can be applied. In this regard, the moment at which the government can intervene in response to signs of radicalisation has been progressively moved forward. Nevertheless, a certain level of signs of radicalisation is required to invoke the studied legal instruments.

Chapter 6 builds forward on chapter 5 and provides a detailed analysis of the interaction between the legal instruments from the three areas of law. Because of historical legal developments these three areas of law are to a certain extent interrelated in the government's response to 'undesirable' behaviour of children, although the areas of law are fundamentally distinguished from one another. Nonetheless, the interests pursued by the legal instruments, according to statutory texts, legislative history, and jurisprudence, differ. Instruments based on administrative law prioritise the protection of public safety and do not provide a framework for care and support. In contrast, child protection law is primarily focused on safeguarding the child's development. Youth justice measures pursue public interests in the first place, but at the same time aim to promote the child's development.

The interaction between the legal instruments from the different areas of law in the context of tackling of radicalisation is based on the premise that on a case-by-case basis it can be determined how behaviour is most adequately regulated. However, the interaction also impacts the legal position of the child, in terms of proportionality of government interference, potential legal uncertainty, and – resulting from that – a risk of legal inequality.

Chapter 7 presents the results of the empirical research. The interviews show that there is a certain level of interplay between a multidisciplinary case conference and the use of legal instruments for the government's response to radicalisation. Information shared during a case conference can for example influence the decision-making process of individual partners (Public Prosecution Service, National Coordinator for Security and Counterterrorism and the Child Protection Board) about the use of a legal instrument, and legal instruments can be used by the partners of a case conference to impose a coercive framework on a child. The interviews show that the fact that a child is discussed during a case conference can thereby, to some extent, lower the threshold for the use of legal instruments. Against the background of this interplay between a case conference and (the decision-making regarding) the application of legal instruments, three

areas of tension have been identified from the interviews that in practice are visible in the government's legal response to radicalisation among children. First, there is a tension regarding the interaction of legal instruments and the organisation of legal procedures and privacy considerations. Second, a tension is apparent between a pragmatic approach to the use of legal instruments and the legal protection of children. Finally, it has been established that in the context of the government's response to radicalisation among children there is a visible tension between a safety perspective and a care perspective (see further par. 7.9)

Analysis and conclusions

In the final chapter of this research (Chapter 8), the use of legal instruments at the national level for the tackling of radicalisation is examined in the light of the international children's and human rights perspective and the underlying interests. It is argued that first of all the Dutch system of the tackling of radicalisation, as the context in which legal instruments are applied, is intrinsically linked to the extent to which the children's and human rights perspective is complied with. In this regard, this research has identified three main findings about the Dutch system that establish important prerequisites for a children's and human rights compliant application of legal instruments in addressing radicalisation. The first main finding is that a clear and uniform definition of the concept of 'radicalisation' is lacking in the Dutch system. Building on this finding, the research shows that the tackling of radicalisation in the Netherlands primarily targets jihadist radicalisation. Varying interpretations of radicalisation, however, lead to far-reaching differences in which children fall under the scope of the government's response to radicalisation, while the discussion during a case conference has significant implications for, among other things, the privacy of the child and the application of far-reaching interventions, with the child being labelled as 'radicalised'. Achieving greater clarity and uniformity on the scope of the tackling of radicalisation is therefore an important prerequisite for a children's and human rights compliant application of legal instruments.

The second prerequisite for a children's and human rights compliant application is ensuring that the individual interests of the child are adequately protected within the Dutch response to radicalisation. A core finding of this research however is that, under the current system, the protection of public safety is predominantly prioritised, while the individual interests of the child are primarily expressed at an abstract or indirect level. A final and related main finding is that the current Dutch system of the tackling of radicalisation is only marginally specific to children. The existing approach seems to lack space for a comprehensive consideration of the child's interests in the specific case, before signals of radicalisation are assessed from a security perspective. In this research it is therefore argued that radicalisation of children should be primarily dealt with from a care or developmental perspective. More national guidance and uniformity in these areas is therefore necessary to safeguard the fundamental rights and

freedoms and the child-specific interest of the protection of the development of the child.

Regarding the legal instruments that can be applied in response to radicalisation, this research has found that the area of law in which a legal instrument has a legal basis largely determines both the fundamental rights impacted by the government's response to radicalisation and the interests pursued. In addition, this research shows that the interaction between areas of law increases the pressure on fundamental rights and freedoms when addressing radicalisation. As a final outcome of this research, a decision-making framework has therefore been developed for a children's and human rights compliant application of legal instruments from youth justice, administrative, and child protection law in response to radicalisation. This decision-making framework (see figure 8.2) consists of three core questions that must be answered by national decision-makers, along with various steps and corresponding guidelines that need to be followed based on the children's and human rights analytical framework. These core questions are the following: (1) Is government interference, given the specific circumstances of the case, appropriate and necessary? (2) Based on the balancing of the interests in the individual case, which area of law forms the most suitable basis for government interference? (3) Which legal instrument, within the most suitable area of law, should be imposed in the specific situation? In addition to the decision-making framework, the final chapter includes various recommendations for the legislator and practitioners to improve conformity with the children's and human rights perspective and provides recommendations for further research. An overview of recommendations is given at the end of chapter 8 (figure 8.3).