

BELGIUM

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Katrien Hanoulle
Paul Lemmens (coordinator)
Frank Verbruggen

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Executive summary

Definitions

- [1]. Belgian law often lacks uniform definitions. There is for instance no definition of the concept of “mental illness” required for involuntary placement. Nevertheless, some definitions can be given:
- Disability (“*handicap*”): with regard to the Act against certain forms of discrimination, implementing the Employment Equality directive, the courts state that the interpretation of the European Court of Justice of, *inter alia*, the notion of “disability” has to be followed.
 - Mentally ill offender (“*geestesgestoorde dader*” / “*malfaiteur atteint d’un trouble mental*”): according to the current law, this term refers to an offender in a state of insanity, a serious state of mental disorder or mental deficiency which makes him incapable of controlling his actions. According to a new law, which will enter into force in the future, it refers to an offender who suffers from a mental disorder which annihilates or seriously affects his ability to judge or to control his actions

Anti-discrimination

- [2]. The central notions throughout the study are the equality rule and the prohibition of discrimination. Apart from the general constitutional provisions, Belgium has implemented the Employment Equality Directive and has worked out several positive measures in order to guarantee actual equality in all public areas.

Specific fundamental rights

- [3]. When it comes to specific fundamental rights, the Constitution never explicitly foresees a guarantee for mentally ill. At the legislative level more attention is being paid to this vulnerable group. For instance, the mental illness of the victim can be an aggravating factor for some offences. The right to liberty and security of mentally ill is explicitly defined in the laws regulating involuntary placement and internment. In order to guarantee a fair trial, several special measures can be taken

in procedures concerning mentally ill. Special attention is also being paid to the patient rights of people with mental illnesses. Their rights to marry and to have children cannot be easily restricted; this is usually only possible when they are subjected to a legal protective measure. The same goes for the restriction of property rights.

Involuntary placement and involuntary treatment

- [4]. Subsequently, the study goes more deeply into the involuntary placement and treatment practice and procedure in Belgium. After a statistical overview of the reference period of 2002-2006, the legal procedure is explained in detail. It is noteworthy that both adults and minors are subject to the same law on involuntary placement. Also important is the specific law on internment of mentally ill offenders, which falls out of the scope of the civil law on involuntary placement. These internees end up in prison or in an institution for the protection of society, instead of being placed in a psychiatric institution. Belgium has repeatedly been slapped on the wrist for this practice.
- [5]. When examining the criteria and definitions in the law on involuntary placement – for instance the concept of “mental disorder”, it becomes clear that no strict definitions have been provided for. A final aspect which has to be highlighted is the fact that the law only regulates the placement of the patient, without regulating any treatment. Some separate laws provide treatment rules.

Competence, capacity and guardianship

- [6]. Finally, the protective measures which affect competence and capacity and which can install guardianship are examined. Belgium has four legal systems which can apply to a mentally ill person: the declaration of incompetence, the extended minority, the designation of a legal adviser and the designation of a provisional administrator. According to the seriousness of the incapacities of the mentally ill person, a more or less restrictive measure is adopted. These measures have different consequences on the competence of the protected person with regard to his or her assets and/or with regard to his or her person. None of these measures have strict time limits, but last as long as needed. The normal appeal procedure applies.

Miscellaneous

[7]. Not applicable.

1. Definitions

[8]. Definitions of terms referring to mental disorders and intellectual disabilities will be given throughout the report. It will be clear that Belgian legislation and case law often lack uniform definitions. There is for instance no definition of the concept of “mental illness” required for involuntary placement (see [[69]]). Nevertheless, some definitions can be given:

- Disability (“*handicap*”): with regard to the Act against certain forms of discrimination¹, implementing the Employment Equality directive, the courts state that the interpretation of the European Court of Justice of, *inter alia*, the notion of “disability” has to be followed².
- Mentally ill offender (“*geestesgestoorde dader*” / “*malfaitteur atteint d’un trouble mental*”): according to the current law³, this term refers to an offender in a state of insanity, a serious state of mental disorder or mental deficiency which makes him incapable of controlling his actions. According to a new law⁴, which will enter into force in the future, it refers to an offender who suffers from a mental disorder which annihilates or seriously affects his ability to judge or to control his actions.

¹ Belgium/Act against certain forms of discrimination (10.05.2007).

² For instance: Belgium/Labour Court of Tongeren (29.06.2006).

³ Belgium/Belgisch Staatsblad-Moniteur belge 11.V.1930/ Act on the protection of society against abnormal people, habitual offenders and the perpetrators of certain sexual offences (09.04.1930), Art. 1 § 1.

⁴ Belgium/Belgisch Staatsblad-Moniteur belge 13.VII.2007/ Act on the internment of persons with a mental illness (21.04.2007), Art. 8, § 1.

2. Anti-discrimination

2.1. Incorporation of United Nations standards

- [9]. Belgium has ratified the Convention on the Rights of Persons with Disabilities and the Optional Protocol on 2 July 2009, after approval by the Federal Parliament and by all Parliaments of the Regions and the Communities.⁵
- [10]. The ratification was not accompanied by any amendments to existing domestic legislation. However, as will be explained below, Belgian anti-discrimination law had just recently been adapted to the European directives on the same issue, including provisions on reasonable accommodations for persons with a handicap.⁶

2.2. The anti-discrimination national framework

- [11]. The Belgian Constitution contains a general equality rule and a general prohibition of discrimination, not a specific one for people with a mental illness. Article 10 of the Constitution states: '*All Belgians are equal before the law*'. Article 11 declares that '*The enjoyment of all rights and freedoms has to be assured to all Belgians without discrimination*'. The courts have not developed any specific standards. For the equality and anti-discrimination rules at the statutory level, see further (paragraphs [13]-[15]).
- [12]. Belgium's preferential treatment arrangements in respect of mentally ill can be derived from the general equality and anti-discrimination

⁵ Federal Parliament: Belgium/Act of 13.05.2009; Flemish Parliament: Flanders/decreed of 08.05.2009; French Community Parliament: French Community/decreed of 26.03.2009; Walloon Parliament: Walloon Region/decrees of 30.04.2009; Parliament of the German speaking Community: German speaking Community/decreed of 11.05.2009; Parliament of the Region of Brussels-Capital: Brussels-Capital/ordinance of 26.03.2009; United Assembly of the Common Community Commission of Brussels: Brussels-Capital/decreed of 14.05.2009; Assembly of the French Community Commission of Brussels: Brussels-Capital/decreed of 15.01.2009.

⁶ See, e.g., at the federal level: Belgium/Act Act against certain forms of discrimination (10.05.2007).

rules. These contain not only the principle that all people in the same circumstances should be treated in the same manner, but also the opposite principle that people in different circumstances should be treated differently. A person's specific situation always has to be taken into account. As a result, mentally ill should not be treated the same as mentally sane people in every single situation. Where and when needed, the constitutional equality and anti-discrimination rules provide a basis for preferential treatment of mentally ill. The courts apply the same reasoning. For preferential treatments at the statutory level, see further (paragraphs [16]-[20]).

- [13]. At the statutory level, Belgium first of all implemented the Employment Equality directive into the (federal) Act of 10.05.2007 against certain forms of discrimination. This law does not specifically consider that the notion of 'disability' includes people with a mental disorder. Neither does the Flemish Decree of 08.05.2002 on Fair Employment Participation.⁷ When it comes to the interpretation of the concept of 'disability' in the context of discrimination based on disability, the courts consider the case law of the European Court of Justice to be decisive.⁸
- [14]. The Act against certain forms of discrimination is not only applicable in work situations. Article 5, which defines the scope of the law, mentions inter alia the access to and the offering of public goods and services, social protection (including social security and health care) and social benefits.
- [15]. Certain aspects of health care, education and housing are within the competency of the Communities and the Regions. The Flemish Parliament has enacted an anti-discrimination Decree.⁹ It applies to employment and professional training (except for forms of discrimination covered by another decree, the Decree on Fair Employment Participation), health care, public goods and services (including housing), social benefits and any non-private economic, social, cultural or political activity. Also the French Community¹⁰, the Walloon Region¹¹ and the Region of Brussels-Capital¹² have enacted similar decrees and ordinances.

⁷ See also: Walloon Region/Decree against certain forms of discrimination (06.11.2008); German speaking Community/Decree concerning the guarantee on equal treatment on the labour market (17.05.2004); Region of Brussels-Capital/Ordinance for diversity and against discrimination in the public office (04.09.2008); Region of Brussels-Capital/Ordinance against discrimination and for equal treatment in private employment (04.09.2008).

⁸ For instance: Belgium/Labour Court of Tongeren (29.06.2006).

⁹ Flanders/Decree on the framework of a Flemish policy or equal chances and equal treatment (10.07.2008).

¹⁰ French Community/Decree against certain forms of discrimination (12.12.2008).

¹¹ Walloon Region/Decree against certain forms of discrimination (06.11.2008).

- [16]. Moreover, the federal authority, the Communities and the Regions have all worked out positive measures for mentally ill, which strive to equality. These will be described in the next paragraphs.
- [17]. Since mentally ill usually require more medical care than on average, the Belgian social security system has been adapted to their special needs. Under the Belgian security system patients in general only have to pay a small amount of overall medical expenses. For persons with a disability and for persons who receive an additional child allowance for a disabled child, this amount is even lower than the amount for those who live on welfare. Additionally, the annual amount of medical expenses per family is limited; above a certain limit no contribution at all has to be paid. For the protected category the limit of the own contributions is below the general one.
- [18]. The social protection system also guarantees other benefits for mentally ill, such as tax benefits and an additional child allowance (either because the parent is disabled, or because the child is disabled). There are also three types of allowances for disabled people. First of all, there is the allowance which replaces the income of a person who is not capable of working due to his or her disability. Secondly, disabled people can request an allowance to facilitate their integration. Lastly, elderly people can ask for an allowance when they have become less independent.
- [19]. Disabled people can also enjoy cheaper housing.
- [20]. Education is within the competency of the Communities. Flanders has an integrated educational policy which strives to integrate inter alia mentally ill children in the regular educational system. The pupil/student, the parents, the school or the student guidance centre can request special support. A teacher or employee of a school within the special educational system guides the pupil/student so that he or she can go to a “normal” school. Apart from this system mentally ill children can go to special schools which provide education adapted to their abilities. The classes are set up according to the type of disability of the children.
- [21]. Case law can be found concerning the social rights of foreign persons with a disability who are settled in Belgium. There is no discrimination based on their nationality when they do not receive for instance an allowance for disabled people, because Belgium has no obligations towards them.¹³ This obligation can only be found in an international treaty with regard to recognised refugees.

¹² Region of Brussels-Capital/Ordinance containing the Housing Code of Brussels (17.07.2003).

¹³ Belgium/Constitutional Court, No. 92/2004 (19.05.2004).

- [22]. According to Directive 2000/78/EC and the draft “horizontal” Directive Belgium has to provide “reasonable accommodations” to meet the needs of disabled people. The Flemish Region or Community can for instance enter into a sector covenant with employers’ and employees’ organisations, in order to support and execute its policy on equal employment participation.¹⁴
- [23]. In order to employ people with a mental handicap, Belgium organises employment in sheltered work areas. The regional governments subsidise their salaries and social security contributions. An additional subsidy is foreseen for the weakest employers. In order to be recognised as a claimant of the allowance, the sheltered work area has to meet certain conditions: it must guarantee useful and sufficiently rewarding and paying work, provide technical, social and medical guidance, aim – if possible- at moving the employees to the regular employment circuit, and adapt the infrastructure to the special needs of the employees.
- [24]. It is possible to bring a discrimination complaint before the Centre for Equal Opportunities and Opposition to Racism.¹⁵ The Centre will try to bring about reconciliation between the parties. When reconciliation seems impossible or fails, the case can be brought before a court. In these cases, the Centre is competent to act on behalf of the discriminated person when this is considered useful. Other discrimination cases, or cases without the involvement of the Centre, can also be dealt with by Belgian courts and tribunals.

¹⁴ Flanders/Decree regarding the sector covenants within the framework of the Flemish employment policy (13.03.2009).

¹⁵ In case of violations of the federal Act against certain forms of discrimination or of the Decrees of the French Community and the Walloon Region against discrimination.

3. Specific fundamental rights

[25]. In the following paragraphs Belgium's constitutional and legal framework with regard to specific civil and political rights will be described. The focus will be on whether or not people with mental disorder or intellectual disability fully enjoy these rights and freedoms.

3.1. The right to life

[26]. First, the **right to life** will be discussed. The Belgian legislation does not explicitly protect the right to life of people with a mental disorder or an intellectual disability. Moreover, the abortion legislation even restricts their right to life. Article 350, second paragraph, 1° of the Criminal Code allows in principle an abortion within the first 12 weeks of pregnancy. After these 12 weeks abortion is still justified when there is proof that the child will suffer from a very severe dysfunction which is recognised to be incurable. No relevant recent case law can be found.

3.2. The right to freedom from torture or cruel, inhuman or degrading treatment or punishment

[27]. The second right is the **freedom from torture or cruel, inhuman or degrading treatment or punishment**. Article 417*quater* of the Criminal Code considers the mental condition of the victim of inhuman treatment to be an *aggravating factor*, when "the victim, due to a mental deficiency or inferiority, is particularly vulnerable". Article 417*ter* speaks of an aggravating factor when the victim of torture, because of his or her physical or mental condition, is unable to support himself or herself.

[28]. Secondly, the right to freedom from torture or cruel, inhuman or degrading treatment has to be taken into account in a medical context. When considering medical interventions, Belgium holds on to the principle of informed consent.¹⁶ If the patient is declared incompetent or is subjected to the system of extended minority, his or her parent(s)

¹⁶ See for instance the case in footnote 30: Belgium/Court of appeal of Antwerp (28.06.2004).

or guardian must give consent. If the mentally ill patient is not the subject of any protective measurement, but is *de facto* incompetent, consent is given by a person who is appointed beforehand by the patient to represent him or by a cohabiting husband/wife, a (legally) cohabiting partner, or by a medical professional (after multidisciplinary deliberation).

3.3. The right to freedom from exploitation

- [29]. Thirdly, the right to **freedom from exploitation** can be considered to be protected under article 23 of the Constitution. This article states that anyone has the right to live a life in dignity, which consists amongst other things of the right to work and the free choice of the profession in the context of a general employment policy which focuses inter alia on the guarantee of a level of employment as high and stable as possible, the right of reasonable employment conditions and a reasonable remuneration, as well as the right of information, deliberation and collective negotiation. In criminal legislation concerning exploitation, the particularly vulnerable position of a mentally ill person is an aggravating factor. This is the case with article 433*quater* (exploitation of begging), article 433*septies* (human trafficking) and article 433*decies* of the Criminal Code (exploitation of a particular vulnerable position by selling, letting out or putting goods at disposal in order to realise an abnormal profit). No relevant recent case law can be found.

3.4. The right to liberty and security

- [30]. Next is the **right to liberty and security**. Article 12 of the Belgian Constitution guarantees in a general way the freedom of the person. Exceptions are only allowed when provided by the law. The Belgian law strictly defines the conditions under which a person with a mental illness can be restricted in his or her freedom.
- [31]. An *involuntary placement* can only be the last option, when any other appropriate treatment is lacking and the condition of the mentally ill requires so.¹⁷ Applications for involuntary placement have been rejected where the “patient” could not be treated, so that involuntary placement would not be appropriate.¹⁸ Unless the statutory conditions

¹⁷ See further, Belgium/Act concerning the protection of the person of the mentally ill (26.06.1990).

¹⁸ See for instance: Belgium/Judge of Peace of Ghent (11.12.1997): the “patient” suffered from a irreversible behaviouristic disorder, which is not a treatable mentally illness.

are fulfilled, the diagnosis and treatment of a mental illness cannot lead to a restriction of freedom. Moreover, a person who has been voluntarily placed in a psychiatric service is free to leave at any time. However, it is possible that a voluntary placement is turned into an involuntary placement (see further).

- [32]. Secondly, the *internment* of an offender is only possible when he or she has committed an act, which is called a misdemeanour or a crime, and when he or she is in a state of insanity, a serious state of mental disorder or mental deficiency which makes him or her incapable of controlling his or her actions or deeds. He or she has to be released when his or her mental condition has sufficiently improved. The new Act on the internment of persons with a mental illness¹⁹ (not yet into force) slightly changes the conditions. At the moment of the decision, the offender has to suffer from a mental disorder which annihilates or seriously affects his or her ability to judge or control his or her actions and the danger has to exist that he or she, due to his or her mental condition, will reoffend. He or she can be locked up even before the decision of internment, when it is to be feared that he or she will escape or will be a danger to others.

3.5. The right to fair trial

- [33]. The importance of the **right to fair trial** will be elaborated on when discussing involuntary placement, competence, capacity and guardianship. This paragraph will focus on specific legal provisions that foresee special guarantees to mentally ill in order to ensure actual and equal access to justice.
- [34]. Free legal advice and support can be given to a mentally ill person who receives an income replacing allowance for disabled people.²⁰ In a procedure for an involuntary placement, a state-funded independent counsel is even automatically appointed, regardless of the means of the mentally ill (see further). There is no similar legal provision for a mentally ill offender who is involved in a procedure leading to his or her punishment or internment. However, the Constitutional Court has recognised the importance of a lawyer in such cases. Therefore it has annulled certain parts of the above mentioned Act on the internment of persons with a mental illness, in order to assure the full assistance of a lawyer throughout the whole of the procedure.²¹ When a mentally

¹⁹ Belgium/Belgisch Staatsblad – Moniteur belge, 13.VII.2007 (Act of 21.04.2007 on the internment of persons with a mental illness).

²⁰ Belgium/Royal Decree setting the conditions for full or partial freedom of charge for legal aid of the second line and for court costs (18.12.2003).

²¹ Belgium/Constitutional Court, No. 154/2008 (06.11.2008). Not only the interned person but also his or her lawyer has to automatically receive any relevant advice concerning the

ill person is the subject of a procedure of extended minority, he or she always gets the support of a separate lawyer. Parliament thus has ensured that the interests and opinions of the mentally ill person are taken into consideration when deciding on extended minority, which leads to more equality.

3.6. The right to privacy, including the access to one's own confidential medical records

- [35]. The **right to privacy** is explicitly guaranteed by Article 22 of the Constitution. Like article 8 ECHR, this article proclaims the general right to respect of a person's private life, albeit subject to exceptions.
- [36]. When dealing with mentally ill, special attention has to be paid to their medical treatments and medical record. These are matters regulated by the Act on the rights of the patient²². According to that act, the patient's privacy, especially information about his or her health, has to be protected whenever a medical professional intervenes. The patient is entitled to respect for his or her intimacy. Only persons whose presence is justified for the services of the medical professional are allowed to be present at the care, the examinations and the treatments.
- [37]. Moreover any patient is entitled to have his medical records carefully updated and safely stored. Any patient has access to the records, assisted by a trustee he or she has appointed, should the patient wish to do so. He or she can demand for a (partial) copy of it.
- [38]. In principle everyone fully enjoys his or her patient rights. When an adult is subject to extended minority or is declared incompetent, his or her parents or guardian exercise his or her patient rights. When a person is declared incompetent, his or her provisional administrator is also his or her trustee in the sense of the Act on the rights of the patient.²³ Other incompetent patients are represented by their cohabiting spouse or partner, an adult child, parent or sibling. When no one can or wants to represent the patient, the medical professional, after a multidisciplinary deliberation, looks after his or her interests. The patient is involved as much as possible and according to his or her abilities.

implementation of his or her internment and they both have to have the right to receive a copy of the file, since an interned person is not always capable of handling it on his or her own.

²² Belgium/Act on the rights of the patient (22.08.2002).

²³ Belgium/Judge of peace of Bruges (24.06.2008).

3.7. The right to marry, to found a family and to respect for family life

- [39]. Next is the **right to marry, to found a family and to respect for family life**. Article 22 of the Constitution declares that everyone has the right to respect for his or her personal and family life, subject to exceptions. We will discuss in particular the right to marry and the right to family life.
- [40]. There are no strict rules whether a mentally ill can *marry* or not. In principle, anyone is allowed to marry, regardless of his or her intellectual level.²⁴ However, a legal marriage requires a free consent, which cannot be given by a person who lacks the ability to give conscious consent or who suffers from a manifest mental retardation.²⁵ Also relatives can object to the marriage for reason of insanity or mental retardation of the husband or wife to be (articles 173 and 174 of the Civil Code). The judge can annul the marriage without further due, but the person who objected has to request the declaration of incompetence or extended minority. When the mentally ill person is subjected to a special status²⁶, the law is more precise. A person who is declared incompetent cannot perform any legal act, including consent to a marriage. The Court of Cassation has ruled that a marriage by such a person is absolutely null and void.²⁷ An extended minor can only marry when the Juvenile Court grants dispensation, which is unlikely to happen. In other cases the marriage is absolutely null and void. The person for whom a legal adviser or an administrator is designated can in principle autonomously enter into a marriage. With regard to the financial aspects, the legal adviser assists the mentally ill person when the stipulations of the marriage settlement differ from the conventional legal system. When the legal adviser or administrator was designated for reason of feebleness, the marriage can in some cases be declared null and void because of lack of consent.
- [41]. Because of the need to respect *family life* and the importance of it, a child with a mental disorder cannot be taken out of its familiar environment easily. Belgian juvenile legislation emphasises that only in exceptional circumstances, and when it is in the interest of the

²⁴ Belgium/ Court of First Instance of Liège (22.09.2000).

²⁵ See for instance: Belgium/Court of Appeal of Liège (16.02.2000).

²⁶ See further for a more detailed explanation: [87]-[113].

²⁷ Belgium/Court of Cassation (21.02.1895).

child, the latter can be placed in a (psychiatric)²⁸ institution. The return to the family has to be encouraged.

3.8. The right to have children and maintain parental rights

- [42]. The following right is the right **to have children and to maintain parental rights**. There is no legal prohibition for mentally ill people to have children and to raise them. Therefore, the Board of medical doctors (“Orde van geneesheren”/“Ordre des médecins”) has stated that the systematic sterilisation of mentally disabled people is unacceptable.²⁹ Thus it is forbidden to sterilise a mentally disabled woman without her consent, even though the doctor is of the opinion that this would be in her own interest.³⁰ Not only is a mental illness in itself insufficient to deny to a person the right to have children, it is also insufficient to restrict or exclude the right to exercise parental rights. However, a mental illness can constitute a so called “problematic situation of upbringing”. This term refers to a situation where the physical integrity or the affective, moral, intellectual or social development of minors are jeopardised by specific events, relational conflicts or the circumstances in which they live. If so, special measures can be taken to protect the minor, such as an increased supervision or even placement of the minor in a youth facility. The Youth Protection Act³¹ states that parental authority can be removed from a father or mother who by maltreatment, apparently bad behaviour or gross negligence, jeopardises the health, the safety or the morality of the child. The parent’s mental condition can be part of the unhealthy or unsafe situation of the child.
- [43]. When one of the parents is unable to express his or her will, for instance due to his or her mental condition, the other parent exercises all parental rights autonomously.

²⁸ For a maximum period of one year.

²⁹ Orde van Geneesheren (1994) “Advies over de sterilisatie van mentaal gehandicapten”, in: *Tijdschrift van de nationale raad Orde van geneesheren*, No. 64, p. 20 (Dutch).

³⁰ Belgium/Court of appeal of Antwerp (28.06.2004).

³¹ Belgium/Act concerning the youth protection, the taking at charge of juveniles who have committed an act qualified as an offence and the compensation of the damages caused by this act (08.04.1965).

3.9. The right to property

- [44]. The **right to property** is generally guaranteed in article 16 of the Constitution. For mentally ill persons the right to property is only legally restricted when the person is subjected to a special legal measure, namely extended minority, declaration of incompetency, designation of a legal adviser or an administrator (see **Error! Reference source not found.** and following). Moreover, with regard to (property) contracts, article 1123 of the Civil Code states that anyone is competent legally to act, except when he or she is declared incompetent. A formal declaration of incompetence does take away the capacity of the person to take up legal obligations. When a person, who has a provisional administrator, wants to dispose of his or her property by will, his or her competence and mental health have to be assessed by the judge of peace.³² The protected person has to have some knowledge of the meaning, the nature and the scope of the will and his or her total property.
- [45]. For other mentally ill people, article 1108 of the Civil Code has to be taken into account: a valid contract requires a free consent and the competency to contract. The fulfilment of these conditions has to be checked in the light of the concrete circumstances.

3.10. The right to vote

- [46]. Lastly, the **right to vote** has to be explored. In principle, article 12 of the Constitution guarantees all political rights to all Belgians (and allows for the extension of some of these rights to aliens). The Belgian Election Code denies the right to vote only to those who are declared incompetent, to extended minors or to interned persons. Consequently, other mentally ill keep the right to vote. No relevant case law can be found.

³² For instance: Belgium/Judge of peace of Sint-Truiden (07.09.2005).

4. Involuntary placement and involuntary treatment

- [47]. The findings of the Report on *Compulsory Admission and Involuntary Treatment in the EU* of 2000 have to be updated. As for procedural changes in the Belgian legislation, they will be discussed under the Legal Framework (point 4.1).
- [48]. The federal Ministry of Public Health requires all general and psychiatric hospitals to register all psychiatric intakes, both voluntary and involuntary. These “Minimal Psychiatric Data” are centralised per year. The most recent registration dates from 2006. In order to show consistencies, evolutions and changes, the reference period starts at 2002.

	2002	2003	2004	2005	2006	TOTAL
OTHER PLACEMENTS	82404	83590	84556	87288	88363	426201
INVOLUNTARY PLACEMENTS (observation)	4068	4135	4344	4827	4784	22176
TOTAL	86472	87743	88900	92115	93147	448377

2002

	MEN	WOMEN
AGE		
0-15	23	32
16-18	88	61
19-21	259	64
22-25	350	85
26-35	685	282
36-45	539	373
46-55	365	300
56-65	175	148
66-75	74	74
> 75	43	42
unknown	5	1
Total	2606	1462

2003

	MEN	WOMEN
AGE		
0-15	20	19
16-18	88	59
19-21	244	67
22-25	353	101
26-35	681	288
36-45	570	369
46-55	365	326
56-65	171	142
66-75	78	87
> 75	59	65
unknown	1	0
Total	2630	1523

2004

	MEN	WOMEN
AGE		
0-15	24	21
16-18	106	41
19-21	237	88
22-25	340	106
26-35	731	322
36-45	558	410
46-55	359	352
56-65	194	155
66-75	66	100
> 75	48	86
unknown	0	0
Total	2663	1681

2005

	MEN	WOMEN
AGE		
0-15	29	27
16-18	119	50
19-21	226	79
22-25	385	135
26-35	761	360
36-45	614	439
46-55	458	412
56-65	213	199
66-75	90	99
> 75	55	76
unknown	0	1

Total	2950	1877

2006

	MEN	WOMEN
AGE		
0-15	36	34
16-18	92	64
19-21	223	79
22-25	342	123
26-35	773	333
36-45	616	453
46-55	446	399
56-65	214	203
66-75	109	103
> 75	59	79
unknown	2	2
Total	2912	1872

	2002	2003	2004	2005	2006	Total
MAIN DIAGNOSIS						
Feebleness	29	35	39	36	27	166
Disorder child/adolescent	73	53	69	71	84	350
Adaptive disorder	191	237	222	254	297	1201
Cognitive disorder	85	107	164	130	128	614
Substance related disorder	876	948	910	977	987	4698
Psychotic disorder	1560	1539	1657	1861	1842	8489
Mood disorder	656	658	714	868	790	3686
Anxiety and stress disorder	32	25	28	30	29	144
Somatophorm disorder	8	9	8	8	11	44
Dissociative disorder	7	5	4	3	4	23
Paraphilia and sexual functioning disorder	6	3	3	4	5	21
Eating disorder	10	10	16	13	26	75
Sleeping disorder	0	1	0	1	2	4
Impulse control disorder	106	81	76	99	79	441
Personality disorder	247	267	248	238	262	1262
Psychosocial problems	26	38	55	48	47	214
Other problems	6	3	6	2	5	22
Postponed diagnosis	83	87	116	82	84	452
Not filled in	67	47	9	102	45	270
Total	4068	4153	4344	4827	4784	22176

	2002	2003	2004	2005	2006	Total
DURATION OF STAY						
0 days	10	17	18	21	29	95
< 1 week	602	618	641	804	758	3423
< 2 weeks	633	626	614	722	770	3365

< 3 weeks	209	178	193	209	231	1002
< 4 weeks	178	164	167	179	177	865
< 40 days	587	622	649	691	691	3240
< 1 year	1495	1613	1742	1817	1831	8498
> 1 year	266	253	255	328	302	1404
Total	3980	4091	4279	4771	4771	21892

- [49]. Between 2002 and 2006, both voluntary and involuntary placements have increased in absolute numbers. The share of involuntary placements has remained relatively stable (4.7 percent, 4.7 percent, 4.9 percent, 5.2 percent and 5.1 percent). It is noteworthy that voluntary placements which are being turned into involuntary placements are registered as voluntary placements. Therefore, these numbers do not entirely correspond with the reality.
- [50]. In each year of the reference period, more men than women are involuntarily placed, especially between the age of 26 and 35 (from 64 percent men in 2002 to 60 percent in 2006). Most women are involuntarily placed between the age of 36 and 45. Compared to 2002, in 2006 almost twice as many women over 75 underwent involuntary placement.
- [51]. A very small number of the involuntarily placed patients are minors under the age of 15. However, this number has slightly increased. In this group, there is no significant difference between the sexes. When it comes to minors between 16 and 18 years, significantly more boys than girls are being placed.
- [52]. In on average 38 percent of the cases, patients are being involuntarily placed due to a psychotic disorder. About 21 percent of the patients suffer from a substance related disorder. The third main diagnosis leading to involuntary placements is a mood disorder, affecting about 21 percent of all patients. Though still constituting a small amount of all diagnosis, more and more patients are being involuntarily placed because of a paraphilia or a sexual functioning disorder (from 10 in 2002 up to 26 in 2006). Also placements for psychosocial problems are on the rise.
- [53]. The duration of involuntary placements is usually relatively short. Most placements last up to maximum one year. For many patients there is no further stay after the initial observation period of 40 days.
- [54]. On 19.01.2009 the United Nations Committee Against Torture (CAT) publicised its concluding observations on Belgium, including findings

regarding involuntary placement and treatment.³³ The CAT was mostly concerned that, despite earlier recommendations, Belgium had not ended its practice of keeping mentally ill detainees in prisons and psychiatric annexes to prisons for months before transferring them to social protection establishments. Moreover, the psychiatric wings in prisons suffer from a lack of staff and dilapidated facilities. As a result, no adequate care is being given. Therefore the CAT recommends Belgium to adopt measures to remedy the problems caused by the insufficient health care, overcrowded psychiatric wings, dilapidated facilities and the lack of a special treatment for mentally ill offenders.

- [55]. Also the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has reviewed the Belgian involuntary placement and treatment practices. On 20.04.2006 it transmitted its findings to the Belgian government.³⁴ With regard to the psychiatric institutions, the CPT is overall positive but stresses the need for the law to be revised. With regard to mentally ill in Belgian prisons, the CPT is less positive. Due to insufficient staff and means, health care in psychiatric annexes consists only of medication and crisis interventions. The CPT also emphasises that internment is no punishment so mentally ill offenders do not belong in prison. Therefore, the CPT is pleased with the intention the Belgian public authority expressed to treat interned people in federal public mental health institutions.

4.1. Legal framework

- [56]. Involuntary placement is regulated by the Act concerning the protection of the person of the mentally ill³⁵. For the Act on the internment of persons with a mental illness, applicable in cases of criminal acts, see [32].
- [57]. The Act concerning the protection of the person of the mentally ill is a federal law of a civil nature. Its scope extends to the involuntary placement of all mentally ill, except for those mentally ill and juveniles who have committed acts which are qualified as offences.

³³ CAT, *Concluding observations. Belgium* (19.01.2009), CAT/C/BEL/CO/2, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/403/25/PDF/G0940325.pdf?OpenElement>.

³⁴ CPT, *Rapport au Gouvernement de la Belgique relative à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants du 18 au 27 avril 2005*, CPT/Inf (2006) 15, available at <http://www.cpt.coe.int/documents/bel/2006-15-inf-fra.pdf>.

³⁵ Belgium/Act concerning the protection of the person of the mentally ill (26.06.1990).

- [58]. The Act was adopted on 26.06.1990. Recent amendments revolve around juveniles. Since the Act to amend the laws concerning the youth protection and the taking at charge of juveniles who have committed an act qualified as an offence³⁶, the words “Judge of the Peace” has been replaced by “judge” in all relevant articles. Also juveniles can now be involuntarily placed, by the Juvenile Court, which means that the Judge of the Peace is no longer the only competent judge.
- [59]. In the future³⁷ section 3 of the Act will enter into force. This section regulates the placement of an offender who is interned while he or she is serving a prison sentence and who is detained beyond the duration of the initial sentence.
- [60]. The Act does not make a distinction between involuntary placement and treatment. It only regulates involuntary placement, there is no specific legislation for involuntary treatment.
- [61]. Patients are first being placed for observation. The goal is to examine and observe the mental condition and to decide upon a specific treatment. As a result, during this observation period, the Act does not explicitly foresee any treatment.
- [62]. The aims for involuntary placement are not explicitly expressed in the Act. It is clear, however, that the purpose of a placement is to reduce the patient’s danger for his or her own health and safety and to reduce the threat to other people’s life or integrity.
- [63]. The Act does not only deal with the involuntary placement but also foresees aftercare. During the so-called further stay (i.e. the period of placement after the observation period) the doctor-chief of staff can at all times, in a motivated report and with the consent of the patient, take a decision on aftercare outside the institution, determining the conditions concerning residence, medical treatment or social assistance. During the aftercare, which can last maximum one year, the measure of further stay is maintained. During the aftercare the doctor-chief of staff can at all times end the aftercare when he or she considers that the condition of the patient allows it or decide that the patient will be taken in the institution again because his or her condition requires it or because the conditions of the aftercare are not respected.

³⁶ Belgium/Act to amend the laws concerning the youth protection and the taking at charge of juveniles who have a committed an act qualified as an offence (13.06.2006).

³⁷ At the latest on 01.01.2012.

- [64]. When a child or young adult is concerned, the same procedure applies. However, it is then the Juvenile Court that has competency instead of the Judge of the Peace.
- [65]. Belgium has special legislation for **offenders** with a mental disorder. The applicable law on internment is the Act on the protection of society against abnormal people, habitual offenders and the perpetrators of certain sexual offences (09.04.1930). When the perpetrator of a crime or misdemeanour is at the time of the judgment in a state of insanity, a serious state of mental disorder or mental deficiency which makes him incapable of controlling his or her actions, he or she can be interned. The mentally ill can be released (definitively or on trial) when his or her mental condition has sufficiently improved and the conditions of rehabilitation are met. Sexual delinquents can only be released after an extensive opinion of a service specialised in the guidance or the treatment of sexual offenders. An offender who has been sentenced to prison for a crime or a misdemeanour and who, in the course of the detention, develops one of the states mentioned above, can also be interned. The Minister of Justice decides after a concurring opinion of the Commission for the protection of society. When the mental condition sufficiently improves before the end of the detention, the Minister sends the offender back to prison. Recidivists and habitual offenders can or must be placed under a restriction order of the government after their release. The Minister of Justice can release them under certain conditions or have them interned. In principle, the internment takes place in a psychiatric institution. However, in Flanders most people who are interned end up in prison and will not go to a psychiatric institution until they are released under conditions. Psychiatric institutions can refuse to accept internees, whereas the Act concerning the protection of the person of the mentally ill does not allow them to refuse to accept patients who are being involuntarily placed. The Constitutional Court³⁸ stated that this difference in treatment was not unconstitutional. For the fact that internees have committed an offence and the latter not, is an objective and reasonable element justifying the difference in treatment. In the French Community internment is less often implemented in prisons but more in specific “institutions for the protection of society”.
- [66]. The Act on the internment of persons with a mental illness (21.04.2007), which has not yet entered into force, will slightly change the conditions for internment. Only perpetrators of crimes or misdemeanours punishable with a prison sentence can be interned as mentally ill offenders. They have to suffer, at the time of the judgment, a mental disorder which annihilates or seriously affects

³⁸ Belgium/Constitutional Court (30.06.1999).

their ability to judge or to control their actions. The judge will also have to establish that the danger exists that they might reoffend because of their mental disorder.

- [67]. When a **minor suffering from a mental disorder** has committed an act which for adults would amount to a crime, the legislation on internment does not apply. When the child is under the age of 12, it can not be involuntarily placed or treated. When it is older than 12, the Juvenile Court can order ambulant psychological or psychiatric treatment. The minor can also be placed in a service specialised in addictive behaviour or in the open or closed ward of a juvenile psychiatric institution.

4.2. Criteria and definitions

- [68]. The criteria for involuntary placement are: having a **mental disorder** and being a **danger** either because the condition of the mentally ill seriously puts his or her health and safety at risk, or because he or she is a serious threat to another person's life or integrity.
- [69]. The Act concerning the protection of the person of the mentally ill does not define the concept of "mental disorder".³⁹ Therefore for some mental handicaps, it is disputed whether they fall within this concept. Alcohol and substance abuse can lead to an involuntary placement when they are caused by or result in a mental disorder. The substance abuse in itself does not amount to a mental disorder, however.⁴⁰ The law does state explicitly that the fact of not being adapted to the moral, social, religious, political or other values of society cannot in itself be considered a mental illness.⁴¹
- [70]. The criterion of danger to the person himself or herself requires that both the own health and safety are at risk. Only a health risk is insufficient, but depending on the interpretation of "health", the concepts health and safety can be closely intertwined. When the person is not a danger to himself or herself, he or she has to be a serious threat to the life or integrity of others. The threat has to be sufficiently real and not a mere possibility. When a mentally ill is

³⁹ During the parliamentary discussion of the bill, it was explained, however, that the concept refers to "serious forms of mental illness", not to "mild mental illnesses of a transitory nature": Belgium/Parliamentary Documents, Senate, 1988-89, no 733/2, p. 13.

⁴⁰ See for instance Belgium/Court of Cassation (22.10.1998).

⁴¹ See for instance Belgium/Judge of Peace of Borgerhout (16.02.1993): rejection of request for involuntary placement of a man who had a unconventional lifestyle.

imprisoned, he or she still can be a threat upon release and therefore involuntary placement is possible.⁴²

- [71]. However, the Act determines as one of the criteria *per se* that the protective measures of observation and involuntary placement can only be ordered when any other adequate treatment is lacking. Although the law speaks of “treatment”, it is meant that a voluntary *placement*, needed to guarantee treatment, has not succeeded. The placement thus is not a goal as such; the goal is to provide an adequate treatment.
- [72]. Whether the opinion of the patient counts when placing him or her, is vaguely mentioned. The mentally ill has to be heard by the judge, but there is no explicit rule on the extent to which the opinion has to be taken into consideration.
- [73]. As mentioned above, the Act speaks of a condition which “seriously” puts the patient’s health and safety at risk or due to which the patient is a “serious” threat to others. There are no strict standards.

4.3. Assessment, decision procedures and duration

- [74]. The role of medical staff in the decision procedure differs depending on the phase in the placement procedure. The **decision on observation** is made by a judge following a request from any interested party. The request has to be accompanied by a detailed medical report based on an examination which can be maximum 15 days old. It has to describe the health condition and must state that the conditions for involuntary placement (state of mental disorder, danger) are met. This report cannot be made up by a doctor who is a relative of the person concerned or the applicant or who is in any way related to the psychiatric ward where the patient is. There are no other specifications; the doctor does not have to be a psychiatrist or neurologist, he or she can even be the treating doctor. The **decision on an extended stay** is made by the judge after the director of the institution sends him a report of the doctor-head of department.
- [75]. Consequently, only one expert opinion is required for the assessment of the psychiatric condition.
- [76]. As said in paragraph [74], the **decision for observation** is made by a judge: either the judge of the peace (for an adult) or the juvenile court

⁴² Belgium/ Court of First Instance of Ghent (31.10.1991).

(for a minor or an adult in whose regard a youth protection measure has been maintained). In case of **urgency** the public prosecutor decides, after which he or she informs the judge of the residence or the domicile or of the place where the person is, and he or she files a request. The **decision on the extended stay** is made by the judge after the director of the institution sends him a report of the doctor-head of department.

- [77]. The decision of termination is made by the doctor-head of department, either on his or her own motion or at the request of any interested person. The person who had requested the placement can object, in which case it is for the judge to decide.
- [78]. When a voluntary placement becomes involuntary, the procedure for involuntary placement applies, not the initial one.
- [79]. The maximum period of time which can elapse between the psychiatric assessment and the placement is 25 days: the decision by the judge has to be made within ten days after submission of the request, which is accompanied by a medical report of maximum 15 days old. After the decision the placement has to start as soon as possible.
- [80]. In emergency situations the decision on placement is made as soon as possible, followed by medical report within 24 hours. This report cannot be older than 15 days.
- [81]. The observation period can last maximum 40 days. Fifteen days before the end of the observation period a report must be sent to the judge who has to decide on the extension of the stay.
- [82]. Regulations on the treatment of mentally ill cannot be found in the Act concerning the protection of the person of the mentally ill. Therefore, the general Act on the rights of the patient applies, which allows health care interventions when the patient gives an informed consent or when his or her representative does so when the patient is incapable (incapable of will, extended minority, declared legal incompetent). In most hospitals a formal consent is required for more intrusive treatments such as electroconvulsive therapy (ECT). Even though ECT is not regulated by any law, it is officially recognised as a treatment which is reimbursed by the social security system. Also hormonal treatments of sexual deviants are reimbursed.

- [83]. There is specific legislation on treatment with substitutes for drugs (methadone and buprenorphine). Article 3 §4 of the Drugs Act ⁴³ allows this kind of treatment under the condition that it is carried out only by a medical professional and when the goal is to improve the health and the quality of life of the patient and to possibly lead to his or her detoxification.
- [84]. Measures such as seclusion and fixation are not regulated in the Act concerning the protection of the person of the mentally ill. In the Flemish Community vague rules can be found in a circular letter of the Flemish Minister of Public Health of 24.10.1990. According to that circular letter a seclusion has to contribute to the physical and/or mental integrity of the patient. The decision has to be made by the treating doctor. Whenever a patient is secluded, a registration form has to be filled out. Each psychiatric hospital has to draw up an internal code of behaviour regarding the conditions and rules for seclusion. The code has to be sent to the Ministry of Public Health. Each patient (or his or her representative) has to be informed about the code. Whenever a minor or incompetent person is secluded, his or her parents or representative have to know about it as soon as possible. However, the circular letter contains only recommendations which are not strictly binding.
- [85]. Procedures for review and appeal concerning the involuntary placement as regulated by the Act concerning the protection of the person of the mentally ill can be described by going along the standards of article 25 of Recommendation Rec (2004)10 of the Committee of Ministers of 22.09.2004 concerning the protection of the human rights and dignity of persons with mental disorder:
- Mentally ill subjected to an involuntary placement have the right to appeal against any decision, even when they are minors.
 - Every two years the lawfulness of the placement is being automatically reviewed. The review can also be requested at any time during the further stay.
 - Mentally ill subjected to an involuntary placement have the right to appeal against any decision, even when they are minors.
 - In both appeal and review procedures the placed mentally ill is being heard in person, accompanied by his or her lawyer.
 - When a judge receives a request for involuntary placement, he or she automatically appoints a state-funded independent lawyer.

⁴³ Belgium/Act on the traffic of toxics, sleeping pills and drugs, psychotropic substances, disinfectants and antiseptics and the substances which can be used for the illegal production of drugs and psychotropic substances (24.02.1921).

Moreover, during the whole procedure, the mentally ill can be accompanied by a trustee.

- The mentally ill has access to all materials before the court, subject to the protection of confidentiality and safety of others.
- The judge has to deliver his or her decision within ten days.

[86]. As mentioned above, to the mentally ill can be designated a state-funded independent lawyer, who gives free legal aid.

5. Competence, capacity and guardianship

[87]. When mentally disordered or intellectually disabled people are unable to manage their affairs, certain protective measures can apply. Either the person is subject to a declaration of incompetence or to an extended minority, or a legal adviser or provisional administrator is appointed.

[88]. The legal protective system does not provide definitions of “competence” or “capacity”.

[89]. For a person to be **declared incompetent**, he or she has to be in a “permanent state of stupidity or insanity”. An **extension of minority** is the option for “mentally retarded” persons, meaning that they suffer from mental inferiority, which can either be congenital, or have developed during the early childhood. This mental inferiority is characterised by the failed development of the joint capacities of mind, sense and will. A **legal adviser** can be appointed for “feeble” people whose condition is not serious enough to declare them incompetent. Such an advisor can also be appointed for so-called “wasters” whose issues are caused by a mental disorder, whimsicality or passion. A **provisional administrator** is designated for those who are unable to administer their assets due to their health problems. The inability can be partial or absolute and can be irreversible or temporary.

[90]. The degree of incapacity varies depending on the different measures. When a person is **declared incompetent** or an **extended minor**, his or her incapacity is general and absolute, meaning he or she cannot perform any legal act, whether it is about property or not. When a **legal adviser** is designated, the person is only subject to a partial and restricted incapacity. The incapacity extends to only those acts that are

enumerated by the law (see paragraph [109]). When a **provisional administrator** is involved, the protected person is only incapable with regard to acts concerning capital or goods. The incompetency can be absolute or partial.

- [91]. The same protective measures can apply for the more general protection of adults.
- [92]. The following paragraphs roughly describe the main characteristics of each protective system.
- [93]. A person who is **declared incompetent** needs to be represented by his or her guardian in almost all matters. Generally excluded are highly personal matters, but there are exceptions on this point. In case the protected person acts on his or her own, his or her acts are null and void. However, in matters of property there is a relative nullity, which means that the nullity can only be demanded for by the protected person, after the protective measure has ended, by his or her guardian or by his or her heirs.
- [94]. An **extended minor** is equated with a minor under the age of 15 for both his or her person and his or her assets. This means that the parents either continue to detain or retrieve the parental authority and parental duties. When no parent is left a guardian is appointed. The nullity of acts committed by the extended minor is of a relative nature. The equation with a minor under the age of 15 is restricted to matters concerning the private state of the protected person.⁴⁴
- [95]. A **legal adviser** is designated to *assist* a person who acts on his or her own. When such a person acts without the assistance of his or her adviser, the acts are relatively null.
- [96]. A **provisional administrator** is not a guardian; he has no competency with regard to personal matters. See paragraph [110] for his tasks towards the assets of the protected person. The protected person can also count on a trustee. If he or she acts in the violation of his or her competency, the sanction is a relative nullity.
- [97]. None of the protective systems contains minimum or maximum time limits. All measures apply as long as needed, which is a criterion depending on the concrete circumstances.
- [98]. The request for the placement of an adult under a protective regime cannot be made by anyone. A **declaration of incompetence** or a designation of a **legal adviser** can be requested by the husband or the wife of the person concerned, or by any relative of blood. The public

⁴⁴ For instance, in criminal law, the real age has to be looked at.

prosecutor has subsidiary competency. For the **extension of minority**, a distinction has to be made between a minor or an adult who is to be protected. When he or she is still a minor, only his or her parents or guardian can demand to prolong the minority. In order to bring an adult under the measure, any relative of blood or a guardian can file such a demand. Once again the public prosecutor has a subsidiary competency. The request for a **provisional administrator** can be made by the person concerned himself or herself. Also any interested person, the prosecutor, or the public centre for social welfare can do so. Lastly, when the Judge of the Peace has competency for an involuntary placement, he or she can additionally appoint an administrator.

- [99]. The Civil Court has competency for the **declaration of incompetence, for the extension of minority** and for the appointment of a **legal adviser**. A **provisional administrator** is designated by the Judge of the Peace. Once a year, the administrator has to give account to the Judge of the Peace and to the trustee.
- [100]. The normal appeal procedure in civil cases applies for all the protective systems.
- [101]. The following persons can be appointed to implement these protective measures.
- [102]. During the procedure of a **declaration of incompetence**, an interim administrator is appointed. He or she can eventually also become the guardian, but this is not necessary. The law does not specify who can become the guardian. This can be a lawyer, but in most cases the guardian is the husband or the wife or another relative. The measure is mostly used for elderly people.
- [103]. Due to the **extension of minority**, the parents detain or regain the parental authority. When the extended minor has no parents left, the general rules for guardianship of minors apply. Also in case the parents or the prosecutor request so, the parental authority can be replaced by guardianship. The guardian cannot be linked to the institution where the extended minor is staying.
- [104]. The **legal adviser** is a lawyer.
- [105]. Anyone can declare before the Judge of the Peace or a notary whom he or she wants to be his or her **provisional administrator** in case he or she is no longer competent to manage the own assets. If such a preference is not indicated, the law prefers a parent, the husband or the wife, the legal cohabiting partner, the person with whom the mentally ill forms an actual family, a close family member or the trustee. It is in

any event forbidden to appoint a member of the board or staff of the institution where the mentally ill is staying. In practice, very often a lawyer is appointed, sometimes a notary.

- [106]. These entrusted persons have different scopes and extents of powers.
- [107]. The guardian of a person who is **declared incompetent** has to represent the protected person in all acts. Exceptions are made for highly personal acts, such as the recognition of a child. However, sometimes the law explicitly requires representation even for such acts, for instance in a divorce procedure.
- [108]. The parents or guardians of an **extended minor** have the same scope and extent of powers as parents towards a child under the age of 15.
- [109]. The **legal adviser** only has competency for those acts which are enumerated by the law. He or she has to assist the protected person when selling goods, when this will affect the capital. He or she also has to assist for acts concerning mortgages, loans and settlements. He or she has to accept and give acquittal of assets. Except for highly personal procedures as divorce procedures, he or she also has to be present in every lawsuit in which the protected person is concerned.
- [110]. The **provisional administrator** manages or renders assistance with the management of the assets, sometimes after an obligatory authorisation of the Judge of the Peace. He or she pays the costs of maintenance and treatment and puts money at the disposal of the protected person. He or she represents the protected person in all lawsuits concerning the capital and some personal acts. These personal acts are the defence in divorce procedures on the ground of mental disorder, lawsuits on the determination or controversy of the filiation, acts concerning nationality, resistance during the life to the removal of organs after decease, and lawsuits to determine the continuing incapacity to exercise parental authority.
- [111]. Against the decision of appointment of a guardian or administrator the normal appeal procedure in civil cases apply. Only in case of extension of minority, there is no legal provision for an appeal against the appointment of the parents or guardian.
- [112]. The decisions of incapacity, i.e. declaration of incompetency and extension of minority, are not periodically reviewed. They last as long as needed.
- [113]. Neither is the need of a guardian periodically reviewed. These measures last as long as needed as well.

6. Miscellaneous

[114]. Nothing to report.

Annexes-Case Law

In different Sections of the Guidelines, experts have been asked to refer to case law. Please present the case law reference in the format below

Case title	
Decision date	19.05.2004
Reference details	No. 92/2004, Grondwettelijk Hof – Cour constitutionnelle (Constitutional Court)
Key facts of the case	A Macedonian disabled person lived in Belgium. He requested an allowance for disabled persons. This request was refused since he was not entitled according to the Belgian legislation. Only Belgian nationals, citizens of the European Community, displaced persons and recognised refugees were entitled. The Labour Court requested a preliminary ruling from the Constitutional Court on the question whether this restriction was discriminatory.
Main reasoning/argumentation	The Constitutional Court rejected the argument based on discriminatory treatment. The law could require a sufficient connection between the disabled person and Belgium or the existence of a treaty or agreement between Belgium and the State of which the person is a citizen.

Key issues (concepts, interpretations) clarified by the case	The Belgian social security is not discriminatory when refusing requests from aliens living in Belgium, but without any legal connection to Belgium.
Results (sanctions) and key consequences or implications of the case	The Constitutional Court holds on to this reasoning when receiving requests for preliminary rulings concerning the same issues, for instance in case no. 153/2007, 12.12.2007.
Proposal of key words for data base	Belgium – social security - disabled person – aliens – non-discrimination

Case title	
Decision date	06.11.2008
Reference details	No. 154/2008, Grondwettelijk Hof – Cour constitutionnelle (Constitutional Court)
Key facts of the case	A petition for annulment of certain parts of the new Act on Internment was filed. The act did not provide that in all stages of the proceedings after the internment, the lawyer was automatically informed about all aspects of the case. When the prison director or the prosecutor makes up an opinion with regard to the (modalities) of the release, this is only sent to the interned person and not automatically to his lawyer. Moreover, only the interned person has the legal right to request a copy of his file.
Main reasoning/argumentation	The Constitutional Court held that the Act of 21.04.2007 on the internment of persons with a mental illness violated the effective exercise of the right of judicial review, guaranteed by article 5.4 of the ECHR, since the special situation of a mentally disordered offender requires special procedural guarantees. Since the interned person is not always capable of looking after his own interests, a lawyer is invaluable. He has to be automatically informed about all aspects of the case and must have the right to request copies of the file.

Key issues (concepts, interpretations) clarified by the case	Since an interned offender has a mental illness, procedural laws have to take his special situation into account, in order to assure an effective exercise of procedural rights.
Results (sanctions) and key consequences or implications of the case	A number of provisions of the Act on the internment of persons with a mental illness are annulled.
Proposal of key words for data base	Belgium – Law on Internment – judicial review - importance of lawyer

Case title	
Decision date	30.06.1999
Reference details	No. 78/99, Grondwettelijk Hof – Cour constitutionnelle (Constitutional Court)
Key facts of the case	A mentally disordered offender was interned. He wished to be placed in a private psychiatric institution but was refused by it. He was instead placed in a so-called institution for the protection of society. He asked the civil court to order the State to make it possible to have him placed in a private institution. The court requested the Constitutional Court to give a preliminary ruling on the question whether the law was discriminatory, in that it provided that a private institution had the right to refuse a mentally ill person who was interned, while it was obliged to accept a mentally ill person who was involuntarily placed.
Main reasoning/argumentation	The Constitutional Court did not find the difference discriminatory. The difference was based on an objective criterion: an interned mentally ill has committed a crime, an involuntary placed mentally ill has not. The difference was reasonable since private institutions cannot always guarantee sufficient safety, and since offenders are usually more dangerous. Moreover it was better not to blend mentally ill

	offenders with mentally ill non-offenders, who are very vulnerable and easily influenced.
Key issues (concepts, interpretations) clarified by the case	Though internment is not a punishment and an interned offender is not guilty, there has been a crime and the protection of society should be looked after.
Results (sanctions) and key consequences or implications of the case	Most mentally ill offenders in Belgium reside in prisons and institutions for the protection of society. Only from the moment they are released under conditions – i.e. when they are considered to be less dangerous-, they usually stay in (private) psychiatric institutions.
Proposal of key words for data base	Belgium – internment – refusal by psychiatric institutions – danger for society

Case title	
Decision date	22.10.1998
Reference details	Hof van Cassatie – Cour de Cassation (Court of Cassation)
Key facts of the case	A judge had decided to involuntarily place a man who regularly abused alcohol. He reasoned that he was a danger to himself and others.
Main reasoning/argumentation	The Court of Cassation argued that the danger criterion in itself was insufficient to decide upon an involuntary placement. Apart from being “dangerous”, the person has to have a mental illness. Alcohol abuse is not a mental illness and can therefore not lead to involuntary placement.
Key issues (concepts, interpretations) clarified by the case	Being dangerous for himself and others is insufficient to be involuntarily placed; one has to suffer from a mental illness. Alcohol abuse is not a mental illness in that sense.
Results (sanctions) and key consequences or implications of the case	The person could not be involuntarily placed. Alcohol abuse in itself cannot lead to involuntary placement.
Proposal of key words for data base	Belgium – involuntary placement – alcohol abuse

Case title	
Decision date	21.02.1895
Reference details	Hof van Cassatie – Cour de Cassation (Court of Cassation)
Key facts of the case	A woman who had been declared incompetent married. The marriage was declared null on the instigation of her son.
Main reasoning/argumentation	The Court of Cassation stated that a person who is declared incompetent is absolutely and permanently incompetent to act with regard to his or her goods AND person. There is no legal exception for concluding a marriage, since this is the most important contract with considerable consequences. These consequences are both personal and pecuniary.
Key issues (concepts, interpretations) clarified by the case	The incompetence of a person who is declared incompetent extends to acts concerning his or her person, such as concluding a marriage.
Results (sanctions) and key consequences or implications of the case	The Court of Cassation agreed with the annulment of the marriage. People who are declared incompetent cannot marry.
Proposal of key words for data base	Belgium- declaration of incompetence - marriage

Case title	
Decision date	28.06.2004
Reference details	Hof van Beroep van Antwerpen (Court of Appeal of Antwerp)
Key facts of the case	A mentally disabled woman gave birth for the fourth time. The doctor who performed the caesarean also sterilised her without her consent. She claims this was in the interest of the disabled woman, since she had given birth to four mentally disabled children and was not to be persuaded to take contraceptives. Moreover, her also disabled husband seemed to be pressuring her to become pregnant, even though there were not able to look after their children.
Main reasoning/argumentation	The Court of Appeal reasoned that, since there was no medical emergency for the sterilisation, the doctor should have asked for an informed consent, which would have been possible for the woman to give. However, given the circumstances, the sterilisation had prevented more damages than it had caused. Therefore only moral damages for the woman –not her husband- had to be compensated.

Key issues (concepts, interpretations) clarified by the case	Mental disability does not always exclude the need of informed consent with regard to medical interventions. The competence of the concerned person has to be examined in each case.
Results (sanctions) and key consequences or implications of the case	Only moral damages had to be compensated.
Proposal of key words for data base	Belgium – mental disability – sterilisation – consent

Case title	
Decision date	29.06.2006
Reference details	Arbeidsrechtbank van Tongeren (Labour Court of Tongeren)
Key facts of the case	A Belgian company designed a selection system for a collective dismissal. One of the criteria for dismissal was the number of times an employee had been absent due to illness. Some employees claimed that this was discriminatory towards them who have a weak health, in the sense of Equal Employment Directive.
Main reasoning/argumentation	The Labour Court stated that, in order to judge whether a weak health is a disability in the sense of the Act against certain forms of discrimination and thus The Equal Employment Directive, the interpretation in the judgements of the European Court of Justice have to be taken into account, since the Belgian Act is the implementation of the European Directive. Therefore it waited for the likewise decision in a Portuguese case before the ECJ (ECJ/C-13/05 (11.07.06)).
Key issues (concepts, interpretations) clarified by the case	Belgian tribunals and courts follow the judgements of the European Court of Justice to interpret the concept of “disability” with regard to the Act against certain forms of discrimination. Although this case involved physical disability, this decision could be relevant for the future

	interpretation of mental disability.
Results (sanctions) and key consequences or implications of the case	The ECJ stated that a disease in itself is not a disability in the sense of the Equal Employment Directive. Therefore, the Labour Court decided the same.
Proposal of key words for data base	Belgium – Act against certain forms of discrimination – Equal Employment Directive – disability - interpretation

Case title	
Decision date	22.09.2000
Reference details	Président du Tribunal de première instance de Liège (President of the Court of First Instance of Liège)
Key facts of the case	A Belgian woman was somewhat feeble-minded. She wanted to marry a Moroccan, but this was refused by the Register Office. It feared the woman was lured into a marriage of convenience, given her mental state and his nationality.
Main reasoning/argumentation	The president of the Court of first instance stated that only extended minors are legally forbidden to marry. The fact that a somewhat feeble-minded woman wants to marry a foreigner is in itself insufficient to refuse marriage on the ground that the marriage is one of convenience. Though the woman might be an easier prey for a marriage of convenience, she has not lost her ability to consent to a marriage. All aspects of the case have to be taken into consideration. In this case, the president believed the relation and the intentions of the future husband to be genuine.
Key issues (concepts, interpretations) clarified by the case	Only extended minors are legally forbidden to marry. Other mentally ill people can <i>in principle</i> consent to a marriage.

Results (sanctions) and key consequences or implications of the case	The concerned woman and her Moroccan fiancé were allowed to marry.
Proposal of key words for data base	Belgium – refusal by register office of marriage – feebleminded – marriage of convenience

Case title	
Decision date	16.02.2000
Reference details	Cour d'appel de Liège (Court of Appeal of Liège)
Key facts of the case	A seriously mentally disabled woman married a Turk on a holiday in Turkey. He returned with her to Belgium. After one year they separated. The woman – represented by her mother- wanted to have the marriage annulled on grounds of deceit and lack of consent.
Main reasoning/argumentation	The Court stated that the woman was not subject to any protective measure, such as extended minority. However, several medical exams showed that she was mentally retarded and therefore lacked the ability to consent to a marriage. Moreover, the intentions of her husband were not genuine; his aim was to move to Belgium.
Key issues (concepts, interpretations) clarified by the case	Even though a person is not subject to a protective measure, a mental illness can affect the ability to consent to a marriage.
Results (sanctions) and key consequences or implications of the case	The marriage was annulled.

Proposal of key words for data base	Belgium – marriage – annulment – mental disability- lack of consent
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Case title	
Decision date	24.06.2008
Reference details	Vrederegerecht van Brugge (Judge of Peace of Bruges)
Key facts of the case	A man was subject to the measure of provisional administration. This administrator asked the doctor of the protected man to hand over his medical record. The doctor refused, since she was of the opinion that the protected man remained his personal rights thus the administrator had no competence to exercise his patient's rights.
Main reasoning/argumentation	The Judge of Peace reasoned that a person who is subject to provisional administration, is in principle incompetent to act (legally); the provisional administrator is his legal representative. Therefore this broad protective system has precedence over other protective systems, such as the possibility to designate a representative to exercise one's patient's rights.
Key issues (concepts, interpretations) clarified by the case	Provisional administration is a broad protective system that has precedence over other, narrower, protective system. It cannot be accumulated with a system of legal assistance.

Results (sanctions) and key consequences or implications of the case	The doctor had to hand over the medical record to the provisional administrator of her patient.
Proposal of key words for data base	Belgium – provisional administrator – medical record

Case title	
Decision date	07.09.2005
Reference details	Vredegerecht van Sint-Truiden (Judge of Peace of Sint-Truiden)
Key facts of the case	A man was subject to the measure of provisional administration; his uncle was his administrator. He wanted to make up a will in favour of this uncle. Therefore the judge of peace had to examine whether he was sound in mind and could validly consent.
Main reasoning/argumentation	The judge of peace argued that it had to be examined whether the protected man had a proper understanding of the meaning of a will. Moreover he needed a reasonably correct and personal – this means not suggested by his uncle – understanding of the nature and the size of his potential legacy. It turned out he was not aware of his financial state and he did not know what he would legate.
Key issues (concepts, interpretations) clarified by the case	Soundness in mind, needed to make up a will, does not only consist of freedom of will and clarity of mind. It also has to be examined in each specific case whether the concerned person has an understanding of what a legacy is.

Results (sanctions) and key consequences or implications of the case	The man was not allowed to make up a will in favour of his uncle.
Proposal of key words for data base	Belgium – provisional administrator – competence to make up a will – sound in mind

Case title	
Decision date	11.12.1997
Reference details	Vredegerecht van Gent (Judge of Peace of Ghent)
Key facts of the case	The prosecutor requested the involuntary placement of an aggressive man. His aggression was a symptom of his irreversible behavioural disorder.
Main reasoning/argumentation	The judge of peace stated that the involuntary placement is not the goal, but should be accompanied by an appropriate treatment. When there is no effective treatment – for some behavioural disorders for instance – involuntary placement would not be justified. Even though the man was violent and dangerous, the impossibility to cure him made the measure of involuntary placement inappropriate.
Key issues (concepts, interpretations) clarified by the case	Involuntary placement should not be the goal, it should be accompanied by an appropriate treatment. When treatment is impossibility, placement is inappropriate.
Results (sanctions) and key consequences or implications of the case	The judge rejected the request for involuntary placement. He also suggested other measures should be considered.

Proposal of key words for data base	Belgium – involuntary placement – irreversible behavioural disorder
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Case title	
Decision date	16.02.1993
Reference details	Vredegerecht van Borgerhout (Judge of Peace of Borgerhout)
Key facts of the case	A 45 year old unemployed man lived with his parents. He had a neurotic personality and an unconventional lifestyle: he always slept in, argued a lot, was sometimes aggressive, showed great interest in African magic and tended to dress up as a transvestite. His parents requested for an involuntary placement.
Main reasoning/argumentation	The judge of peace reasoned that having a neurotic personality and an unconventional lifestyle, that was quite different from his parents' lifestyle, is not a mental illness and can therefore not lead to involuntary placement. The Act explicitly states that " <i>the fact of not being adapted to the moral, social, religious, political or other values of society cannot in itself be considered a mental illness.</i> "
Key issues (concepts, interpretations) clarified by the case	One has not a mental illness when he is not adapted to the moral, social, religious, political or other values of society and when he lives in an unconventional way.

Results (sanctions) and key consequences or implications of the case	The judge of peace rejected the request for involuntary placement.
Proposal of key words for data base	Belgium – involuntary placement – mental illness – unconventional lifestyle