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Offenders with Psycho-Social and Intellectual Disabilities: Identification, Assessment of Needs and Equal Treatment
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**“Rights of mentally ill suspects and accused in Belgium:
beyond the dangerousness' treatment scheme”**

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Disabilities and rights: Belgium legal framework

- Belgian Constitution and Article 10
- Convention on the Rights of Persons with Disabilities and the Optional Protocol on 2 July 2009
- Anti-discriminations Act and the right to reasonable accommodations in the provision of public services

Statistics on disabilities and prevalence

- No official database on persons with disabilities
- Surveys carried out by the Scientific Institute of Public Health Scientific Institute of Public Health (ISSP - Institut Scientifique de la Santé Publique) neither recent, nor providing a clear picture on the number of persons affected by psycho-social or intellectual disabilities.
- Nevertheless, On the basis of an average prevalence, it is estimated that there are approximately 150,000 people with mental disabilities in Belgium, of which, according to the available data, around 50 000 people also suffer from psychiatric and/or behavioural disorders, hence the name of “Double Diagnostic” patients

Disabled offenders and legal status in the area of criminal law

Most literature and research refer to

- the access to justice and victims' rights approach
- the treatment of mentally ill offenders and the question of criminal liability

Legal framework

- Article 71 of the Belgian Penal Code
- The Belgian Act of 1964 on the Protection of Society against Abnormal and Recidivist Offenders (Law on social protection and internment as a security measure): protecting society and curing the mentally insane
- The 2014 Act on the internment of mentally ill persons (amended in 2016)

Policing “unrest”: police as first line respondents

- supervision of mentally disordered persons
- Principles of legality, subsidiarity, proportionality and opportunity guiding police intervention
- Training dedicated to intervention in situations involving mentally ill persons: between consciousness and lack of means
- Illustrating the knowledge’s gaps beyond media exposure: Jonathan Jacob (2010) and Jozef Chovanec (2018) cases

Safeguarding the rights and access to legal aid

- defendants with a mental disability are entitled to free legal aid
- However, neither the identification by the police, prosecuting authorities or the courts, nor the identification by the psychiatrist, of a severe mental disorder is made with the aim of granting the defendant additional extra-legal assistance in order to be able to participate in the proceedings properly
- The regulations do not mention the possibility of instigating extra-legal procedural protection involving a relative, a social worker or a healthcare professional in order to safeguard the fairness of the proceedings.
- Similarly, no specific provision is made to ensure appropriate access to documents for persons with cognitive disabilities
- The person therefore has no other choice than to rely solely on their lawyer. In this regard, communication between the lawyer and the client is extremely important. If some lawyers are specialised in dealing with cases involving mentally ill defendants, there is no procedural guarantee that these latter would be represented by such specialists
- As a sad conclusion, we can say that identification of mentally disordered defendants do not have a “fair-trial-rights finality”.

Post-Trial stage: mentally ill offenders and penitentiary systems

- The lack of understanding of disability among staff is nowhere as dramatic as in the prison system
- While the principle of reasonable accommodation has been enshrined in law, there are no binding measures explicitly enshrined in the Prisons' regulations
- The training of prison staff does not include any official information or specific guidelines on this subject either expressly intended for persons with disabilities in the prison regulation
- Having said that, certain actors within the prison system do promote the “natural” practice of making such accommodations, particularly in the case of staff working within prison psychiatric units. However, such way of addressing special needs of disabled inmates is not sufficient nor appropriate
- The Belgian penitentiary administration should integrate the concept of “reasonable accommodations” organically within its policy, staff training and infrastructure design.

OPSIDIANET forward-thinking and realistic approach

- Rights-based approach with a safety and security approach pursuant to the quintessence of the Rule of Law
- Police as primary and first line respondents: Model of authority and respect of person's rights, the right balance
- Required training and knowledge to ensure appropriate measures safeguarding own, defendant's and others' safety
- Knowing the limits: the purpose is not to deliver a liable psychiatric/psychological diagnosis and strive to be a substitute to medical expertise. Ensuring a first line proper communication and identification and then rely with other adequate supporting actors
- The manual also highlights the key role of the lawyer/legal aid in ensuring abidance of judicial authorities to the respect of the defendant's cognition and comprehension of its rights
- The aim is also to ensure a fair application/implementation of criminal judicial procedures. A proper and adequate identification and communication (of and with) the defendant means (notably and crucially, by avoiding "false declarations") above all ensuring justice takes its due course. Safeguarding the rights of a defendant but also trying to ensure the credibility of the judicial procedure.

Conclusions

- Not an easy and obvious task. Beyond its solemnity, justice remains after all an exercise, a system, a “voice”, carried out, crafted or built and expressed by humans with a correspondent level of fallibility. Be it for the defendant possibly involved in a crime or misdemeanour, the police officer arresting him/her, its lawyer trying to defend his/her rights, the public prosecutor building his/her culpability on whatever grounds he/she retains reliable or the judge making its verdict by weaving the pros and cons and according to its own perceived rationale of the reconstructive criminal tale. To be clear with my words and conclusions, justice should take its course and impunity is not an option. However, all safeguards should be guaranteed to make sure rights of suspects and accused with intellectual and psychosocial disabilities are respected and the criminal proceedings carried out against them are fair in the light of their specific condition.