



Prison Litigation Network

Funded by the Criminal Justice Programme of the European Union

Belgium - Annex to the national report: empirical research findings

I. Objective of the research

This memorandum summarises the results of the empirical study conducted in addition to the research report pertaining to Belgium in the *Prison Litigation Network's* Workstream 2. It thus follows on from a first examination of regulatory provisions and mechanisms put in place to ensure a court ruling or an institutional response to the violation of the rights and freedoms of prisoners. Drawing on interviews with field actors and professionals, this document proposes to examine the effectiveness with which these rights and freedoms are ensured in Belgium. It also aims to assess the conditions enabling these rights to be applied through means of legal redress.

The guidelines drafted with all the partners of the project are combined in a common work document and define the three priorities of this empirical study, which will, in part, structure this research memorandum:

- The use of the law by practitioners and prisoners
- The means of access to legal redress
- Communication and impact of the legal decisions rendered – in particular on everyday prison life

II. Research methodology

Although the guidelines cited hereinabove give a good overview of the way in which the research was carried out for this empirical part of the European programme, further details are nonetheless necessary.

1. Status of the data

The scope of this study being restricted, the findings described hereinafter may be modestly qualified as “exploratory”. In accordance with the guidelines, a limited number of people were contacted for a research interview. These interviews provided in-depth and highly detailed input, creating a corpus of approximately one hundred pages.

2. Sampling

This study is qualitative, and as such the sampling cannot in any way be construed to aim for representativeness. At the start of this study, a small diversification target was

thus set up. Three types of variables were used¹: (1) general sociological variables (age and gender); (2) institutional variables (people from different types of institutions and organisations) and (3) variable pertaining to involvement in the issue of prisoner rights (people involved exclusively or non-exclusively in this field).

It is important to specify here that the respondents were mainly interviewed in the Brussels region, for three reasons: (1) Belgium is reasonably small; (2) the Brussels region is bilingual and is the region that numbers the most prisoners; (3) most NGOs and Institutions that are active in the field of prisoner rights, or who are interested in the issue, are headquartered in this region. It is also worth pointing out that there is a limited number of NGOs dedicated to the prison issue in Belgium, both in the French- and Flemish-speaking parts of the country.

Given these specifics and considering the people who accepted to speak to us (acceptance being a crucial aspect that takes us further from the initial target), our actual sample is as follows and is satisfactorily diverse for a study of this size.

- A woman involved directly in an NGO that is exclusively dedicated to the defence of prisoner rights;
- A man, a lawyer, working in highly varied legal fields;
- A man working for an NGO that defends prisoner rights, among other social considerations;
- A woman, a lawyer, specialised in criminal law and in sentence application law;
- A man, a lawyer, particularly involved in sentence application law²;
- A man, a judge, ruling on the grounds of criminal matters, and who was previously an investigative judge;
- A woman working for a semi-public organisation that is exclusively dedicated to prison issues.

For reasons pertaining to access restriction, feasibility or diary, it was impossible to meet the prisoners or prison administration personnel, even though their input would have certainly helped elucidate a number of queries.

3. Data collection method

The recommended method being that of semi-directive interviews, the meetings were set up with the help of an interview guide that was common to all *Prison Litigation Network* research teams. Most interviews were recorded except one, for detailed minutes were drafted. Transcripts were made of all the other interviews. Considering the sensitive nature of the field being explored and the details provided on certain ongoing cases, some of our interviewees preferred to remain anonymous. We will therefore not reveal the identity of any of our respondents and will not append to this report the transcripts or minutes of the interviews. This practice is particularly commonplace in criminology³.

¹ For diversification purposes, the variables aim only to differentiate the interviewees, and not to define working hypotheses that would then need to be verified. No feedback will thus be given based on these parameters.

² The recording is faulty at certain points of the interview, but most points discussed are audible.

³ See for instance Lesley NOAKS, Emma WINCUP, *Criminological Research. Understanding Qualitative Methods*, London, Sage Publications, 2004, p. 48.

The interviews went relatively well and highlight a real desire to talk openly about the topic at hand. The end purpose of the interviews was always well understood, and any prompting during the interview was clearly seen as being part of the research framework, as defined at a prior time. The interview guide was well designed, as it required no modification during the data collection phase.

4. Data analysis method

The relatively low number of people interviewed and the informative nature of such interviews led us to analyse the data collated using a simple theme-based method. This type of analysis meant we did not require any data analysis software (such as N-Vivo or Maxqda), which works on the basis of an epistemology deriving from the grounded theory, which is irrelevant for informative material. Each interview was thus analysed in light of the topics that emerged during stage 1 of *Workstream 2*, which are partly indicated in the interview guide. The guide's logic and chronology were nonetheless not respected, given that the respondents themselves suggested specific topic-based structures and organisations that we wished to use as reference. Once each individual interview had been analysed (particularly by mapping the topics addressed and the relations between them), all results were pooled for cross-analysis of the data. This last stage of the research was helpful in highlighting convergences and divergences present in all the material collated.

Lastly, considering the deadlines of the general research calendar, the interviews and their analysis were not conducted by the same person. Julianne LAFFINEUR, temporary researcher at the UCL, funded by the *Prison Litigation Network* programme and busy 50% of her time on its various aspects for six months, collated all the data, i.e. personally conducted all the interviews one-on-one with the respondents. She also transcribed these interviews in Word. The analysis was then carried out by Marie-Sophie DEVRESSE, promoter of the research and lecturer at the UCL. Both researchers remained in touch after the departure of Ms LAFFINEUR from UCL, which facilitated work on the content of this report where necessary. The report was first drafted in French and then translated into English. All quotes in *italics* placed in inverted commas in this document are translations of the literal transcriptions of excerpts from the recorded interviews.

III. Use of the law by practitioners and prisoners

An important point about Belgium, already mentioned in the introductory paragraphs of this document, is that although there are a number of NGOs active in prisons⁴, only a handful is exclusively or incidentally dedicated to the issue of the *right* of prisoners and its implementation, in the strict sense of the word. These NGOs are few and far between (OIP, Ligue des droits de l'Homme, Liga voor mensenrechten, Centre D'action Laïque, Réseau Détention et Alternatives, Amnesty International...) and fewer than 50 people in the country are involved in cases pertaining directly to the rights of prisoners. They practically all know each other personally, having all been required to work together at some point, and to different levels, on a case. As

⁴ For the French-speaking sector, see the directory of the Concertation des Associations Actives en Prison (CAAP), <http://www.caap.be/index.php/document/caap> (viewed on 2 April 2016). For the Flemish-speaking sector, see the page of the Flemish government on Welzijn en samenleving <http://www4.vlaanderen.be/wvg/welzijnsamenleving/hulpaangedefineerden/Paginas/inhoud.aspx> (viewed on 2 April 2016).

is frequent in Belgium, one does nonetheless observe a certain distance between French- and Flemish-speaking actors⁵.

As regards the mobilisation of the law, we are therefore faced with a double lever that is admittedly not specific to Belgium. The first is the traditional lever of lawyers working on these cases in a professional context, with some lawyers organising themselves into networks or organisations (e.g. *avocats.be*). The second is that of the few NGOs and bodies mentioned above which, in some limited cases (1) help to take to court the causes deemed significant, yet without being able to start legal proceedings themselves (we will come back to this), and (2) will commit to an objective dispute with a view to attacking norms or rules before the Council of State (*Conseil d'Etat*) or Constitutional Court (*Cour Constitutionnelle*) because they are viewed as problematic in terms of norm hierarchy or respect of fundamental rights (we will come back to this point also). These NGOs and organisations also work to raise awareness of the cause and lobby to this end.

The sections below will address, in no particular order, the points of view expressed by our respondent lawyers and NGO members on the Belgian situation as regards the mobilisation of the law on prison matters, although certain views may be nuanced considering the background of the interviewees.

1. Identification of the wronged subjective right or "going from the fact to making a case"

The practitioners we met indicated that, when they are given facts, their first step is logically to carry out a legal analysis, i.e. identify the right that was wronged and the origin of this wrong. When faced with incidental events or with administrative decisions, the strategies to set up a case or a line of defence may vary, particularly as regards the bodies before which the case will be brought and the legal norms to be invoked (ECHR, Prison Principles Act etc.). One lawyer tells us that his strategy is *"to launch several procedures at the same time"*.

Most often, the simple threat of a procedure seems to produce the desired effects, in particular when this threat is supported by a renowned NGO. Our lawyer respondents indicate that it is often when they go to sum up a case that the decision they were questioning is suddenly annulled.

Violations reported in Belgium cover a broad spectrum of incidents, but mostly concern the same types of facts and decisions. They also refer more generally to detention conditions. As regards facts, there are reports of violence, humiliation, pressure, abuse, thefts etc. As regards decisions, they mostly pertain to disciplinary sanctions (e.g. various deprivations, removal to a bare cell), application of specific regimes (e.g. specific security regimes, such as that known as "terrorists"), repeated transfers, failures in care for the prisoners' health, delays in case processing, refusal to grant leave and vacation requests, refusal to grant specific measures or release etc. As regards detention conditions, these mainly concern overcrowding (very recent *VASILESCU* judgment obtained by the ECHR), hygiene, food and promiscuity in common living spaces.

⁵ This distancing in the prison field is, for the most part, a result of the State's structure, in which "person-related" fields, such as assisting a prisoner, are the responsibility of communities rather than the Federal State.

Other prisoner situations are also brought to our attention. Certain prisoners have a general behaviour that is deemed problematic, and since such prisoners are labelled as unruly or dissenting or have a good following, they are the subject of strict handling by the prison administration (sometimes even under the direct supervision of the minister). Their entire prison life is organised around exception and restriction. In such cases, the role of the lawyer is to highlight and question that which our interviewees term the “*bad faith*” of the prison administration in the daily management of these particular prisoners. In some of the cases reported, the excessive application of these special treatments has led lawyers and NGOs alike to denounce these handlings as paramount to torture.

The subjective rights wronged thus refer to violations of various national and international legal and regulatory texts. Most often, the texts called upon are the Constitution, the Prison Principles Act, the legal status of prisoners⁶, and the European Convention of Human Rights⁷.

As regards international bodies, NGOs with a lobbying action have highlighted the fact that, among the questions recently put to Belgium by the United Nations concerning fundamental rights, the most significant concerned prisoner rights, in particular prison surveillance mechanisms (reference to the OPCAT, not ratified by Belgium, is constant), the issue of prison overcrowding, and the imprisonment of people suffering from mental disorders.

2. Building a case, or “*collating the relevant elements*”

Beyond the law, each case must obviously be based on a set of convincing factual elements or administrative documents. This is the most complex part of legal defence, particularly considering the impossible access to the custodial setting and the timeframe of the legal process, which, when stretched out, often leads to the disappearance of evidence. Additionally, the assistance of prison management in investigations is very variable. In the words of one lawyer, prison administration “*is very sparing in the information it communicates*”. All interviewees agree that they expect no assistance from either the prison administration or the Minister and his cabinet, even when rights violation is blatant and the human situations are extreme. “*When we call them or we write to them to draw their attention to a situation affecting a client, there is never any response. It is extremely complicated*”, indicates one lawyer. “*The prison administration never admits to any responsibility, even in the most blatant cases*”, adds another lawyer. Additionally, some of the evidence required to build a case may represent a cost that the prisoner cannot afford, or may simply be completely out of reach (e.g. getting an outside doctor to record injuries).

This is where the importance of lawyers working with one another and with NGOs really comes into its own. Above and beyond the elements of the case they are working on, the legal practitioners highlight the importance of creating a more general “*corpus*” on the operation and state of Belgian prisons. This corpus is produced in particular by bodies publishing annual reports on the state of prisons

⁶ Law of 12 January 2005, “Loi de principes concernant l’administration pénitentiaire ainsi que le statut juridique des détenus (Law of principles pertaining to the prison administration and the legal status of prisoners)”, *Moniteur Belge*, 01.02.2005, pp. 2815-2850, referred to as the “Prison Principles Act” in this document.

⁷ For an overview of legal texts governing prison law, see section I. of M.-A. BEERNAERT, *Manuel de droit pénitentiaire*, Limal, Anthemis, 2012.

and the (non) respect of imprisonment rights, such as the Ligue des Droits de l'Homme, the Belgian section of the Observation International des Prisons, the Local Prisons Monitoring Commissions or the Central Prisons Supervisory Council etc. (vivid criticism is regularly sent to the latter because it has stopped publishing its annual report⁸).

In this regards, the networks that legal practitioners belong to appear to constitute a significant resource. Discussions about good practices as well as the communication of legal redress results are regular, even though the latter is often conducted informally. As one lawyer states, *"It is true that it is a small world. Decisions get round. If one lawyer gets a good decision, he will email it to all his contacts. [Same thing] if he sees a loophole"*. Another lawyer indicates, *"It is one of the only fields in which lawyers are so close to one another as compared to, say, criminal law, where it is every man for himself"*. It is worth noting here that a number of lawyers are part of militant associations, which are few in number but very closely connected. We are repeatedly told that this *"is not a neutral field"*, as not all lawyers want to get involved in these kinds of disputes, which are complex, sensitive, unpopular and often financially unprofitable. As one lawyer sums it up, *"we enjoy the spotlights of criminal cases, but the shadows of prisons are much less appealing"*.

In this interview exercise, the attitude of members of local prisons monitoring commissions, prison visitors and chaplains, is criticised. Their positioning is often questioned, in so far as, although they have access to the inside of prisons (meaning they have particularly important information), they most often refuse to provide evidence or certificates pertaining to facts that take place inside the prisons they are connected with. This refusal, often justified by their specific mandate, is interpreted by those who take cases to court, despite their dissatisfaction, as a desire to keep good relations with prison management and to work in a non-conflictual environment, even though activism in this field, as far as lawyers and NGOs are concerned, would necessarily pre-suppose conflict and an ability to deal with it. Similar criticism is formulated against prison doctors, who are often not forthcoming when required to provide medical certificates supporting evidence of bodily injuries sustained. That said, the respondents also highlight some good interpersonal contact, but the role and actions of the Monitoring Commissions and the Central Prisons Supervisory Council receive the most vivid criticism in terms of networking.

3. Use of the ECHR judgments

The concept of Human rights is naturally at the heart of court cases since, as highlighted by one lawyer *"the penal logic is, by its very essence, incompatible with that of human rights, and they can therefore only go head-to-head"*. ECHR case-law is therefore *"referred to continuously"*, indicates one lawyer. *"Our conclusions refer to them constantly, even though we know that it is not necessarily followed up"*. *"They are a strong argument"*, indicates one member of an NGO. But, another respondent states that *"the national judge is distrustful and does not necessarily like being brought face-to-face with ECHR case-law (...) If we arrive with 4-5 pages of conclusions on ECHR case-law, he will tend to say 'Oh come on, what is all this, just explain it to me in concrete terms' (...) As though it only concerned exceptional*

⁸ The last published report dates from 2010, see

http://justice.belgium.be/fr/themes_et_dossiers/prisons/surveillance_et_conseil/conseil_central_de_surveillance_penitentiaire_et_commissions_de_surveillance (viewed on 2 April 2016).

cases". Unsurprisingly, ECHR case-law is also one of the main levers, for NGOs, to initiate dialogue with political spheres and serves as the basis for a number of working reports and memoranda. We would like to indicate here that the judgments are used independently of the States involved. In this regard, networks are set up with specialised lawyers and university researchers who work in this field, but communication on this topic is far from being systematic, and neither is there a structured initiative to broadcast significant judgments.

4. Use of case-law from other European countries

Our research material unequivocally highlights great ignorance of the decisions rendered in other European countries, a fact that is well summarised by one lawyer: *"It is complicated to handle all this on a national level, so..."*. Once again, it appears that nothing is in place to share experience and practices across borders.

IV. Access to judicial remedies

After examining the various legal and administrative remedies accessible to prisoners, we will review the difficulties encountered by the practitioners in their access to such remedies.

1. Legal remedies available under Belgian law

While the Prison Principles Act organises, according to its section VIII, a system of complaints that provides for legal remedies and a procedure applicable to the prison system, the delay of entry into force of these provisions means legal practitioners must rely on common law tools. This particular situation of multiple authorities is the subject of the most vicious criticisms from all our respondents. *"That is where the problem comes from: on the one hand, there are strategies to be put in place, but you need to know the law on your fingertips. And when I say 'know the law', I'm not talking only about the law applicable to prisoner rights! To be effective in prisoner rights, you have to be competent in public and administrative law, judicial law, civil law, sometimes even criminal law because we'll occasionally need to file a complaint against someone, employment law because we're also dealing with social welfare centres... On top of all that, we have to deal with questions that are highly specific to each field. When I talk to a specialist, I always get told 'pff, there's no clear-cut answer to that question. (...) You practically need an army behind you'".*

The common law means that are used are thus quite varied⁹. It is worth noting here the recent entry into force of a special procedure before the sentence enforcement court pertaining to healthcare, which is the subject of vivid criticism. Let us briefly review the various means of redress that are called upon most often.

a) Civil means

Using civil law means that the lawyer must demonstrate that the administration is at fault in the way in which the prisoner is treated and accommodated in prison, and must request the cessation of the problematic situation and/or request compensation on the basis of the damage caused. This action for damages aims to question the liability of the Belgian state, in the context of a common law civil

⁹ A judge indicates, for instance, that some lawyers may plead detention conditions before the Council Chamber, with a view to request the release of their clients held confined awaiting trial. This example shows how each legal « space » can be used to assert the rights of prisoners to a decent treatment.

procedure pertaining to improper conditions of detention. One situation that is encountered relatively frequently, considering the frequent supervisory personnel strikes in Belgium (minimum service is not in place, which has led in the past to police violence, which in turn led to successful cases) is to request that the State restore "normal" detention conditions, which suffered from the work stoppage of the prison agents, and ask compensation for the harm suffered during such work stoppage.

b) Criminal means

In this case, a prisoner files a complaint and a claim for criminal indemnification before an investigative judge, with a view to referring the case to the correctional court and obtaining the conviction, for instance, of a member of staff who inflicted violence or degrading treatments. In such cases, the legal authorities, in particular the public prosecutor's department, must demonstrate at least a slight interest in this type of approach. Our respondents rue the fact that these cases are often not viewed as priority, for various reasons that would need to be investigated further.

c) The interim relief judge

This court refers to back to the classic procedure. In urgent matters, the president of the district court is required to render a summary judgment, i.e. to take urgent and provisional measures pending a judgment to be rendered at a later time. Conditions for interim measures are the urgency of the matter, the provisional nature of the decision, and the fact that such decision cannot prejudice the case. Our respondents state that this type of redress is the means they use the most often in order to oppose the imposing of a measure in detention. It thus applies to great variety of situations. One lawyer further states that it is difficult to take a case to the Brussels interim relief judge when an application for legal assistance must be made, since it is time-consuming and is not always granted because a number of arguments will be made to avoid granting it.

d) Administrative means

The challenge here is to try to contest administrative decisions taken against the prisoner and to request their annulment. The Council of State is the body competent to receive these appeals. This means of redress is nonetheless described by our respondents as being relatively limited, whose chances of success are quite low. Indeed, in a number of cases, the Council of State considers that the decision questioned does not represent an administrative act but rather a measure of order for which it is not competent. This attitude is less frequent in disciplinary cases than in other fields since, as highlighted by J. DETIENNE and V. SERON¹⁰, "the Council of State, under the pressure not only of the doctrinal criticism but also of international conventions, has changed dramatically since the Kazuyuki Takigawa judgment¹¹. Faced with the prison administration's desire to consider all individual decisions of a disciplinary nature as an internal order measure, the Council of State was required to specify what was to be considered as an internal order measure¹²". That said, this clarification does not seem to be applied systematically, and these redress means remain uncertain.

¹⁰ Jean DETIENNE and V. SERON, « Politique pénitentiaire en Belgique », in P. J. P. Tak & M. Jendly, *La protection des droits fondamentaux des détenus en droit national et international*, Nijmegen, Wolf Legal Publishers, pp 239-265 (p. 263).

¹¹ E.C., decision of 10 April 1981.

¹² E.C., decision of 21 December 2001, party Rachid WADEH.

It appears that a recent example impressed itself upon the minds of some of our interviewees, several of whom recounted the same story of a lawyer defending an unfairly sanctioned prisoner and who managed to convince the judge that the prison's director was not of sufficiently highly ranked in terms of administrative law to be allowed to exact sanctions. He was successful before the Council of State. It should be noted here that the information serving as basis for this argument was very hard to access...

e) The (new) competence of the Judge for the enforcement of health-related sentences

This specific means of redress is a particular expertise of the judge for the enforcement of sentences. Since the implementation in late 2014 of articles 72 to 80 of the law on the external legal status¹³, the judge for the application of sentences "can grant provisional release to the prisoner for medical reasons, where it is established that said prisoner is terminally ill or that his detention has become incompatible with his state of health". We will not go into any further detail as to the conditions under which such release can be granted, or on the procedure in required. We mention it here however, since several of our interviewees mentioned this new procedure.

Indeed, according to our respondents, this new provisional release procedure for health reasons seems relatively inefficient when compared with the adversarial procedure that existed previously. The procedure now requires several opinions, including that of the prison's doctor and that of the general doctor, who is responsible for all prison institutions. The lawyer, however, does not receive a copy of these medical opinions, which demonstrates a certain lack of transparency. Additionally, the lawyer no longer has the right to a hearing. The president of the court for the enforcement of sentences takes his decision on evidence only, without hearing the interested party, which leads us to believe that the prisoners have lost a lot of their possibility for action in this field.

2. Legal redress means considered as part of the work carried out by the Local Prisons Monitoring Commissions and the Central Prisons Supervisory Council

Without going into detail about the implementation, role and composition of the local prison monitoring commissions, which are clearly explained in the report pertaining to Belgium, it is important to highlight that their action, which is volunteer and non-judicial, nonetheless enables prisoners to give account of the violation of their rights and to bring such information to the attention of third parties outside the prison administration.

The system put in place is relatively simple and operates in two ways: a reactive and a proactive mode. On the one hand, the prisoner can address a "complaint form" to the commission (form that, most often, contains only the contact details of the prisoner and is posted in a letter box present in each wing of the prison) in order to

¹³ Law of 17 May 2006 "relative au statut juridique externe des personnes condamnées à une peine privative de liberté et aux droits reconnus à la victime dans le cadre des modalités d'exécution de la peine (pertaining to the external legal status of persons condemned to a sentence of deprivation of freedom and to the rights acknowledged to the victim in the context of the sentence execution conditions)", *Moniteur Belge*, 15 June 2006, pp. 30455-30477.

meet a member of this commission and directly put to him the grievances in question during a visit to the cell, or in a different room. A member of the commission in charge of a Brussels prison (approx. 800 prisoners) estimates the number of complaints at 60-70 every month, which leads prisoners to have to wait several days before meeting a commission member. On the other hand, a more proactive action is put in place, in particular by the person designated, within the commission, as "commissioner of the month". This commissioner can move about at will throughout the prison, including the solitary confinement cells and the cells of prisoners subjected to a specific regime. They collate statements from the prisoners who have not been able to, or who have not wished to, use the letterbox system. Additionally, during their visits, the commissioners of the month can see with their own eyes any infringements of prisoner rights and can talk to them about it, and even put in place a more structured awareness approach as to the general situation in the prison. Whereas previously, the commission members had access to the prison records in their paper form, the move to a computerised system means that they no longer have access to the files, leading to a significant loss of information¹⁴.

Even if they receive real complaints, the members of the commissions nonetheless define their work as more of a mediation mission with the prison management to advance a given situation. The results of this mediation are variable depending on the quality of the relationship with the management and the latter's commitment in the process (in certain cases, monthly meetings are organised, with minutes, but this is not always the case). They also indicate that an important part of their work is to listen to grievances, which seems to address a gap in a context where management, personnel, social workers, doctors, psychiatrists and psychologists are overworked. Beyond this listening, the commissions work on consigning and reporting, with names, on all the facts and incidents recounted, as well as any follow-up changes made. They must also draft an annual report that outlines the situation within their assigned prison, considering the elements of the Prison Principles Act, be they implemented or not. These reports, as well as that drafted by the Central Prisons Supervisory Council, summarise the major challenges specific to the various local situations, and aim to serve as basis for dialogue with the Justice Minister (prison monitoring is actually carried out officially in his name) in order to, not only inform him, but also to drive him to take the necessary steps to remedy the issues encountered.

It is clear that the process to feedback the information does not support the "individual" nature of remedies possible, even though the mediation work completed with the prison management team on a local level is sometimes successful as regards specific claims made by prisoners. As already stated, the role the commissions play is often condemned by lawyers and NGO militants when the question of prisoners' "right to complaint" is at stake. Criticism is first of all aimed at the difficult working relationship with certain members of the various prison monitoring commissions, which include former judges, doctors, lawyers and simple laymen (most often retired), whose "consensual" culture is at odds with the much more contentious and dissenting militancy of NGOs. That said, every year, a local

¹⁴ Discussions on this topic with the Director General of prison institutions came to a compromise that enables the printing of documents for which the prisoner has expressly given his approval. This system nonetheless requires a certain transparency that may prejudice the prisoner, and additionally requires that the registry staff be available for such printing, which is only feasible during office hours that do not always match with commission visiting times.

Brussels-based commission decides to publicly communicate its annual report, even though this is not included in their protocol of action.

Next, we would like to recall that if the Prison Principles Act is one day implemented in this regard, these commissions will most likely play the role of "complaints commissions", with more power than they have now¹⁵. This leaves everyone sceptical, even their own members and the members of the Central Prisons Supervisory Council. Be that as it may, as things stand, one of its members tells us "*we are a body without power, we just provide advice*" and goes on to say that "*we are not a very effective remedy, but we're better than nothing*". Another member will add "*we are there to frighten them, and cross fingers that it boosts them a little*".

Additionally, the fact that a number of commission members are not legal practitioners and have imperfect or no knowledge of sentence execution law is seen by most lawyers as a problem, both in their relationship with prisoners (they are sometimes incapable of answering questions pertaining to the violation of their rights) and their general assessment of the legal remedies available to solve the issues observed. Moreover, where they can very clearly identify rights violation, the volunteer commitments and tasks they already undertake are likely to hinder their further involvement in legal proceedings: "*The commission members already draft their reports and visit the prisons (...), to ask that they begin to get involved in legal proceedings is not an option (...) Or else, there should be real professional training in the sector and proper remuneration*", indicates one commission member.

One of the specifics characterising the operation of the supervisory councils is that they are extremely variable from one prison to another, and are highly dependent on the personality of each commission member and their initial training. It also depends on the personality and training of the prison management, bearing in mind that no specific training on the work of the commissions is dispensed by the SPF Justice. One of the consequences is that the local commissions have very little contact with one another.

Lastly, when prison administration inertia is deemed too problematic by the commission members, the latter sometimes encourage the prisoners to get in touch with a lawyer, and sometimes contact one directly on their behalf to report on the situation to hand. This kind of approach has given rise to veritable disputes with prison management, who interpreted this approach as an unacceptable breach of the supervisory assignment the commissions are supposed to be carrying out, to the point of considering their action "*as the work of the enemy, to whom we should give the least possible amount of information and with whom we should speak as little as possible*". It should be noted nonetheless that, in disciplinary matters, when certain commission members observe illegal sanctions, they continue to directly contact the lawyers where possible, in particular considering the urgency of such cases. Conversely, some lawyers have been known to contact commission members in order to obtain further information on a given situation when preparing a case. Furthermore, distrust of prison managers is mutual insofar as the commissions complain that the letterboxes are often "forced" or "visited" and that some complaints forms never reach them.

3. Hurdles in the application of means of redress

¹⁵ Subject to ratification of the Optional Protocol to the Convention against Torture (OPCAT) that should split monitoring and complaints competence.

Our interview corpus highlights several types of obstacles that practitioners encounter in the exercise of means of redress. To introduce this point, nothing seems more appropriate than the words of a member of an NGO, who states that *"generally speaking, one could say that theoretical and legal redress means do exist [in Belgium] but the effectiveness of these means is very, very, very limited, and it is therefore quite difficult and complicated to implement them"*.

a) Difficult access for individuals

"We can only act in the most blatant situations", says one lawyer. The number of violations is so high that, as well as the difficulties inherent to bringing the cases to justice, the tendency is to focus on significant cases where violations are clear and where chances of success seem possible. This may be why one lawyer tells us that *"8 times out of 10"*, she is successful in summary proceedings. Additionally, certain cases seem more arguable than others, particularly when objectivation is possible or particular areas of expertise are involved: for instance, a case of breach of health rights supported by medical certificates will have more chance of success than trying to contest the vision or arguments supporting a refusal to grant leave or conditional release. It is clear that there is a form of implicit selection of cases brought to court.

The fact that the cases concern prisoners does not appear to adversely affect the contact with the lawyers or NGOs working to defend their rights, whether this contact is initiated by the prisoner himself or by his friends and family. The lawyers do not appear to be hindered in these contacts (although the detention conditions of their clients are a different matter) and can visit their clients every day in prison until 9 pm. What is more, word-of-mouth between prisoners as to the name and contact details of lawyers who agree to take on prison complaints seems to work reasonably well, especially considering the small size of the country and the small number of lawyers working on this type of dispute resolution. For prisoners, apart from potential reprisals, the most immediate problem they have to overcome is the financial aspect of hiring a lawyer.

Our respondents do speak of difficulties in having access a lawyer, but highlight more specifically the issue of balance of forces in the legal procedure. As one lawyer states, *"the problem is that [prison life] is propitious to abuse. And it is a public body that is violating the law"*. Another says that, *"it is exhausting because the system is seriously hindered [by the redress cases] and it is hard to convince lawyers to fight so hard"*.

All the content of our interviews is organised around this double issue: opaque context and inequality of arms. We note that a number of difficulties encountered by the lawyers stems from their clients' lack of financial means, who therefore rely very heavily on legal aid. The following point of view seems to summarise that of all lawyers met in the context of this *Prison Litigation Network* project: *"Prison cases are worse than not being paid. The lawyer is the one who funds the case! There are long hours of work, a high level of legal technicity and [complex] procedures, for which you'll get paid 400 euros in legal aid and you'll have worked, I don't know... 100 hours... Even if there may be interesting professional consequences, it is the kind of work that does not get done in good conditions. Really, really not"*. Another, slightly older, defender adds, *"It's practically a hobby, funded by another, more lucrative, side of our activity as lawyer. The terrible thing is that the system actually relies on it"*.

This difficulty is all the more problematic than the legal practitioners we met tell us that the prison administration often instructs very good lawyers who conduct an in-depth analysis of the complaint, burdening the case as much as possible, opposite lawyers who are very often appointed as part of legal aid services. The arms are therefore not at all equal and the question of legal aid thus becomes central to the issue: the prisoners are not equal among themselves either, in terms of material means and combativeness. Indeed, their experience appears to play an essential role in the process: there are those who have the personal financial resources and those who, in the words of one lawyer, are "*clever [because they quickly get to] know which lawyer will do what [while] others will stay in dire straits because they don't understand anything*". This type of comment highlights the lack of voluntarist policy in terms of prisoners' equal opportunities and equal means before the law.

b) Difficult access of NGOs to subjective disputes

One major legal hurdle is the non-recognition, for NGOs, of the interest in bringing proceedings on behalf of prisoners. Collective action with collective interest is inconceivable in Belgium. In the past, complaints brought to court for poor detention conditions in Belgium (two cases concerned French-speaking prisons) did not pass the Court of Cassation, even though they had got through the barrier of trial judges who had recognised the interest of right of action. The Court of Cassation deemed that an NGO had no direct interest in any such action and could not cite the violation of a right to bring civil action, insofar as it does not directly represent the victim. Prisoners alone may act and complain of their detention conditions, without the support of an NGO. Recent advances for unaccompanied minors, and where an interest in acting was acknowledged for NGO "Défense des Enfants International" may however provide a loophole in the matter.

Additionally, the practice of a third party intervention seems underdeveloped in Belgium, even though the Human Rights League acted in 2015 in the *HUTCHISON vs. United Kingdom* and in the *MURSIC vs. Croatia* decisions. But as indicated by one NGO member, often "*opportunity makes thieves*", and it is more a question of seizing opportunities than making it a prime form of action and being proactive. "*It is a question of means too, because they are sometimes quite technical cases and you need time, information, etc. We have limited staff and our volunteers already have their plates full with other tasks*". Yet, in certain cases brought by the prisoners and their legal counsel, and which are viewed as "significant causes", some NGOs have been known to support them in making their case and drafting the legal arguments.

c) Prison administration strategies

Most of our respondents gave us multiple examples of strategies used by the prison administration with a view to reacting to or anticipating a complaint. For instance, when a prisoner initiates court proceedings to end improper detention conditions, he is often quickly moved to another cell or transferred to another prison in order to fictitiously end the problematic situation and, above all, to act so that the case suddenly becomes groundless and no conviction can be handed down.

In other words, although the prison administration assuredly manages the day-to-day lives of the prisoners, its ability to adapt and respond quickly to a situation is a veritable obstacle to the legal recognition of rights in prison.

c) The lack of judges' awareness of prison issues

Judges' awareness of prison issues is depicted as very low. The training of judges and investigative judges, even on criminal issues, does not provide for any specific training on prison issues and its current contradictions. Most judges have never set foot in prison, and the few experiments conducted in this matter were enlightening, particularly as regards their plain ignorance of the reality of detention conditions in Belgium. This is especially surprising considering that their job regularly results in imprisonments¹⁶. One nuance is nonetheless important to point out as regards social defence: the situation of prisoners has been brought to the media's attention so regularly these past few years that it now seems impossible to ignore the issues encountered (including, in particular, their continued detention). Our respondents say that they have observed a significant improvement in the attitude of judges in this regard.

Yet, the positioning of judges (particular investigative and trial judges) receives harsh criticism from our respondents, who denounce a certain weakness when it comes to taking prison disputes seriously. In the words of one lawyer, "*[there is] a certain amount of resistance from the judges to point the finger at the prison administration, which is a huge machine where responsibilities are spread out and which never admits to anything*". Additionally, the idea of moving the sentence enforcement court to within the prison institutions creates a certain amount of scepticism as regards the collusion that could come into being between the judges and the prison directors. Two of our interviewees nonetheless observed that, these past few years, the Service Public Fédéral Justice (federal public justice service) particularly "*ill-treated the judges*" (finances crisis, sick leave of prison staff that disrupted transfers for trial, review of the pension regime etc.), which may have contributed to reducing the reticence in questioning the liability of the prison administration.

c) Difficulties related to multiple timescales

When it comes to asserting the rights of prisoners who live in poor conditions, one of the major difficulties highlighted by our respondents concerns the management of the multiple timescales that come into play. The prisoner is usually in a situation of urgency, even if this can be questioned – and often is. This is the case particularly when a disciplinary sanction is applied, such as the transfer to a bare cell, which requires an immediate decision, or in the case of major health issues. Additionally, the actual detention situation places the prisoner in a very specific relationship with time, which leads him to consider even the smallest thing as fundamental. Lawyers are in a different time continuum, as they must not only carry out their legal profession and handle multiple client cases, but they are also dependent on various priorities related to the procedure and the case preparation. Yet, this not only requires time to listen, understand and conduct a legal analysis, but also depends on information that must sometimes be sent through by third parties, including prison administration civil servants or service providers acting on its behalf and who are not always very conscientious. Lastly, added to these three timescales (prisoner/lawyer/administration) is that incurred by the operation of the various jurisdictions and bodies before which the case is brought. This timescale is variable

¹⁶ Thus, in 2012, the president of the Brussels court of first instance, with 22 investigation judges, went to the Forest prison, a Brussels prison that is particularly dilapidated and in which over-crowding and the living conditions of prisoners have been reported countless times. The press reports and interviews published at the time unambiguously highlight the judges' lack of awareness of the institution's state. <http://www.lalibre.be/actu/belgique/des-juges-en-visite-a-la-prison-51b8e864e4b0de6db9c61768> (viewed on 2 April 2016).

depending on the nature of the jurisdiction/body and the type of procedure being considered—and the significant backlog of cases.

When one considers that emergency interim proceedings can take several months and that a compensation procedure against the Belgian State can last over 5 years, it is easy to see how this time dimension of legal actions is a major concern for legal practitioners. One of our interviewees states, *"For the time being, at the Brussels court of appeal, [tort claims against the Belgian state] will be processed in 2020 or 2021 [even though] they can be already be judged. If all goes well, the prisoner will have already left prison by then!"*.

d) The sometimes counter-productive nature of the law

One of our respondents points out that, as regards "rights", the reasoning is not necessarily the most appropriate to manage certain detention-related issues. Even though the law provides for the regulation of the external status of prisoners, i.e. fewer arbitrary actions by administrative bodies, the facts indicate that such arbitrariness could sometimes in fact benefit the prisoner. Thus, the courts are sometimes more prudent than the administration when they adjust sentences. Their operation and related procedures are also often slower and more burdensome. *"Before, the administration reasoned not in terms of law but in terms of management"*, says one member of an NGO. This means that a decision of interim release could be effective very quickly where a prison was overcrowded, simply to facilitate internal management. With the court, myriad elements are taken into account, including the point of view of the victim, the proposed solution etc. which means that, in extreme cases, a decision of interim release can be refused repeatedly where it would previously have been conceivable.

Additionally, as we have already highlighted, our interviewees, who are discouraged by the general inertia in the implementation of the Prison Principles Act, put the importance of the law into perspective when political will is non-existent or when it does not go far enough. One judge tells us that, *"If the law does not provide for sanctions in the event of non-respect of certain guarantees, what does that say of the 'guarantees'?"*. This is all the more important that, as highlighted by one lawyer, the prisoner *"needs to be supported by a network that has no relation to law"* to live out his detention.

e) As regards "objective" means of redress

Questioning the constitutionality or the legality of legal and regulatory texts is one of the main aspects of the work carried out by NGOs involved in prison issues, and requires little further comment. Our corpus highlights the few difficulties encountered, mainly financial and human resources. Additionally, Belgium being as it is, it does not appear too complicated for NGOs to have direct contact with members of the administration, parliament, and even members of the government. A member of an NGO indicates however that their lobbying action is *"time-consuming and unproductive"*. During the interviews, relationships are cordial and the speeches by elected representatives or managers appear voluntaristic. *"Sometimes we will have good discussions, we meet with highly intelligent people or people who are very aware of the situation, who tell us of their desire to make things change. Unfortunately, in the field, there is very, very little change (...) [The current minister] had very interesting ideas as regards prison policy, ideas that move in the right direction. But once again, we can only observe that the texts submitted to the*

parliament go against these ideas. (...) Prison is a pretty disheartening topic". The general economic and social context and the unpopular field are not encouraging, but, as highlighted by one lawyer, even with brave political positions, progress is far from obvious. The problem is that it is a question of taking on an elaborate system that is dysfunctional at every level, and whose structure needs to be comprehensively overhauled.

Although some cases should take precedence in this field, cases pertaining to employment law seem to be the most promising. Indeed, the position of Belgium is an issue as regards employment law in prison and the right to social welfare. Belgian law excludes prisoners from work contracts and from compensation for work incapacity. One respondent informed us that the NGO he works for has decided to concentrate on this particular field, which is less subject to popular controversy than detention conditions, and which can find support from other types of social achievements.

V. Impact of court decisions

Despite explicitly asking our respondents a number of questions about the impact of court decisions, this field is the weak link in our research results. The respondents have little to say, despite our insistence. Admittedly, the impact of ECHR legal decisions and judgments is mentioned, but remains relatively marginal in the responses gleaned.

An NGO member highlights the significance of the *BOUAMAR vs. Belgium* decision, which dates back to 1988. The fact that this decision is quite old means its impact over the long term is measurable. The decision concerned the imprisonment of children and, according to this respondent, it has been used as a weapon by lawyers and NGOs to change the situation in Belgium on this matter. He clearly states that it is only in the coming years that we will be able to assess the impact of the recent decisions *VASILESCU* and *BAMOUHAMMAD*, despite the victory they represented for militants campaigning for the rights of prisoners. That being said, concerning the *BAMOUHAMMAD* judgment, the actual progress of the case demonstrates extreme resistance from the Belgian state at every stage of the process, and ultimately, resistance when it came to acknowledging the result of the legal redress means and the content of the ECHR decision (multiple theoretical and complex legal arguments, appeals, slowness etc.).

For their part, the recent construction of social defence institutions for people suffering from mental disorders in prison and the modification of the social defence law are mentioned several times by our respondents in that they are a direct consequence of the proliferation of legal decisions in the field, and the many interventions of the CPT condemning the disastrous state of psychiatric wards in Belgian prisons.

Our respondents indicate that the application of decisions rendered by the ECHR by the Belgian authorities does not seem to constitute a priority action driver for Belgian NGOs. Even if they are in regular contact with political authorities, their discussions rarely address the issue of receiving and transposing the European and legal decision into national law.

As to the effect of the legal decisions that the lawyers occasionally obtain in their favour, they often seem to believe that, above and beyond that specific case, their

worth is above all symbolic and sometimes contribute to sparking a form of respect as regards their work as lawyers. *"The next time we go into a prison, they say, that one, he actually achieved something so tread carefully"*, says one lawyer. That lawyer had, incidentally, put in an impressive number of working hours on a case *"about a disciplinary decision that had been taken in four minutes"*. Success is therefore not to be found in efficiency, and is seen as barely efficient beyond the case at hand, but is noticeable more in effectiveness, in the need to assert a right and to work so that, despite everything, it is applied.

VI. Conclusions

Although we met lawyers who were particularly active in the prisoner rights field, in our civil law culture where the centre of gravity for all law-related matters seems to be the responsibility of the legislator (at least on a formal level), i.e. the parliament and the government, legal activism addresses more clearly the legislator than the courts. In the prison field, we therefore notice the importance of lobbying in parliament in relation to what is expected from a jurisdictional point of view, even if such lobbying, as we have seen, cannot be qualified as substantial or terribly efficient. Considering that the majority of decisions pertaining to prison life are taken on an administrative level¹⁷ and are governed by a normative framework based on royal and ministerial regulations, circulars and/or decisions, the lawyers are often faced with norms whose justiciability is controversial. Additionally, such regulations are not always published or communicated, and their legal status does not always enable their questioning before a judge. The lawyers and NGOs must therefore address multiple authorities and the people who defend the rights of prisoners, both in practice and on a militant level, are hindered by a double obstacle: the 2005 Prison Principles Act¹⁸ is still not applied in its entirety (in particular as regards the rights of complaint authorities) and there is no unique jurisdictional competence that could render a decision in all prison-related issues, as is the case with the Aliens Litigation Council or the family courts single judge.

One of our respondents, a lawyer, qualifies prisoner rights law as *"a vast magma that requires that we dive into a number of practice areas because we touch on civil procedures [even though we are criminal lawyers] (...) and administrative procedures [like before] the Council of State in disciplinary matters"*. This piecemeal breakdown complicates the dialogue between the players involved in the dispute: those who know prison law well have a lesser knowledge of civil and administrative procedures, while the jurisdictions handling these matters have little knowledge of real life in prison and its regulatory framework. The image that comes out of all this research is the need to be a *"resourceful"* lawyer. *"It is complex, not standard. We switch from one law to another, one court to the next"*. Few legal practitioners have knowledge of everything, which leads this same respondent to say that *"it requires a lot of work, (...) those who are efficient in this field are few and far between (...) because it requires an incredible investment compared with what the lawyer will get out of it, since we are mostly talking about legal aid cases"*. Another lawyer, speaking of an issue raised in administrative law on a complex case, further adds that, *"you sometimes have to spend hours researching fields that are not your own"*.

¹⁷ Even more so given that the sentence application judge, established in the "loi du 17 mai 2006 instaurant des tribunaux de l'application des peines (law of 17 May 2006 establishing sentence application courts)" (*Moniteur Belge* dated 15.06.2006, pp. 30477-30487) is still not implemented

¹⁸ Law of 12 January 2005, law of principles pertaining to the prison administration, *op. cit.*

In the same vein, such piecemeal breakdown also places judges in an uncomfortable position that fosters a defensive attitude on their part. When one of our respondents explains that, although leave and temporary absence requests today represent a real subjective right that a prisoner has right to if he fulfils certain conditions, judges seem unwilling to acknowledge it, particularly so that the dispute does not move into their sphere— the administration likely to transfer its own liability to the judicial power. We would like to point out that this hypothetical refusal of “unauthorised” widening of court jurisdiction to cover prison disputes may be surprising at a time when the law on the external legal status of prisoners¹⁹, whose purpose is precisely to organise the broadening court jurisdiction of sentence adjustments, is slow in its implementation.

Above and beyond this organisational and procedural difficulty that seems to be specific to this type of dispute and heavily burdens the work of those who aim to defend the rights of prisoners, it is plainly apparent that the general condition of the prisons themselves and the structural issues make up the major obstacle in acknowledging the rights of prisoners. Some decisions are rendered on multiple cases, but the move to generalise their results, left to its own devices, is excessively slow. In the words of one lawyer, in prison *“the effectiveness of rights without means and the effectiveness of rights without policies, without cultural, social and training policies, mean absolutely nothing”*. In a context where the most elementary conditions for a decent life are not met in prison, the major risks are to see standards drop as regards what is acceptable, to produce an acclimatisation to impossible living conditions, and to tolerate that cases be void of social integration prospects, thus encouraging continued imprisonment. This would gradually contribute to making judges and citizens view a “normal” situation as disgraceful, and complicate even further lawyers’ and NGOs’ establishment of evidence showing that the Belgian situation is, in many ways, still very concerning.

¹⁹ Law of 17 March 2006 pertaining to external legal status, *op. cit.*