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The tension between cross-border cooperation in the European Area of Freedom, Security and Justice and the fundamental rights of mentally ill offenders in detention☆

Michaël Meysman *,[1]

Ghent University, Faculty of Law, Department of Criminology, Criminal Law and Social Law (RE023), Institute for International Research on Criminal Policy (IRCP), Belgium

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ABSTRACT

In two recent judgements, the European Court of Human Rights (ECtHR) has given an alarming signal regarding the placement, care and treatment of mentally disordered offenders in Belgium. This article analyses these judgements and the Court's assessment that Belgium faces a structural problem regarding the detention of people with a mental illness in prison. By exploring other recent ECtHR decisions across the EU and combining this with an analysis of international norms and standards, it contends that there is something amiss regarding the post-trial approach towards mentally disordered offenders in an EU-wide context. The potential hazards of this situation, from both an individual and an EU perspective are then presented by analysing the EU Framework Decision on the transfer of prisoners (which aims to facilitate offender rehabilitation) and the EU Court of Justice's interpretation of the relationship between instruments like the Framework Decision that are based on mutual recognition and fundamental rights. Lastly, the EU's initiative for enhancing procedural rights in criminal proceedings through the Roadmap trajectory, and the subsequent Commission Recommendation of 27 November 2013, are scrutinized. Based on this research, the article pinpoints the flaws and vacuums that currently exist for mentally disordered offenders, and the negative outcome this may have on the legitimacy and effectiveness of the European Area of Freedom, Security and Justice.

1. Introduction

The year 2015 began with an alarming signal from the European Court of Human Rights (hereafter: ECtHR) about the continuing structural problems in Belgium regarding the (detrimental) placement, care and treatment of mentally ill offenders. Barely a month into the new year, Belgium could add eight new decisions to its anthology of ECtHR judgements regarding the detention in prison facilities of offenders suffering from mental disorders (ECtHR, 2015). Over a period of as little as two years – starting with the definitive ruling by the ECtHR in the case of L.B. v. Belgium on 2 January 2013 – Belgium managed to muster a towering collection of 20 judgements against it for breaches of the fundamental principles and safeguards enshrined in the European Convention on Human Rights (hereafter: ECHR or the Convention). In each of these cases, the Court had to rule on the circumstances of the treatment, care and detention in a prison setting of mentally ill offenders (that is, offenders who were found not to be accountable under (Belgian) criminal law because of a mental disorder (Staudt, 2014).[2] Lastly, Belgium became world news with the affair of Mr. Van Den Bleeken, a mentally ill detainee who requested euthanasia because of his unbearable physical suffering (Le Monde, 2015; The Guardian, 2015; The Telegraph, 2014), engaging both Belgium and the Netherlands in the ensuing debate (De Morgen, 2015). Even in the most conservative of interpretations, the accumulated evidence of the past couple of years makes it safe to conclude that something is amiss in this small kingdom when it comes to the way in which mentally ill offenders are treated. Notwithstanding this observation, Belgium is far from unique in the EU in this matter. During the past few years many other European countries have had judgements given against them by the ECtHR in similar circumstances. Last but

☆ This is Madness: Detention of Mentally Ill Offenders in Europe.

* RE023, IRCP, Universiteitstraat 4, 9000 Ghent, Belgium. Tel. +32 0 9 264 84 60.
E-mail address: Michael.Meysman@ugent.be.

[1] The author is a PhD Researcher at the Institute for International Research on Criminal Policy (IRCP) at the Department of Criminology, Criminal Law and Social Law of Ghent University. His research focuses on European Criminal Policy and the position of mentally disordered suspects and offenders under European Criminal Law.

[2] It is noteworthy that the number of mentally ill people who are detained in prison settings in Belgium is a fraction of the total number of this category of offenders. Approximately 1100 of such offenders (making up approximately 10% of the total prison population) are currently held in prisons in Belgium. While the majority of prisoners are released on probation or transferred to specialized facilities, it is precisely this 10% who are the subject of the overwhelming majority of judgements and decisions by the ECtHR as well as the negative reports by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT).

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not least, the following bears repetition (Langford, 2009; Meysman, 2014a): the ECtHR's threshold is still at a considerable height, meaning that judgements are handed down only for the worst – and therefore the most obvious – of breaches. When looking at international norms and standards, CPT reports, and indications coming from non-governmental actors, it becomes obvious that many EU Member States fail to meet their obligations towards this vulnerable category of offenders.

This article first discusses these recent ECtHR judgements within a European context. The existing European diversity vis-à-vis the legal approach of offenders with a mental illness – in terms of procedural rights, effective participation, liability outcome *etc.* – is outside the scope of this article, which instead focuses on the detention conditions of offenders with a mental illness deprived of their liberty.[3] The case law and its implications vis-à-vis the applicable international norms and standards regarding psychiatric detention are analysed. Moreover, the issues raised are discussed within the context of European cooperation in criminal matters. The EU has created a number of instruments – most notably the European Arrest Warrant[4] (hereafter: EAW) – that are aimed at facilitating cross-border cooperation between the EU Member States while simultaneously seeking to enhance the individual rights of the persons involved. Given the collection of serious breaches of mentally ill offenders' human rights, concerns have been raised about how to deal with this specific category of vulnerable defendants when applying these instruments. The European Commission sought to respond to (some of) these issues with the Recommendation on procedural safeguards for vulnerable persons (European Commission, 2013), and hence the article touches upon this recent initiative.

2. Overview and analysis of recent ECtHR case law regarding the detention of mentally ill offenders

2.1. A small kingdom with big issues. Belgium's enduring structural problem

While the greater number of the cases discussed under this heading was decided in the past two years,[5] the conditions of detention and the standard of care for mentally ill offenders[6] are a long-standing problem in Belgium. As early as 1993, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter: CPT), following their first visit to Belgium, sets out some serious concerns (CPT, 1993, paras 175–211) regarding the situation for interned detainees. A crucial factor in the treatment of mentally disordered individuals who have committed a crime is whether they are criminally responsible or accountable for the act(s) committed. Because individuals who are not accountable are (at least partly) found not to be guilty, it is generally recognized that they should not be placed in ordinary correctional settings (Court of Cassation, 1946, para. 116).

The CPT, however, lamented the shortage of available and qualified doctors (CPT, 1993, paras 161, 188, 189), and the fact that local staffing, facilities and equipment in the infirmaries at some of the prisons visited were not likely to provide satisfactory medical treatment and nursing care (CPT, 1993, para. 162), and concluded that in general the practise of accommodating detainees in 'psychiatric annexes' (separate wings) in prisons provides them with neither the observation and psychiatric care, nor the staff and infrastructure, of a proper psychiatric hospital or institution (CPT, 1993, para. 191). In conclusion, the CPT stated that "in all respects, the standard of care for patients placed in psychiatric annexes is below the minimal acceptable standard from both an ethical and human point of view" (CPT, 1993, para. 191).

Almost simultaneously with the publication of the CPT's report in 1994, a Mr. Aerts, backed by the European Commission of Human Rights,[7] started an application for alleged breaches of Articles 5 §1, 5 §4, 6 §1 and Article 3 of the Convention. In 1998 the ECtHR concluded in its judgement of Aerts v. Belgium[8] that there had been a breach of Article 5 §1 (because the right to liberty is jeopardized when there is no apparent connection between the purpose of the deprivation of liberty – protection, care and treatment – and the specific place and conditions of the detention, being a psychiatric wing of a prison; specifically, Article 5 §1, (e) addresses the lawful detention of persons of unsound mind) and a breach of Article 6 §1 (because the applicant's right to a fair trial was violated by the refusal to give him legal (pecuniary) aid, which denied him the possibility of bringing his case before the Court of Cassation). For its judgement and the appreciation of the Belgian situation, the Court drew heavily on the CPT's earlier report (Aerts v. Belgium, para. 66). Both the report and the Aerts ruling confirmed that one should not be deceived by the adjectives *forensic* and *psychiatric*, as (Belgian) forensic prison wings cannot be seen as appropriate institutions for treating mentally disordered offenders who were held not to be accountable.

Following the Aerts judgement, and in spite of the Belgian response to the CPT report (Rapport de Suivi, 1996; Rapport Intérimaire, 1995), hardly anything changed for the better regarding the position of mentally disordered offenders. Legislative changes were proposed, postponed and ultimately abandoned, budgets and staffing remained inadequate, and planned infrastructure developments proved to be little more than a mirage. An illustrative example was the announcement by the Belgian government in response to these CPT reports that a so-called 'Penitentiair observatie en klinisch onderzoekscentrum' (POKO) would be created; this would be a clinical observation centre designed specifically to address the need for proper mental health assessments. The centre was, however, never realized in practise (Casselman, 2009; Heimans, Vander Beken, & Schipaanboord, 2014). Nonetheless, the Belgian government enjoyed a period of relative calm before the issue of mental health came back into the headlines in 2011 with the case of De Donder and De Clippel,[9] in which the parents of a young interned offender successfully lodged a case alleging the violation of Article 2 (right to life) and Article 5 ECHR due to their son's detention in the ordinary section of a prison.

With hindsight, the De Donder and De Clippel case seems to have started the avalanche of judgements that we are currently witnessing, as this time barely one year passed before a new judgement was given. In the case of L.B. v. Belgium, the applicant claimed, again based on the conditions and timespan of his detention, that there had been violations of Articles 5 §1 and 6 ECHR In its judgement, the Court made an assessment from the point of view of the applicant by taking into account the severity and treatability (L.B. v. Belgium, paras 94, 99,

[3] As such, differences between the Member States' legal approach towards offenders with a mental illness – for instance, the referenced Belgian system of 'internment', the Dutch system of 'TBS' or the English-Welsh approach of 'diversion' – may imply a different legal outcome in terms of offender liability (see, f.i. Verbeke et al., 2015) but are taken into account for this article insofar as they result in the deprivation of liberty.

[4] Council of the European Union (2001). Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. OJ L 190/1, 18.07.2002.

[5] L.B. v. Belgium, 2 January 2013 (22831/08); Dufoort v. Belgium, 10 April 2013 (43653/09); Claes v. Belgium, 10 April 2013 (43418/09); Swennen v. Belgium, 10 April 2013 (53448/10); Caryn v. Belgium, 9 January 2014 (43687/09); Lankester v. Belgium, 9 January 2014 (22283/10); Plaisier v. Belgium, 9 January 2014 (28785/11); Gelaude v. Belgium, 9 January 2014 (43733/09); Moreels v. Belgium, 9 January 2014 (43717/09); Oukili v. Belgium, 9 January 2014 (43663/09); Saadouni v. Belgium, 9 January 2014 (50658/09); Van Meroye v. Belgium, 9 January 2014 (330/09); Smits and others v. Belgium, 3 February 2015 (49484/11, 53703/11, 4710/12, 15969/12, 49863/12, 70761/12); Vander Velde and Soussi v. Belgium and the Netherlands, 3 February 2015 (49861/12 & 49870/12).

[6] Under this heading these constitute, as aforementioned, so-called internees under the Belgian system. As such, they may not be considered as offenders by other legal systems, in part due to the fact that they will not necessarily be people who have been convicted by a (criminal) court or have been through (criminal) trial and procedures.

[7] Before the entry into force (in 1998) of Protocol 11 of the ECHR, individuals did not have direct access to the Court and had to lodge their application with the Commission; the Commission would then launch a case before the Court should it deem the case well-founded.

[8] Aerts v. Belgium, 30 July 1998 (25357/94).

[9] De Donder and De Clippel v. Belgium, 6 December 2011 (8595/06).

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