Research project EUPRETRIALRIGHTS

Improving the protection of fundamental rights and access to legal aid for remand prisoners in the European Union

ANALYSIS OF NATIONAL LAW

National norms as regard to access of detained persons to the law and to court

Report on BELGIUM

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April 2019

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This report is part of the research project EUPRETRIALRIGHTS from the consortium of partners :

Centre National de la Recherche Scientifique
Laboratoire SAGE, Université de Strasbourg
CESDIP, Université de Saint Quentin en Yvelines/Ministère de la Justice
European Prison Litigation Network
University of Utrecht, Montaigne Centre for Rule of Law and Administration of Justice
Helsinki Foundation for Human Rights, Poland
Dortmund University of Applied Sciences and Arts
University of Florence, L'Altro diritto - Inter-university Centre
Bulgarian Helsinki Committee
Ghent University, Institute for International Research on Criminal Policy
General Council of Spanish Bars
Pontifical University of Comillas

This project was funded by the European Union's Justice Programme (2014-2020).

1. INTRODUCTION

1.1 AIM AND METHODOLOGY OF THE NATIONAL LAW STUDY

Work Package 2 of the EUPRETRIALS-project aims to provide an in-depth analysis of the national legal system about prisoners' access to rights, access to legal support and access to legal aid. This report thus provides insight in the provisions of the Belgian legislation and clarifies Belgian policy on the subject.

The research for this report on national law was conducted in two different stages. The first research stage consisted of a literature review to identify the relevant legal instruments and case law in respect of legal support and legal aid. Legal and scientific databases were used, such as Jura and Jurisquare.[1]

The relevant legal instruments are:

- Basic principles act of 12 January 2005 concerning the administration of the prison system and the legal position of detainees (further: Prison Act);[2]
- Four Royal Decrees arranging the entry into force of different articles of the aforementioned law:
    - The Royal Decree of 28 December 2006 concerning the administration of the prison system and the legal position of detainees (further: RD2006);[3]
    - The Royal Decree of 8 April 2011 concerning the establishment of the date of the entry into force and the executions of several provisions of title VII of the Basic principles act of 12 January 2005 concerning the administration of the prison system and the legal position of detainees (further: RD2011(VII));[4]
    - The Royal Decree of 8 April 2011 concerning the establishment of the date of the entry into force and the executions of several provisions of titles III and V of the Basic principles act of 12 January 2005 concerning the administration of the prison system and the legal position of detainees (further: RD2011(III/V);[5]
    - The Royal Decree of 19 July 2018 concerning the establishment of the date of entry into force and the executions of the provisions of the Basic principles act of 12 January 2005 concerning the administration of the prison system and the legal position of detainees regarding the supervision and the handling of complaints and objections, and amending the Royal Decree of 21 May 1965 establishing the general rules of the penitentiary institutions (further: RD2018);[6]

[1] Both Jura and Jurisquare are databases offering Belgian legal and academic publications.
[2] Basiswet van 12 januari 2005 betreffende het gevangeniswezen en de rechtspositie van gedetineerden, *BS* 1 februari 2005. Not all provisions of the Prison Act have entered into force.
[3] Koninklijk besluit van 28 december 2006 betreffende het gevangeniswezen en de rechtspositie van de gedetineerden, *BS* 4 januari 2007.
[4] Koninklijk Besluit van 8 april 2011 tot bepaling van de datum van inwerkingtreding en uitvoering van verscheidene bepalingen van titel VII van de basiswet van 12 januari 2005 betreffende het gevangeniswezen en de rechtspositie van gedetineerden, *BS* 21 april 2011.
[5] Koninklijk Besluit van 8 april 2011 tot bepaling van de datum van inwerkingtreding en uitvoering van verscheidene bepalingen van titel III en V van de basiswet van 12 januari 2005 betreffende het gevangeniswezen en de rechtspositie van gedetineerden, *BS* 21 april 2011.
[6] Koninklijk Besluit van 19 juli 2018 tot bepaling van de datum van inwerkingtreding van de bepalingen van de basiswet van 12 januari 2005 betreffende het gevangeniswezen en de rechtspositie van de gedetineerden, met betrekking tot het toezicht en de afhandeling van klachten en bezwaar, en tot wijziging van het Koninklijk Besluit van 21 mei 1965 houdende algemeen reglement van de strafinrichtingen, *BS* 24 september 2018.

- The Royal Decree of 21 May 1965 establishing the general rules of the penitentiary institutions (further: RD1965);[7]
- The Judicial Code (further: JC);[8]
- The Code of Criminal Procedure (further: CCP);[9]
- The Pre-trial Detention Act of 20 July 1990;[10]
- The Police Service Act of 5 August 1992;[11]
- The Coordinated laws of 12 January 1973 on the Council of State;[12]
- Several Collective Letters.[13]

The relation between these instruments will be explained later. Besides the aforementioned national legal instruments, other instruments have been taken into account, such as the internal regulations of prisons and documents of the bar associations. Policy papers on the drafting and implementation of the aforementioned legislation were also used to clarify public policy and the aim of the legislator.

The second research stage consisted of the legal analysis of all said legal instruments as well relevant policy documents and case law.

1.2 CONTEXT: STATE STRUCTURE AND LEGAL BACKGROUND

1.2.1 BELGIUM'S INSTITUTIONAL STRUCTURE

In order to understand the legal framework concerning pre-trial detention, legal support and legal aid, we shall commence with a short description of Belgium's institutional structure. As it stands, the competence to regulate pre-trial detention, legal support and legal aid is shared between multiple governments, depending on the kind of legal support or legal assistance. In Belgium, legal support is split into **legal first-line support and legal second-line support**.[14] Legal first-line support refers to the provision of legal information and a first legal advice, whereas legal second-line support refers to detailed legal advice and/or the assistance of a pro deo lawyer.[15] **Legal assistance** refers to the system responsible for granting advance payments for legal costs.[16]

Belgium is a federal state, comprising three Communities and three regions. The three Communities have been established on the basis of the region's official language (thus leading to a Flemish Community, the French Community and the German-speaking Community)[17] and have competences on (broad) cultural matters such as

[7] Koninklijk Besluit van 21 mei 1965 houdende algemeen reglement van de strafinrichtingen, *BS* 25 mei 1965.
[8] Gerechtelijk wetboek.
[9] Wetboek van Strafvordering.
[10] Wet van 20 juli 1990 betreffende de voorlopige hechtenis, *BS* 14 augustus 1990.
[11] Wet van 5 augustus 1992 op het politieambt, *BS* 22 december 1992.
[12] Gecoördineerde wetten van 12 januari 1973 op de Raad van State, *BS* 21 maart 1973.
[13] Collective letters are circulars, drafted by the government and directed to the prison administration, in which existing legislation is further clarified and the practical implementation of the rules are discussed. Prisoners cannot derive any rights from these Collective Letters and they are usually not made public.
[14] A*ide juridique de première et de deuxième ligne* in French, *juridische eerstelijnsbijstand en juridische tweedelijnsbijstand* in Dutch.
[15] Gerechtelijk wetboek, art.508/1, 1°.
[16] *Assistance judiciaire* in French, *rechtsbijstand* in Dutch. The concepts of legal first-line support, legal second-line support and legal aid are explained in detail later in this report.
[17] Respectively called the *Vlaamse Gemeenschap* (Dutch-speaking), the *Fédération Wallonie-Bruxelles* (French-speaking) and the *Deutschsprachige Gemeinschaft* (German-speaking).

culture, education and language. The three regions (the Flemish Region, the Brussels Capital Region and the Walloon Region)[18] are competent for territorial matters, such as economy, employment and agriculture. Issues such as foreign affairs, national defence, finance and social security remain competences of the federal state. Due to several consecutive state reforms important aspects of social and health care policy no longer belong to the competence of the Federal (Belgian) State, but were transferred to the Communities and/or Regions. For a long time justice fell under the exclusive competence of the federal state but due to the sixth state reform the Houses of Justice, which are in charge of executing aspects of non-custodial sentences in their respective Community, have been transferred to the competences of the Communities as of 1 January 2015 (Law of 6 January 2014).[19] Thus, **custodial measures that can be applied at the pre-trial stage** fall within the competence of the **federal state** (arrest, detention on remand or pre-trial detention) whereas the execution of alternative measures belong to the competence of the Communities (electronic monitoring (partly), community service, etc.). The sixth state reform also transferred the competences regarding **legal first-line support** to the **Communities**, whereas the **Federal State** remained competent for **legal second-line support and legal assistance.**[20]

1.2.2 THE LEGAL FRAMEWORK ON PRE-TRIAL DETENTION, LEGAL AID AND LEGAL SUPPORT

The distribution of competences between the Federal State and the Communities results in different legal instruments regulating legal assistance and legal support provided to pre-trial detainees.

Criminal proceedings are laid out in the Code of Criminal Procedure (**CCP**). However, pre-trial detention is since 1990 subject to separate legislation, contained in the **Pre-Trial Detention Act**.

Legal provisions regarding the prison regime applicable to pre-trial detainees as well as already sentenced prisoners can be found in two main legislative instruments. There is the Royal Decree of 21 May 1965 establishing the general rules of the penitentiary institutions (**RD1965**). This Royal Decree was meant to be replaced in 2005 by the Basic principles act of 12 January 2005 concerning the administration of the prison system and the legal position of detainees (**Prison Act**). Several Royal Decrees are responsible for the entry into force of different parts of the Prison act. Four of them will be mentioned in this report: the Royal Decree of 28 December 2006 concerning the administration of the prison system and the legal position of detainees (**RD2006**), the Royal Decree of 8 April 2011 concerning the establishment of the date of the entry into force and the executions of several provisions of title VII of the Law on principles of 12 January 2005 concerning the administration of the prison system and the legal position of detainees (**RD2011(VII)**), the Royal Decree of 8 April 2011 concerning the establishment of the date of the entry into force and the executions of several provisions of titles III and V of the Law on principles of 12 January 2005 concerning the administration of the prison system and the legal position of detainees (**RD2011(III/V)**) and the Royal Decree of 19 July 2018 concerning the establishment of the date of entry into force and the executions of the provisions of the Basic principles act of 12 January 2005 concerning the administration of the prison system and the legal position of detainees regarding the supervision and the handling of complaints and objections, and amending the Royal Decree of 21 May 1965 establishing the general rules of the penitentiary institutions (further: **RD2018**). However, the Prison Act has not entered fully into force

[18] Respectively called the *Vlaams Gewest*, *Brussels Hoofdstedelijk Gewest* and *Région wallone*.
[19] Houses of Justice are called *maisons de justice* in French or *justitiehuizen* in Dutch.
[20] Vlaams Parlement, *Groenboek Zesde Staatshervorming: deel 6 justitieel beleid*, 16 September 2013, http://www.vlaanderen.be/nl/publicaties/detail/groenboek-zesde-staatshervorming.

yet. The RD1965 is thus still partly applicable in anticipation of the entry into force of the other legal provisions of the Prison Act, more than 13 years after the latter was adopted in parliament.

The provisions regarding legal support and legal assistance can be found in the (federal) Judicial Code **(JC)**. Due to the sixth state reform however, the Communities are responsible for legal first-line support since 2015. The French Community has since adopted new legislation on the matter, namely the Decree of 13 October 2016 concerning the approval and subsidisation of partners providing support to litigants.[21] The provisions in the Judicial Code still apply in the Flemish Community as it has not adopted any new legislation since the transfer of powers.

1.2.3 PRE-TRIAL DETENTION IN BELGIUM: LEGAL BACKGROUND[22]

Pre-trial detention in a broad sense refers to three categories of deprivation of liberty:

1. **Judicial arrest**[23]
   Based on article 1 to 2*bis* of the Pre-trial Detention Act, the police can judicially arrest a suspected person. Belgian law distinguishes two grounds for a judicial arrest. On the one hand, the police can judicially arrest persons when they are caught within the act of a crime. On the other hand, the public prosecutor or the investigating judge can order a judicial arrest in case there are serious indications of guilt. Regardless on which grounds the suspected person has been judicially arrested by the police, he or she can only be held in police custody for a maximum period of 48 hours.
2. **Order to appear**[24]
   According to article 3 to 5 of the Pre-trial Detention Act, an order to appear can to be issued by an investigating judge. It is meant to bring a suspect in for questioning. He or she can only be held in police custody for a maximum period of 48 hours. The order to appear can also be issued for a witness who failed to comply with a summons to appear in court. The investigating judge has to question the person deprived of his liberty without undue delay after issuing the order to appear.
3. **Arrest warrant**[25]
   An investigating judge can issue an arrest warrant for a suspected person when it is deemed absolutely necessary for public security and when the criminal offence is punishable with a prison sentence of one year or more. If the maximum sentence for the criminal offence does not exceed 15 years of imprisonment, additional grounds are required for issuing an arrest warrant: a risk of recidivism, absconding, collusion or destroying evidence. Before the arrest warrant can be issued, the suspect must be heard by the investigating judge (art. 16 Pre-trial Detention Act). The arrest warrant is not subject to appeal (art. 19). There is no absolute maximum length of pre-trial detention following an arrest warrant but a judicial review of the pre-trial detention is required on regular intervals. The first review takes

[21] Décret du 13 octobre 2016 relatif à l'agrément et au subventionnement des partenaires apportant de l'aide aux justiciables, *BS* 12 december 2016.
[22] This description is based on Maes, E., Jonckheere, A., Deblock, M., Hovine, M., DETOUR – Towards Pre-Trial Detention as Ultima Ratio – 1st Belgian National Report, Brussels: NICC, October 2016 (p.6) (report available via http://www.irks.at/detour/publications.html).
[23] A*rrestation judiciaire* in French or *gerechtelijke aanhouding* in Dutch.
[24] *Mandat d'amener* in French or *bevel tot medebrenging* in Dutch.
[25] *Mandat d'arrêt* in French or *aanhoudingsbevel* in Dutch.

place within five days after the arrest warrant was issued, the second review takes place a month later and further reviews are required on a two months basis (art. 21-22).[26]

Although all three categories fall within the scope of the Pre-trial Detention Act, the term "pre-trial detention" is commonly used only to refer to the latter form of deprivation of liberty (i.e. detention based on an arrest warrant). Equally, this report discusses pre-trial detention based on an arrest warrant, unless explicitly mentioned otherwise.

1.3 THE DETENTION REGIME APPLICABLE TO PRE-TRIAL DETAINEES

1.3.1 PLACES WHERE PRE-TRIAL DETENTION TAKES PLACE

Suspects deprived of their liberty stay either **in prison or in police custody**. People can only be held **in police custody** for a **maximum period of 48 hours**.

Persons in administrative detention (e.g. for reasons of public disorder or public safety) may only remain in police custody for a period of maximum 12 hours. In case administrative detention is followed by judicial arrest, police custody can still not exceed 48 hours (art. 31-32 Police Service Act). The investigating judge hears the detained person within the 48 hours period and subsequently either releases him or her or issues an arrest warrant against him or her. In case of the latter, the detained person may be granted conditional release or electronic monitoring or may be transferred to a prison.

The investigating judge who issued the arrest warrant may order that the suspect be detained in the prison located where the investigation is conducted. If such is not the case, the suspect resides in the prison of the district where he was found. Aforementioned decisions are not subject to appeal (art. 19, § 1, § 3 Pre-trail Detention Act). In general, i.e. in as far other legal instruments such as the Pre-trial Detention Act do no not provide otherwise, the place of imprisonment is decided by the prison administration (art. 18 Prison Act). Because the place of imprisonment can have major implications for a prisoner's relations with the outside world, his opportunities for employment and education, etc., the Prison Act foresees that a prisoner can file a complaint against this decision with the director-general of the prison service and appeal his decision with the independent Appeal Committee of the Central Prison Supervisory Body (art. 163-166 Prison Act, for more information on these complaints mechanisms, see *infra*). As the relevant Prison Act provisions have not yet entered into force, no complaints regarding the place of imprisonment can be made to date.

Pre-trial prisoners are presumed to be innocent as long as they have not yet been sentenced. Therefore pre-trial detention should not be similar in nature to punitive sentences (art. 10 and 13 § 1 Prison Act). As a consequence, the Prison Act provides that pre-trial prisoners are kept separate from sentenced prisoners and should be housed in different prisons or separate prison wings (art. 11 and 15, § 2, 1°). However, these provisions have not yet entered into force. Other legal instruments have taken effect however, which ensure that men are separated from women (art. 4 RD1965).

The presumption of innocence equally implies that pre-trial prisoners should have access to all facilities that are compatible with order and safety. In particular, they should be given the opportunity to prepare the legal

[26] Before 1 July 2016 a monthly review was required instead of a two monthly review. See the Act of 5 February 2016 amending criminal law and criminal procedure and containing several provision on justice, *BS* 19 February 2016.

proceedings against them adequately and should therefore have access to **all necessary facilities to ensure their right of defence** (e.g. access to documents and contacts and consultation with a lawyer) (art. 11-13 Prison Act).

1.3.2 VISITING ARRANGEMENTS (ART. 58-63 PRISON ACT)

Pre-trial prisoners have the right to receive daily visits, whereas sentenced prisoners have the right to three visits a week. Visits should last at least one hour. Relatives by blood or marriage up to the first degree, his or her guardian, the spouse, the legally or factually cohabiting partner, brothers, sisters, uncles and aunts are admitted to visit the prisoner after having demonstrated their status. Other visitors need prior authorization by the prison director before being admitted to the visit. Practical arrangements (times, premises, rules concerning the visit) are can be found in the internal regulations of each prison. The Prison Act further determines that visits should take place in circumstances that maintain or promote the links with the affective environment. Therefore, visits only exceptionally take place "behind glass" (i.e. prisoners and visitors should not be separated by a plastic partition). During the visit, supervision is exercised. Furthermore, after one month of detention (art. 15 RD2011(III/V)), every prisoner has the right to undisturbed visits for at least two hours, at least once a month. Undisturbed visits takes place in a separate room where no supervision is exercised. The room can be locked from the inside so that the prisoner and his or her visitor can spend time together in privacy.[27] Prisoners may request undisturbed visits with relatives by blood or marriage to the first degree, their guardian, their spouse, their legally or factually cohabiting partner and their brothers, sisters, uncles and aunts. Other persons have to demonstrate a legitimate interest for at least 6 months, which allows believing in the sincerity of the relationship with the prisoner before being allowed an undisturbed visit. Undisturbed visits are not limited to one person. Several persons, including minors, can be admitted during the visit at the same time.[28]

1.3.3 LABOUR (ART. 62-66 RD1965)

Prisoners who work in prison are not considered regular employees and thus do not enjoy social security rights (such as pension rights and disability benefits), labour rights or an employment contract.

Prison labour is organised by articles 62 to 66 of the Royal Decree of 1965. These provisions determine that **prison labour is optional for pre-trial detainees** and that priority is given to suspected and accused persons who ask for work. Prisoners receive a remuneration of minimum €0.62 (apprentice or servant) to minimum € 0.79 per hour (skilled labourer), depending on their position.[29] This remuneration is subject to management costs, which results in four tenths going to the state to cover management costs.

Articles 81 to 86 of the Prison Act, regulating prison labour, have not entered into force due to the lack of a Royal Decree. Nonetheless, based on art. 133, 6°, prisoners can be suspended from joint prison work for a maximum period of 30 days as a disciplinary sanction.

[27] FOD Justitie, *Soorten bezoek*, https://justitie.belgium.be/nl/themas_en_dossiers/gevangenissen/gedetineerde_bezoeken/soorten_bezoek#a3.

[28] Collective Letter nr.107 of 16 June 2011 regarding the entry into force of several provisions of title III and V of the Prison Act.

[29] Art. 1 Ministerial Decree of 1 October 2004 establishing the wages paid to inmates, *BS* 3 November 2004.

1.3.4 MEDICAL SERVICES (ART. 96-104 RD1965)

Ill prisoners are treated by the physician of the prison.[30] If the prisoner concerned is a pre-trial prisoner, he or she may rely on a self-chosen physician. However, if they choose to do so, prisoners bare the full medical cost themselves, since prisoners do not enjoy social security rights**.** If the condition requires treatment that cannot be provided by the prison itself, the pre-trial prisoner may be transferred to a penitentiary medical and surgical centre, situated in the prisons of Saint-Gillis (Brussels), Bruges or Lantin[31]. In case the pre-trial prisoner suffers from mental disorders, attempted to commit suicide, or suffers from epilepsy, the judicial authority is immediately informed hereof so it can take appropriate measures.

1.3.5 RESTRICTIVE AND DISCIPLINARY MEASURES (ART. 110-139 PRISON ACT)

There are roughly two kinds of restrictive measures that may be imposed on a: special security measures and disciplinary measures. Security measures differ from disciplinary measures in that the former are preventive of nature while the latter are reactive and thus target events that have already occurred.[32]

Special security measures may be imposed by the director of the prison in case of serious indications of a threat to order or security. The following measures may be imposed, individually or in combination: deprivation of objects; exclusion from certain joint or individual activities; observation during the day and at night; compulsory stay in an allocated prison cell and the transfer to a secure prison cell. These measures may not last longer than seven days, but may renewed up to three times. Prisoners subject to a security measure maintain the right to contact with the outside world, including **oral and written communication with the lawyer**, in so far as exercising this right is not incompatible with the security measure. Specifically with regard to the compulsory stay in the allocated prison cell and the transfer to a secure prison cell, the director of the prison must ensure that a prisoner can **call upon the services of a lawyer and can exercise his right to legal support** (art. 110-115 Prison Act).

Prisoners may also be subject to an **individual special security regime**. This decision is taken by the director-general of the prison administration, on the proposal from the prison director. Prior to submitting the proposal, the prisoner may present his defence, assisted by his lawyer if desired. The regime entails of one of the following measures or a combination of several of them: exclusion from joint activities; systematic controls of correspondence; restricting visits to a room equipped with a transparent partition; restricting telephonic communication; systematic application of pat down searches or the application of one or more special security measures. The decision applies for the period as determined by the director-general, with a maximum of two months, and may be renewed. Prisoners may appeal these decisions with the independent Appeal Committee of the Central Prison Supervisory Body, starting on 1 April 2020 (since the relevant legal provision will enter into force then). However, the decision is immediately enforceable, whether or not an appeal is lodged. Minors cannot be placed in an individual special security regime (art. 116-118 Prison Act).

The individual special security regime is enforced in a specific unit in two Belgian prisons, being Bruges and Lantin. These units are specifically aimed at both pre-trial and sentenced male prisoners who show extreme and

[30] See also Eechaudt, V., Vander Laenen, F. & Vander Beken, T., *Organisation of health care in Belgian prisons – legal framework. KCE Reports 293*, Brussels, Belgian Health Care Knowledge Centre (KCE), 2017.
[31] Snacken, S. & Beyens, K., "Gevangeniscapaciteit, gevangenisbevolking en gevangenispersoneel: kwantitatieve evoluties" in Beyens, K. & Snacken, S. (eds.). *Straffen. Een penologisch perspectief*. Antwerp, Maklu, 2017, p.260.
[32] Snacken, S. & Kennes, P., "De interne rechtspositie van gedetineerden" in Beyens, K. & Snacken, S. (eds.). *Straffen. Een penologisch perspectief*. Antwerp, Maklu, 2017, 455.

persistent behavioural problems associated with aggression towards staff or fellow prisoners. The establishment of these specific units prevents a so-called *carousel-system*, in which prisoners are transferred between prisons every few months. Such a carousel-system not only made it more difficult for lawyers to maintain contact with their client, but could also affects the prisoner's well-being, as was illustrated by the ECtHR-case *Bamouhammad v. Belgium* (2015). Based on arguments related to his behaviour, Farid Bamouhammad was continuously transferred between prisons. The European Court of Human Rights found a violation of articles 3 (prohibition of inhuman or degrading treatment) and 13 (right to an effective remedy). The Court recommended that Belgium should introduce a legal remedy under Belgian law for prisoners to complain about transfers and special measures such as those imposed on Bamouhammad. He was eventually diagnosed with the syndrome of Ganser, a rare condition occurring in detention due to extreme stress and lengthy periods of isolation in prison, and has been provisionally released for medical reasons.[33]

Disciplinary measures may be imposed by the prison director, except for when the disciplinary offence was committed against the prison director. The Prison Act distinguishes general disciplinary sanctions, which may imposed regardless of the nature of the infringement, and special disciplinary sanctions. The latter may only be imposed in case there is a clear link between the sanction and the nature of the offence or the circumstances in which the disciplinary offence has occurred.

General disciplinary sanctions include, amongst others, solitary confinement in an allocated prison cell, for a maximum duration of thirty days, and solitary confinement in a punishment cell, for a maximum duration of nine days, with the exception for a maximum period of fourteen days in the event of hostage taking. Solitary confinement in a punishment cell cannot be imposed on pregnant women or Prisoners whose child under the age of three years stays in the prison. In case of solitary confinement in a punishment cell the director of the prison must ensure that a prisoner can call upon the services of a lawyer and can exercise his right to legal support (art. 122-146 Prison Act).

1.4 BODIES ENTITLED TO RECEIVE FORMAL COMPLAINTS, AND THEIR EFFECTIVENESS WITH REGARD TO ARTICLE 13 ECHR

1.4.1 THE COMPLAINTS COMMITTEE

The Prison Act foresees the creation of a **complaints mechanism** largely modelled on the complaints mechanism in Dutch prisons. According to the Prison Act's legal provisions, a complaints committee will be established within the prisons themselves. The committee should therefore be acquainted with the detention climate and the realities of prison life. The committee should function as an easily accessible, impartial and independent complaints body. The subject of the complaint is limited to decisions taken by the prison director (or on behalf of the prison director) which affect the prisoner. The omission or refusal to take a decision within the legally foreseen time limits, or within a reasonable period in the absence hereof, can also be subject to a complaint. The complaint procedure is free and adversarial.

The complaints procedure is designed in such a way that it complaints of prisoners should be dealt with in a simple and rapid manner. There are only few formalities: the complaint should be 'as accurately possible' within seven days after the prisoner was informed of the decision. The complaints committee, consisting of three members, then has two weeks tops to pronounce its judgement. In case of urgency, e.g. when a prisoner incurred

[33] Casier, I. & Kennes, P., "De voorlopige invrijheidstelling om medische redenen in het licht van de zaak Bamouhammad", *Tijdschrift voor Strafrecht* 2015, 97-101.

a disciplinary punishment consisting of solitary confinement, or if the case is obvious, the chair of the complaints committee may decide on his own. The complaints committee has the competence to modify or annul the decision taken by the prison director or to compel the latter to take a new decision. In case of annulment, the committee may decide to compensate the prisoner if the decision of the prison director has led to consequences that cannot be undone. Monetary compensations cannot be granted however. The possibility to appeal a decision of the complaints committee is foreseen.

The establishment of a complaints committee tailored to prison practices was considered a measure that positively discriminates prisoners. However, this was considered necessary, as the specificity of the prison situation requires its own appropriate procedure of internal conflict mediation and conflict resolution.[34] The legal provisions regarding the complaints mechanism are foreseen to enter into force on 1 April 2020 (art. 147-166 Prison Act, RD2018). The delayed entry into force of complaints mechanism was justified by the Minister of Justice as follows: *"Our adage is "first things first". This means that we prioritized our resources and efforts to address the 'basic needs': an infrastructure which ensures humane and secure detention conditions, uniform rules in all prisons, proper provisions for prison visits, prison labour, education, as well as strengthening the partnerships with the Communities who too are responsible for assisting prisoners."*[35]

1.4.2 THE LEGAL REMEDIES AVAILABLE TO THE GENERAL PUBLIC.

As it stands, prisoners are limited to the use of legal remedies available to the general public.[36] First, if a prisoner suffers damages from a fellow prisoner, a member of the prison staff or the prison administration, he can file a **civil claim for compensation via the Civil Court** based on art. 1382 of the Belgian Civil Code. This article stipulates that anyone who causes damages must compensate those damages. Nevertheless, prisoners rarely claim compensation, due to difficulties to provide proof of the fault, the harm done and the link between them.[37]

In case a crime has been committed against a prisoner, such as assault or battery, the prisoner can **bring a civil claim before the investigative judge** (art. 4 CCP), in order to get the case referred to the correctional court and get the perpetrator convicted.[38] This kind of action is also rarely undertaken by prisoners, as they fear retaliation and encounter difficulties to bring enough evidence before court due to the prison context.[39]

If the prisoner's subjective rights are violated, he or she can initiate **interlocutory proceedings before the Court of First Instance**. The judge can take provisional measures to prevent the possible violation of fundamental rights (art. 584 JC). Turning to the judge in interlocutory proceedings is only possible if the situation is so urgent that

[34] *Ibid.*, p.97
[35] *Vr. en Antw. Kamer* 2011-12, 5 December 2011, nr. 48, 212 (Vr. nr. 581 S. De Wit).
[36] Nederlandt, O., "La surveillance des prisons et le droit de plainte des détenus : jusqu'où ira le bénévolat ?" *Journal des tribunaux,* 2017, 541-554; Snacken, S. & Kennes, P., "De interne rechtspositie van gedetineerden" in Beyens, K. & Snacken, S. (eds.) *Straffen. Een penologisch perspectief*. Antwerp, Maklu, 2017, 464; Moreau, T. & Hoffman, C., "Les droits de la défense du détenu dans l'exécution des peines privatives de liberté" in Masset, A. (ed.), *L'exécution des condamnations pénales*, Liège, Anthemis, 2008, 57-67.
[37] Beernaert, M., & Tulkens, F. *Manuel de droit pénitentiaire*, Limal, Anthemis, 2012, 360.
[38] Snacken, S. & Kennes, P., "De interne rechtspositie van gedetineerden" in: Beyens, K. & Snacken, S. (eds.), *Straffen. Een penologisch perspectief*. Antwerp, Maklu, 2017, 464.
[39] Meunier, Ch., Pevee, Ch. & Berbuto, S., "Les recours sur le plan judiciaire" in *La peine et le droit; L'exécution des peines dans tous ses états*, Colloque du 29 janvier 1999 du Jeune barreau de Liège, 2000, 89-91 ; Beernaert, M., & Tulkens, F. *Manuel de droit pénitentiaire,* Limal, Anthemis, 2012 ; 360 ; Smaers, G., "Les possibilités de plainte existant pour les détenus" in De Valkeneer, C., Tubex, H., Durviaux, S. (eds.), *Position en droit et droit de plainte du détenu*, Bruxelles, La Charte, 1997, 88.

immediate action is required.[40] Interlocutory proceedings have thus been initiated for continuing a previously started methadone treatment of a drug addict in prison and for ensuring the necessary psychiatric treatment for mentally ill prisoners.[41] Although recourse to interlocutory proceedings is only possible for urgent situations, one of the main problems is the difficulty to react promptly when immediate action is required.[42]

Regarding administrative decisions, prisoners can turn to **the Council of State** to appeal against the violation of formal requirements, whether substantial or prescribed on the penalty of nullity, or the abuse of misuse of power.[43] For example, the Council of State has ruled on the imposition of a disciplinary sanction of 21 days of solitary confinement in a prison cell for the refusal of prisoners to return to their prison cells. Some substantial aspects of the disciplinary offence were not met, such as the requirement of a *violent* refusal.[44] The Council of State also issues preliminary rulings in case a decision of the prison director may lead to serious and nearly irreparable damage.[45] Thus, the Council of State has ruled upon the refusal of the prison administration to grant a prisoner electronic monitoring (instead of regular imprisonment), taking into account the harmful consequences of imprisonment and the impact it had on his employment and family life.[46]

Laws, decrees and ordonnances (the latter two are laws issued by the Communities and regions) in violation with the rights and freedoms stipulated in the Belgian Constitution (art.8-32)[47] or issued by a non-competent entity (e.g. issued by the Flemish government on a topic which is the sole competence of the federal government) may be nullified by **the Constitutional Court**. In the past, the Court has nullified the provisions in the Prison Act on systematic strip searches.[48]

Prisoners can also appeal to **the Court of Cassation**, which can overturn a final judgment made by a lower court, in full or in part. The Court of Cassation does not re-examine the facts of the case, but instead reviews whether the law was interpreted correctly and ensures that jurisprudence is consistent. If a judgment is overturned by the Court of Cassation, the case will be referred to another court of the same level as the court that pronounced the original judgment. In the past, the Court of Cassation has ruled upon whether or not was the principle of *ne bis in idem* was violated after criminal proceedings were initiated following a disciplinary sanction for the same facts. The Court of Cassation ruled that the principle of *ne bis in idem* does not prevent a prisoner from being sanctioned twice, as long as both sanctions are not of a criminal nature. Disciplinary sanctions are only deemed to be of a criminal nature when they prolong the period of imprisonment that was imposed (in line with the jurisprudence of the European Court of Human Rights (further: ECtHR)).[49]

[40] Van Den Berghe, Y., "De tussenkomst van de rechter in detentiegeschillen" (noot onder Gent 11 mei 2005), *Tijdschrift voor Strafrecht* 2006, 94-98.
[41] See Snacken, S. & Kennes, P., "De interne rechtspositie van gedetineerden" in: Beyens, K. & Snacken, S. *Straffen. Een penologisch perspectief*, Antwerp: Maklu, 2017 , 465.
[42] Moreau, T. & Hoffman, C., "Les droits de la défense du détenu dans l'exécution des peines privatives de liberté" in: Masset, A. (ed.), *L'exécution des condamnations pénales*, Liège, Anthémis, 2008, 67.
[43] Art. 14 Coordinated laws on the Council of State.
[44] RvS 8 February 2016, nr. 233.773; RvS 9 February 2016, nr. 233.786; RvS 9 February 2016, nr.233.787.
[45] Art. 17 Coordinated laws on the Council of State.
[46] RvS 16 November 2000, nr. 90.826.
[47] The Constitutional Court can also test to other articles of the Constitution, but these are in detention context of less relevance.
[48] Snacken, S. & Kennes, P., "De interne rechtspositie van gedetineerden" in Beyens, K. & Snacken, S. (eds.), *Straffen. Een penologisch perspectief*. Antwerp, Maklu, 2017, 465.
[49] ECHR, *Ezeh and Connors v. The United Kingdom*, 2003; Cass. 11 January 2012, *Nieuw Juridisch Weekblad* 2012, 759.

In case of an alleged fundamental rights violation and once all domestic legal remedies have been exhausted, the prisoner may turn to one of the **European courts** (ECtHR or the Court of Justice of the European Union (further: CJEU)) or to the **UN Committee on Human Rights**. For example, the ECtHR found a violation of the right to life (art. 2 ECHR) upon the death of a prisoner following restraining measures by the prison staff.[50]

1.4.3 EFFECTIVITY OF THE CURRENT POSSIBILITIES AVAILABLE FOR PRISONERS

It is argued that the current possibilities for appeal offer no adequate solution for prisoners: the realities of prison life and the fact that the merits of the case are often not re-examined render the appeal process ineffective.[51] Moreover, the fragmentation of legal remedies ensures that "*those who are familiar with criminal law may be less familiar with civil and administrative procedures, while the courts dealing with these matters have little knowledge of the prison environment and its normative framework*".[52]

The ECtHR has stated previously that the current remedies for prisoners in Belgium were ineffective, thus concluding that art. 13 ECHR was violated. In **Vasilescu v. Belgium** (2014), the Court argued that interlocutory proceedings (before the Court of First Instance) and compensatory claims before the civil judge based on art. 1382 of the Civil Code do not constitute an effective remedy.[53] The Court argued that an appeal must be capable of directly remedying the situation complained of and must present a reasonable prospect of success. The ECtHR came to the same conclusion in the case of **Sylla and Nollomont v. Belgium** in 2017.[54] Accordingly, the Court has recommended that prisoners be provided with a remedy capable of putting a stop to an alleged violation or permitting them to obtain an improvement in their conditions of detention.[55]

The ECtHR equally found a violation of article 13 (the right to an effective remedy) in conjunction with article 3 (prohibition of torture) in Bamouhammad v. Belgium (2015). More precisely, the Court stated that the possibilities for appeal that were at the disposal of the prisoner (being compensatory claims before the civil judge, interlocutory proceedings before the Court of First Instance as well as appeals before the Council of State) could not be considered effective remedies as to pursue a claim regarding a violation of art. 3 ECHR. The Court, again, recommended to create an effective remedy in Belgian law, taking into account the situation of those prisoners facing transfers and other measures as those that had been imposed on the applicant. The Court argued that a recourse exclusively aimed at compensating the claimant cannot be considered sufficient when dealing with (alleged) violations of article 3 ECHR, in so far as it does not have a 'preventive effect'. An effective remedy would foresee the rapid cessation of an inhuman and degrading treatment, not a mere compensation. The

[50] ECHR, *Tekin and Arslan v. Belgium*, 2017.
[51] The European Committee for the Prevention of Torture (CPT) stated that the effectiveness a legal remedy is considerably diminished if the merits cannot be re-examined. See CPT, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 26 September 2008*, CPT/Inf (2010) 12, Strasbourg, 20 April 2010, para. 116.
[52] Berbuto, S., Mary, P., & Nève, M., "Garantir les droits en prison: droit de plainte et recours judiciaires" in *Le nouveau droit des peines: statuts juridiques des condamnés et tribunaux de l'application des peines*, Brussels, Bruylandt, 2007, 152.
[53] § 74-75 ECHR, *Vasilescu v. Belgium*, 2014.
[54] § 19-21 ECHR, *Sylla and Nollomont v. Belgium*, 2017.
[55] § 128 ECHR, *Vasilescu v. Belgium*, 2014.

recourses currently open to prisoners are **unable to prevent the continuation of a violation of fundamental rights, nor do they allow prisoners to improve their material conditions of detention**.[56]

In **W.D. v. Belgium** (2016), legal remedies at the disposal of mentally ill offenders, which were detained in prisons, were considered ineffective.[57] In the case concerned, the Court held that the continued detention for more than nine years in a prison environment without suitable treatment for the patient's mental condition or any prospect of social reintegration amounted to degrading treatment. Therefore, the Court found a violation of art. 3 ECHR. Particularly relevant for this study, is the fact that, again, the possibility of introducing a civil claim for compensation under Article 1382 of the Civil Code would not allow an immediate and concrete improvement of the conditions of detention of the applicant or any change of establishment. A favourable decision of the court would simply have the effect of awarding a financial compensation to the applicant for the damage suffered as a result of fault by the competent authorities. Hence, the Court concluded that the action for damages does not fulfil the conditions required to be considered an effective remedy, and found a violation of article 13.[58]

The ECtHR thus repeatedly held that the legal remedies currently available in Belgium are not effective with regards to detention conditions. This point of view has been shared by other organisations such as the Committee for the Prevention of Torture. The latter has recommended Belgium since 1994 that an effective complaint procedure for prisoners should be established, and reiterated this in its latest report of 8 March 2018.[59] Moreover, the ineffectiveness of the current legal remedies was recognized by the parliament while drafting the 2005 Prison Act: "*It has been repeatedly argued that the existing fragmented possibilities for complaints and legal remedies available for the general public only partially meet the requirements of an internal procedural legal position of the prisoners. The analysis of the current Belgian penal law shows that there are currently no specific procedures which allow prisoners to represent their (legal) interests with regard to the decisions that directly concern their life in prison*."[60] The legislator therefore included several provisions in the Prison Act, creating an independent and accessible complaints mechanism. These provisions have not yet entered into force to date (see *supra*).

1.4.4 THE OMBUDSMAN

The current lack of effective remedies in Belgium has lead prisoners to turn to the **Federal Ombudsman** with their complaints. The ombudsman receives several complaints a year and published a 20 page-list of recommendations on prisons in its annual report of 2016. Amongst others, it advises the creation of an independent and effective monitoring body for prisons, the ratification of the Optional Protocol to the UN Convention against Torture, and expressed its concerns regarding the lack of a guaranteed minimum service in

[56] §166-178 ECHR, *Bamouhammad v. Belgium*, 2015.
[57] Internees are persons who have been interned based on the Law of 5 May 2014 on internment, *BS* 9 July 2014. Internment is not a punishment but a security measure for persons with a mental illness who committed a crime due to this mental illness. The aim of internment is both protecting society as well as providing the necessary treatment and care to the internee with a view of his or her reintegration in society. In practice, many internees were detained in prisons as there were only few settings where mental health care was provided in a high security setting.
[58] §153-154 ECHR, *W.D. v. Belgium*, 2016.
[59] CPT, *Rapport au Gouvernement de la Belgique relatif 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 27 mars au 6 avril 2017*, CPT/Inf (2018) 8, Strasbourg, 8 March 2018, 45-46.
[60] Eindverslag van de commissie "basiswet gevangeniswezen en rechtspositie van gedetineerden", *Parl.St.* Kamer 2000-01, nr. 1076/1, 91.

case of a strike.[61] The **Flemish Ombudsman** has a mandate to receive complaints related to the services provided by the department of Welfare, Public Health and Family, since these competences have been transferred to the Flemish Community. It has received complaints concerning medical care in prisons and has forwarded complaints on other topics to the Federal Ombudsman.[62]

1.4.5 PREVIEW: THE ENTRY INTO FORCE OF A COMPLAINTS COMMITTEE

As previously mentioned, the Prison Act foresees the creation of a specific complaints mechanism. Following a 2018 Royal Decree (RD2018), the entry into force of the relevant provisions is scheduled for 1 April 2020. Prisoners will then be able to file a complaint regarding all decisions taken by the prison director affecting them.

The complaints body, while independent, is and internal complaints mechanism, familiar with prison life. The latter is ensured by selecting the members of the complaints committee from the existing local monitoring boards.[63] The hearings are conducted within the prison and complaints may be filed easily by addressing a letter to the committee. There are no requirements as to form for filing the complaints. All of this should ensure that the threshold for filing a complaint is low, and that a complaint may be dealt with swiftly. Moreover, the legislator has clearly wanted to avoid formal procedures as much as possible, stimulating the use of mediation, even after a complaint has been filed. This is done by referring the complaint to the local monitoring board.

Since the complaints mechanism is largely modelled on the Dutch example, the same points of concern may be expressed. First, complaints committees in the Netherlands can barely manage the amount of complaints filed. Hence, the complaints mechanism has become the victim of its own success. This has lead, amongst others, to a considerable delay between the initial complaint and the pronouncement of the verdict. While complaints committees in the Netherlands have four weeks to take a decision, this deadline is not met in most cases (see the chapter on the Dutch remedies). Alas, it might be challenging for Belgian complaints committees to pronounce a verdict within 14 days.

2. LEGAL SUPPORT

As a reminder, in Belgium, legal support is split into legal first-line support and legal second-line support. **Legal first line support refers to the provision of legal information and a first legal advice (i.e. information on rights and duties), whereas legal second-line support refers to detailed legal advice and/or the assistance of a pro**

[61] De federale Ombudsman, *Jaarverslag 2016*, 2017, www.federaalombudsman.be, 48-69.
[62] Vander Beken, T., "Toezicht en beklag m.b.t. detentie in België" in Daems, T., Vander Beken, T., Vermeulen, G. (eds.), *Toezicht op detentie : tekst en context*. Antwerp, Maklu, 2012, 90; Vlaamse Ombudsdienst, *Klachtenboek 2012*, www.vlaamseombudsdienst.be, 138; ; Vlaamse Ombudsdienst, *Klachtenboek 2017*, www.vlaamseombudsdienst.be, 27 & 523.
[63] While the complaints committee is composed out of members of the local monitoring boards, the Constitutional Court has ruled that the complaints committee can be considered to be independent and impartial. It came to this conclusion by explicitly referring to art. 31 § 2 Prison Act, which states that members of the complaints committee are charged exclusively with handling complaints and thus cannot first mediate between a prisoner and the prison administration only to rule on the same case as a member of the complaints committee afterwards. GwH 8 November 2018, nr. 150/2018.

deo lawyer (art. 508/1 JC)**.** Legal assistance refers to granting advance payments for legal costs. See figure 1 for a visual representation of these three different systems.

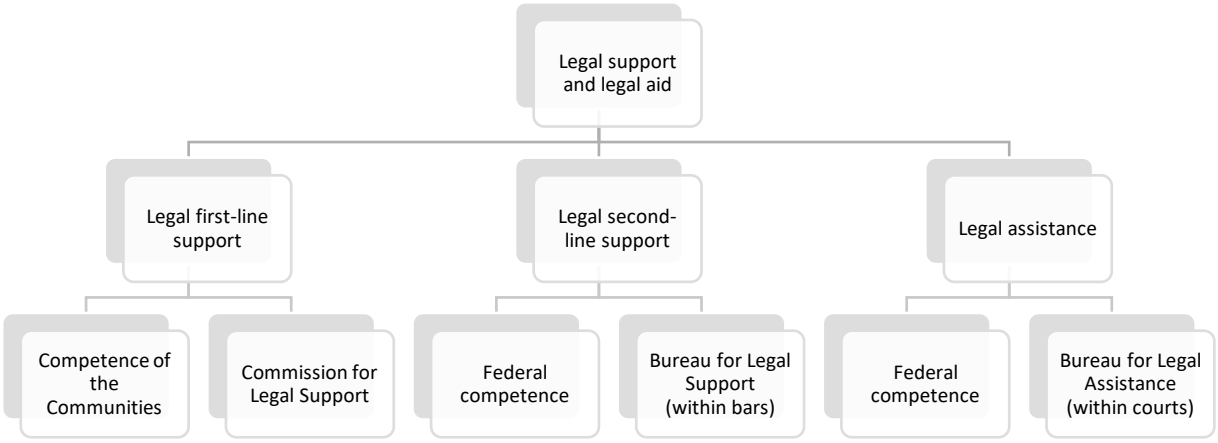

Figure 1: The structure of the legal support and legal aid system in Belgium

The **Commission for Legal Support** is responsible organising legal first-line support and the **Bureau for Legal Support** is responsible for organising legal second-line support. Organising legal first-line support is a competence of the Communities, whereas organising legal second-line support is still a federal competence. More concretely, the Commission for Legal Support is managed by the Department of Welfare, Public Health and Family in Flanders, while the Commission for Legal Support is managed by 'Houses of Justice' (*Maisons de Justice)* in the French-speaking Community.[64] The Bureau for Legal Support is managed by the bar associations.

The **Bureau for Legal assistance** is responsible for organising legal assistance (a federal competence) and is situated within the court of first instance.

In this report, the concept of 'legal aid' shall be used to refer to legal costs (covered by the legal assistance system) and legal representation fees (covered by the legal second-line support system).

2.1 OBLIGATIONS AS REGARD TO LEGAL SUPPORT

2.1.1 TEXTS DEFINING AN OBLIGATION TO PROVIDE LEGAL INFORMATION IN **POLICE CUSTODY**

In Belgium, the right to legal assistance (in Dutch: *recht op rechtsbijstand*) is guaranteed, in a general way, by art. 23 of the Constitution. More specific provisions may be found in other legal instruments.

With regard to **persons administratively arrested** by the police, and consequently in police custody for a period of maximum 12 hours, the obligation to provide legal information is enshrined in art. 33ter Police Service Act.

[64] https://www.departementwvg.be/welzijn-en-samenleving/welzijnswerk/juridische-eerstelijns-bijstand http://www.federation-wallonie-bruxelles.be/index.php?id=60

This provision was added only in 2007, after severe and repeated criticism by the Committee for the Prevention of Torture for the lack of guarantees against ill-treatment.[65]

The obligation to provide legal information to **persons under judicial arrest** by the police, and thus in police custody for a maximum period of 48 hours, is foreseen in article 47bis §2 and §4 CCP. More precisely, it creates an obligation to inform anyone of his or her rights guaranteed by art. 2bis, 16 and 20 §1 of the Pre-trial Detention Act. Both have undergone significant changes following the landmark case *Salduz v. Turkey* before the ECtHR and the EU Directive 2013/48/EU on the right of access to a lawyer.[66]

2.1.2 INFORMATION PROVIDED TO SUSPECTS IN POLICE CUSTODY, WITH REGARDS TO THEIR RIGHTS

Suspected persons in police custody are informed about their rights via a written *Explanation of Rights* of four pages, which they have to receive prior to their interrogation. This document is available in 58 languages.[67] The *Explanation of Rights* informs them on their rights prior, during and after the interrogation.

Prior to the interrogation, suspects must be informed about the right to access to a lawyer, the system of free legal aid, the right to a prior confidential consultation with a lawyer and the right to legal assistance during the interrogation. Suspects are also informed about the right to be told about the offences on which they will be interrogated, on the right to remain silent and on the right to have a third party notified of their arrest. Furthermore, they have to be informed before the interrogation on the right to free medical assistance if required. If they ask to be examined by a doctor of their choice, this is at their own expense. In case the suspect does not understand or speak the language, or if he has hearing or speech impediments and the lawyer does not understand or speak the suspect's language, he is entitled to a sworn interpreter during the confidential consultation with the lawyer. The translation is free of charge. In case the suspect wishes to speak a language that is different from the language of the proceedings, a sworn interpreter will be called up to assist him during the interrogation, which is also free of charge.

The interrogation itself starts out with a number of communications. In addition to repeating the summary communication of the offences and the right to remain silent, the suspected or accused person will be informed that he or she may request for all questions asked and for all answers given by them to be recorded in the words used by them and that they may ask for a specific inquiry to be made or for a specific person to be interrogated.

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[65] Art 56 Wet van 25 april 2007 houdende diverse bepalingen (IV), *BS* 8 May 2007; Daems, T., "Toezicht op detentie in internationaal perspectief" in Daems, T., Vander Beken, T., Vermeulen, G. (eds), *Toezicht op detentie : tekst en context*. Antwerp, Maklu, 2012. 13-14.

[66] ECHR, *Salduz v. Turkey*, 2008; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, *OJ L* 294, 6 November 2013; Art. 2, 4, 7 and 9 Wet van 13 augustus 2011 tot wijziging van het Wetboek van strafvordering en van de wet van 20 juli 1990 betreffende de voorlopige hechtenis, om aan elkeen die wordt verhoord en aan elkeen wiens vrijheid wordt benomen rechten te verlenen, waaronder het recht om een advocaat te raadplegen en door hem te worden bijgestaan, *BS* 5 September 2011; Wet van 21 november 2016 betreffende bepaalde rechten van personen die worden verhoord, *BS* 24 November 2016.

[67] The document can be downloaded on https://justitie.belgium.be/nl/themas_en_dossiers/documenten/documenten_downloaden/verklaring_van_rechten/uw_rechten_als_u_van_uw_0

At the end of the interrogation, they will be provided with the text of the interrogation for them to read. They are informed of the right to have it read to them.

Suspected persons deprived of their liberty by the police are also informed about the duration of the custody and of the subsequent procedure before the investigating judge; about the obligation of the investigating judge to hear them on the matter first and that during this interrogation too they are entitled to be assisted by their lawyer. They are also informed on the rights they have in case the investigating judge issues a warrant for their arrest: the right to speak to their lawyer without limitation, the right to challenge their arrest and the fact that they are being held on remand before the Committals Chamber, within five days after the arrest warrant was issued and the right to consult their case file the day prior before the hearing of the Committals Chamber or the Indictments Chamber. They are informed that, unless they have been given a verbal translation of the arrest warrant, they have the right to request a (written) translation of the relevant passages of the arrest warrant if they do not understand the language in which the proceedings are to be conducted. This translation is free of charge. Lastly, if the suspect is not a Belgian national, he is informed on the right to notify his consular authorities of his arrest.

2.1.3 TEXTS DEFINING AN OBLIGATION TO PROVIDE LEGAL INFORMATION IN **PRISONS**

The obligation to provide legal information in **prisons** has been foreseen in art. 19 Prison Act, after several studies showed that prisoners were largely dependent on the goodwill of the prison staff for legal information.[68] There is thus a specific need to provide legal information in prisons.[69]

Art. 19 Prison Act, in combination with RD2011(III/V), sets out the procedures to be followed when a prisoner is admitted to prison. Every prisoner should be provided with information about his rights and duties in prison, including the opportunity to receive legal support available within prison or accessible from within prison. Information regarding legal support should be provided by a member of the psychosocial service within four days after arrival in prison.

Art. 104 Prison Act deals specifically with legal aid, determining that prisoners are entitled to all forms of legal aid available in society at large and to legal support as foreseen in article 508/1 JC. The latter defines the concepts of legal first-line and second-line support, where legal first-line support is to be understood as legal support provided in the form of practical information, legal information, a first legal advice or referral to a specialized body or organisation and legal second-line support is the legal support provided to a natural person in the form of a detailed legal advice, whether or not in the context of legal proceedings, or assistance in a dispute. Art. 508/3 JC foresees that information on the existence of legal support and the access conditions hereto is disseminated, in particular among the most socially vulnerable groups. The information should be disseminated wherever legal support is provided, as well as at the registries, at the public prosecutor's office, at the bailiffs, at the municipal administration and at the public social welfare centres of each judicial district.

[68] Kellens, G., De Coninck, G., Demet, S. & Kellens, O. *L'information juridique en milieu pénitentiaire*, Brussels, Services fédéraux des Affaires scientifiques, techniques et culturelles, Bruxelles, 1997 ; Ronse, M., "Drie jaar systematische rechtshulp in de centrale gevangenis te Leuven: een terugblik", *Panopticon* 1992, 341-365; Vandenbempt, I., "Rechtshulp in de centrale gevangenis van Leuven", *Winket. Tijdschrift van de federatie van de Vlaamse Gevangenisdirecteurs* 1999, afl. 4, 53-65.

[69] Eindverslag van de commissie "basiswet gevangeniswezen en rechtspositie van gedetineerden", *Parl.St.* Kamer 2000-01, nr. 1076/1, 175.

Art. 508/5 JC further clarifies the relation between legal first-line and second-line support. Persons applying for legal first-line support should be informed of legal second-line support or legal assistance immediately if a referral to one of these services seems advisable. If appropriate, the Bureau for Legal Support is equally informed. In order to obtain partially or completely free legal second-line support, the persons providing legal first-line support refer applicants to the Bureau for Legal Support, in order to assign a lawyer to the applicant. If the applicant has already consulted prior to turning to the Bureau for Legal Support and still wishes to enjoy partially or completely free second-line support, the lawyer concerned asks permission from the Bureau to provide legal second-line support (art. 508/9 JC). Applications for partially or completely free legal second-line support is always done orally or in writing by the applicant or his lawyer (art. 508/14 JC). Moreover, the lawyer has be registered as a lawyer providing partially or completely free legal second-line support.

Art. 104 Prison Act also determines that collective information and training initiatives on important legal issues can be organised in prison. The Prison Act nor RD2011(III/V) provide further details regarding these initiatives.

2.2 LEGAL SUPPORT TO NON-NATIVE SPEAKERS

If the applicant does not speak the language of the legal proceedings, the Bureau for Legal Support will propose to him, if possible, a lawyer who speaks his language or another language he understands. In the absence of such a lawyer, the Bureau for Legal Support will provide him with an interpreter. The reimbursement of costs for the interpreter is borne by the state (art. 508/10 JC). The provisions of the Judicial Code are not only applicable to prisoners, but to all citizens.

The Prison Act contains some provisions regarding legal support for non-native speakers in prison. Prisoners should be informed on their rights and duties, including the possibilities of legal support. This should be done, in as far as possible, in a language they understand or in an understandable manner (art. 19 § 2 Prison Act). Art. 2 RD2011(III/V) further elaborates on this by stating that if prisoners do not understand the language of the region in which the prison is located, 'every reasonable means of translation' should be used to allow prisoners to understand the content of the information provided to them. Collective Letter n° 107 gives more guidance on what constitutes 'every reasonable means', explaining that, to the extent possible, a member of staff should be called upon when necessary. If such offers no adequate solution, the prison director can have recourse to an external person such as an almoner, a visitor, a teacher or a member of an embassy or consulate. He can even appeal to a fellow prisoner.[70]

Besides the rather general language provision, the Prison Act also contains some specific language provisions. Regarding prison discipline, the Prison Act determines that the prisoner should be given the opportunity to understand the content of the written disciplinary indictment against him, in case he cannot read it or in case he does not understand the language it is written in. At the hearing, the prison director informs the prisoner of the facts and the evidence against him, in language the prisoner understands, with the help of others if necessary. The prisoner has to be notified of the decision taken by the prison director and of the possibility to file a complaint. This should be done orally, in a language the prisoner understands, and in written (art. 144 Prison Act).

[70] Collectieve Brief n° 107 van 16 juni 2011 betreffende de inwerkingtreding van verscheidene bepalingen van titels III en V van de basiswet.

When filing a complaint, the prisoner should be assisted when drafting the complaint as well during the subsequent complaints procedure, if he is illiterate or if he does not understand the language (art. 150 Prison Act).

2.3 ACTORS PROVIDING LEGAL INFORMATION, THEIR STATUS, BUDGET AND DEONTOLOGY

2.3.1 THE ACTORS

Different actors are responsible for providing legal information in detention: the prison administration, the Commission for Legal Support, the lawyers and the Psychosocial Service in each prison.

According to art. 104 Prison Act, **the prison administration** has to consult with the Commission for Legal Support on how prisoners are given the opportunity to exercise their right to legal support and legal aid. The prison administration also has to consult with the Commission for Legal Support on how prisoners can enjoy collective information and training initiatives on important legal issues. The Prison Act thus imposes an obligation on the prison administration to inform the prisoner about the way in which he has access to legal support and legal aid. This obligation is nothing more than a duty of care, since Collective Letter n° 107 explicitly states that it is not up to the prison administration to provide any kind of legal advice itself.[71]

The **Commission for Legal Support,** which must consult with the prison administration, is composed of representatives of the bars appointed by the Bar Association of the judicial district concerned (art. 508/2 JC). Due to the sixth state reform of 2014, the competence to regulate the Commissions for Legal Support was transferred from the federal level to the Communities.[72] The Flemish Community still applies the original federal rules as no Flemish decree has been drafted. However, negotiations are currently taking place to this end.[73] The French speaking Community has issued a decree regulating the Commissions for Legal Support. Every judicial district has its own Commission for Legal Support. Brussels, the capital city and officially part of both the Flemish speaking as well as the French speaking Community, has both a Flemish speaking and a French speaking Commission for Legal Support. Half of the members of the Flemish Commissions for Legal Support are representatives of the bars and the other half are representatives of the public social welfare centres and recognised organisations for legal support. The French speaking Commissions for Legal Support are composed of representatives of the bars alone (art. 508/2 JC).

The Commissions for Legal Support do not only provide legal information, but should also organise **duty shifts** for lawyers providing legal first-line support (art. 508/3 JC). The Commissions for Legal Support thus organise legal first-line support, but it is the lawyers who provide this support on specific days (art. 446bis JC). The separate decree of the French Community further stipulates that the Commissions must provide information to all people seeking legal advice on how to obtain legal support.[74]

In the Flemish Community, **social welfare teams** ("*welzijnswerkteams"* in Dutch) also play a role in providing legal information to prisoners. Social welfare teams exist in each prison and provide social assistance to prisoners

[71] Collectieve Brief n° 107 van 16 juni 2011 betreffende de inwerkingtreding van verscheidene bepalingen van titels III en V van de basiswet.
[72] Art. 5 §1, II, 8° Bijzondere wet van 8 augustus 1980 tot hervorming der instellingen, *BS* 15 August 1980 as modified by the Bijzondere wet van 6 januari 2014 met betrekking tot de Zesde Staatshervorming, *BS* 31 January 2014.
[73] Departement Welzijn, Volksgezondheid en Gezin, *Juridische Eerstelijnsbijstand*, https://www.departementwvg.be/welzijn-en-samenleving/welzijnswerk/juridische-eerstelijns-bijstand.
[74] Art. 20 Décret du 13 octobre 2016 relatif à l'agrément et au subventionnement des partenaires apportant de l'aide aux justiciables, *BS* 22 December 2016.

and their families, by coaching them during their imprisonment and preparing their future reintegration in society. Thus, social welfare teams must provide information about the possibilities of legal assistance when new prisoners enter the penitentiary facility. [75] Moral, social, psychologic, material and cultural assistance to prisoners and their families is also foreseen in prisons in Brussels, although the relevant legal instrument does not explicitly foresees in legal support for prisoners.[76] The same is true for prisons in the French-speaking Community.[77]

Lastly, the Belgian law prescribes that the **Psychosocial Service** ("S*ervice Psychosocial"* in French, "*Psychosociale Dienst"* in Dutch) in prison has to inform prisoners within four days after their arrival in prison about the possibilities of legal support either available within prison itself or accessible from within prison (art. 4 RD2011(III/V).

2.3.2 STATUS AND BUDGET OF THE ACTORS PROVIDING LEGAL INFORMATION

The Commissions for Legal Support are entities with legal personality (art. 508/2 JC). Flemish Commissions of Legal Support are recognised by the (federal) Minister of Justice[78], whereas the French Commissions of Legal Support do no longer need to ask for recognition.[79]

The Commissions budgets stem from yearly governmental grants, based on specific criteria that are laid down in a Ministerial Decree (art. 508/4 JC). The grants to the Flemish Commissions for Legal Support are awarded based on the population of the relevant judicial district (40% of the grant), the number of inhabitants living from a subsistence minimum granted by the public social welfare centres (15%), the number of inhabitants who were granted an income guarantee for the elderly (15%), the number of full-time unemployed persons entitled to benefits (10%), the number of judgments of the juvenile court of the judicial district (10%) and the number of suspected persons who have been deprived of their liberty (10%).[80] The attendance fees of the members of the Commissions for Legal Support are not covered by the subsidy.[81]

[75] Art. 1 and 4 Samenwerkingsakkoord van 28 februari 1994 tussen de Staat en de Vlaamse Gemeenschap inzake de sociale hulpverlening aan gedetineerden met het oog op hun sociale re-integratie, *BS* 18 March 1994.
[76] Art. 5 Samenwerkingsprotocol van 25 maart 1999 tussen de Minister van Justitie en de leden van het Verenigd College van de Gemeenschappelijke Gemeenschapscommissie bevoegd inzake bijstand aan personen inzake hulpverlening aan gedetineerden en aan personen die het voorwerp uitmaken van een maatregel of straf uitgevoerd in de Gemeenschap, *BS* 10 September 1999.
[77] Décret du 19 juillet 2001 de la Communauté française relatif à l'aide sociale aux détenus en vue de leur réinsertion sociale, *BS* 23 August 2001.
[78] Art. 1 & 5 Koninklijk besluit van 20 december 1999 tot bepaling van de nadere regels inzake erkenning van de organisaties voor juridische bijstand, alsook betreffende de samenstelling en de werking van de commissie voor juridische bijstand en tot vaststelling van de objectieve criteria van subsidiëring van de commissies voor juridische bijstand, overeenkomstig de artikelen 508/2, § 3, tweede lid, en 508/4, van het Gerechtelijk Wetboek, *BS* 30 December 1999.
[79] Art. 15 § 2 Décret du 13 octobre 2016 relatif à l'agrément et au subventionnement des partenaires apportant de l'aide aux justiciables, *BS 2*-22 December 2016.
[80] Art. 17 § 2 Koninklijk besluit van 20 december 1999 tot bepaling van de nadere regels inzake erkenning van de organisaties voor juridische bijstand, alsook betreffende de samenstelling en de werking van de commissie voor juridische bijstand en tot vaststelling van de objectieve criteria van subsidiëring van de commissies voor juridische bijstand, overeenkomstig de artikelen 508/2, § 3, tweede lid, en 508/4, van het Gerechtelijk Wetboek, *BS* 30 December 1999.
[81] Art.3 Ministerieel besluit van 19 april 2001 tot bepaling van de wijze van uitoefening van controle op de aanwending van de subsidie bedoeld in artikel 17 van het koninklijk besluit van 20 december 1999 tot bepaling van de nadere regels inzake erkenning van de organisaties voor juridische bijstand, alsook betreffende de

The French-speaking Community awards grants to cover the Commission for Legal Support's personnel costs, operating costs and investment costs.[82] The total grant is determined based on unit subsidies, with one unit being equal to the costs of a one hour duty shift.[83] At least three legal support beneficiaries should be seen during a one-hour duty shift as a mean average in order for the lawyer to be entitled to the unit subsidy. For 2018-2023, the amount of one unit subsidy is based on the population density per square kilometre of the relevant judicial district, the average income per inhabitant and the price of an average home. Following these parameters, the unit subsidy varies between € 49.6 and € 51.7 for the different judicial districts. [84]

2.3.3 ETHICAL FRAMEWORK GUARANTEEING THE ACTORS' INDEPENDENCE AND THE SECRECY OF CONSULTATIONS

Prisoners may consult with the lawyers of the Commissions for Legal Support, with the social welfare team of the prison and with the psychosocial service of the prison.

Art. 104 § 3 Prison Act determines that anyone providing legal assistance or legal support to prisoners is bound by professional secrecy. **Lawyers** are also bound by professional secrecy, as follows from their code of ethics.[85] Persons offering legal support in prisons located in the French-speaking Community are moreover bound by professional secrecy, without prejudice to the rules of ethics in place for specific professions, and the **Commissions for Legal Support** are obliged to draw up a code of ethics, to ensure respect for the principles of neutrality and equal treatment, to guarantee professional secrecy and to prevent conflicts of interest.[86]

The **social welfare teams** of the prisons are staffed by social workers and aid workers. Both are bound by professional secrecy.[87] The **psychosocial service** of the prison on the contrary must report to the prison administration and is thus not bound by professional secrecy.[88]

Breaches of professional secrecy are a criminal offence, as defined by art.458-458*bis* of the Criminal Code. This provision stipulates that professional secrecy may only be breached in specific cases. This may be the case when one is asked to testify in a parliamentary enquiry or – under rare circumstances – when one has knowledge of specific crimes, such as those committed against minors. Lawyers, members of the social welfare team and any other actor bound by professional secrecy can also breach his professional secrecy when he would otherwise by guilty of culpable omission (art. 422ibis Criminal code).

samenstelling en de werking van de commissie voor juridische bijstand en tot vaststelling van de objectieve criteria van subsidiëring van de commissies voor juridische bijstand, overeenkomstig de artikelen 508/2, § 3, tweede lid, en 508/4, van het Gerechtelijk Wetboek, *BS* 3 May 2001.

[82] Art. 32 Décret du 13 octobre 2016 relatif à l'agrément et au subventionnement des partenaires apportant de l'aide aux justiciables, *BS* 22 December 2016.

[83] art. 22 *Ibid.*

[84] Art. 1, 22, 25 § 1 & annex 1-3 Arrêté ministériel du 17 mai 2017 portant exécution de l'arrêté du Gouvernement de la Communauté française du 17 mai 2017 portant exécution du décret du 13 octobre 2016 relatif à l'agrément et au subventionnement des partenaires apportant de l'aide aux justiciables, *BS* 9 June 2017.

[85] Orde van Vlaamse Balies, *Codex deontologie voor advocaten*, 2018; Avocats.be, *Code de déontologie de l'avocat* 2018.

[86] Art. 50-51 Décret du 13 octobre 2016 relatif à l'agrément et au subventionnement des partenaires apportant de l'aide aux justiciables, *BS* 22 December 2016.

[87] Art. 2 Samenwerkingsakkoord van 28 februari 1994 tussen de Staat en de Vlaamse Gemeenschap inzake de sociale hulpverlening aan gedetineerden met het oog op hun sociale re-integratie, *BS* 18 March 1994.

[88] Schriftelijke vraag van Bert Anciaux (sp.a) aan de minister van Justitie, *Hand.* Senaat, 2011-12, 15 juni 2012, nr. 5-6493.

2.4 PRACTICAL ARRANGEMENTS

According to art. 104 § 4 Prison Act, specific rooms should be available in prison where a prisoner can enjoy legal assistance and legal support. Legal assistance and legal support should be given in material circumstances that guarantee the confidentiality of the conversations. These rooms are available at specific times, which have been agreed upon with the prison director. RD2011(III/V) determines that lawyers can access the prison between 7h00 and 20h30. Consultations have to end at 21h00 at the latest. The prisoner has the right to call his lawyer on a daily basis between 8h00 and 20h30. The duration of the call may be limited to 15 minutes if the availability of the telephones in prison does not permit granting the prisoner more time. The internal regulations of each prison offer more guidance. The internal regulations of the prison of Ghent for instance, define that the lawyer can visit his client on a daily basis and that during the consultation only visual supervision shall be conducted.[89]

2.5 LEGAL INFORMATION TOOLS

2.5.1 LEGAL INFORMATION TOOLS TO BE MADE AVAILABLE BY LAW

Art. 16 § 3 Prison Act determines that a copy of the internal prison rules has to be made available to the prisoners. RD2011(III/V) furthermore specifies that the prison director has to have a conversation with the prisoner within 24 hours after his arrival in prison. During this conversation the director informs the prisoner about his legal and prison status and in general about the internal prison rules.

2.5.2 PRISONER ACCESS TO **ONLINE** LEGAL INFORMATION PORTALS

Prisoners do not have access to online legal information portals. However, a digital service platform for prisoners, named PrisonCloud, has been introduced in three prisons. PrisonCloud is an electronic service platform which comprises of an intranet and several applications. The extension of this platform to other prisons was envisioned by the Minister of Justice in 2015, but has not yet been accomplished.[90]

2.6 REPORTING ON PROVIDING LEGAL INFORMATION

Both the individual lawyers providing legal first-line support and the Commissions for Legal Support are obliged to report on their actions. Without prejudice to their professional secrecy, lawyers providing legal first-line support are bound to send an annual report to the Commission for Legal Support on their legal first-line support performance (art. 508/6 JC). This annual report should detail for each case 1) whether or not the provided legal first-line report was free of charge and, if so, to which category the client belongs, 2) the nature of the problem presented, and 3) data on the client: year of birth, civil state, gender and nationality.[91] The Commission for Legal

[89] Federale Overheidsdienst Justitie, *Huishoudelijk Reglement Gevangenis van Gent. Ministeriële omzendbrief nr. HR/3 van 09/10/2017*, 2017.
[90] Algemene Beleidsnota Justitie, *Parl.St.* Kamer 2015-16, nr. 1428/8, 31.
[91] Art. 1 Ministerieel besluit van 20 december 1999 tot vaststelling van de nadere regels betreffende de verslagen bedoeld in de artikelen 508/6, eerste lid, en 508/11, eerste en tweede lid, van het Gerechtelijk Wetboek en inzake de controle bedoeld in artikel 508/19, § 2, van hetzelfde Wetboek.

Support, in turn, has to send these annual reports to the Minister of Justice, together with any recommendations it has (art. 508/3 JC).

Following the sixth state reform, lawyers and the Commissions for Legal Support of the French Community are bound by a separate Decree. The Commissions for Legal Support have to send an annual report regarding their activities on legal support to an administrative board specifically established by the Community Government for the implementation of the Decree. The Commissions should also provide any information with regard to their activities on the request of this administrative board. Additionally, the decree establishes a district committee for partnerships within every judicial district. On the request of the Board, they have to obtain information on, *inter alia,* legal support and they should advise the Board on the legal support service and the needs of litigants.[92]

In conclusion, lawyers providing legal first-line support and Commissions for Legal Support from both the Flemish and French Community have to report regularly, at least annually. Within the French Community, reports should also be submitted on the request of the administrative board. However, nothing is foreseen regarding public reporting.

2.7 MAJOR DEVELOPMENTS AND TRENDS IN THE NATIONAL LEGISLATION REGARDING ACCESS TO LEGAL INFORMATION

Not much is foreseen in the Prison Act when it comes to access to legal information for prisoners. This is no coincidence however, as the Communities are responsible for providing social services to prisoners. The Prison Act, being a federal law, therefor remains rather vague on the topics touching the responsibilities of the Communities. The Prison Act imposes a mere duty of care on the prison administration regarding support and services for prisoners, thus ensuring that the prison administration makes legal support within prisons possible and guaranteeing that prisons provide the necessary facilities, but leaving much of the practical organisation of providing legal information to the Communities.[93]

The Belgian state reform of 2014 has transferred the competence to regulate legal first-line support from the federal level to the Communities. The federal government, however, is still responsible for organising legal second-line support. This has two distinct consequences for the provision of legal support to prisoners. First, it is possible that legal first-line support will be organised differently in the French and Flemish-speaking Communities, possibly leading to unequal treatment of prisoners.[94] The organisation of legal first-line support already evolves at different speeds in the different Communities. The French speaking Community has adopted its own decree in 2016 unlike the Flemish Community, which is still working on a decree.[95] The latter thus operates based on old federal legislation, leading to questionable practices, such as the Commissions for Legal Support needing to report to the Minister of Justice while he is no longer responsible for legal first-line support. Secondly, splitting the competence to regulate legal support between the Communities and the federal government means specific attention should be given to aligning legal first-line and second-line support. This can

[92] Art. 1, 21, 22 & 44 Décret du 13 octobre 2016 relatif à l'agrément et au subventionnement des partenaires apportant de l'aide aux justiciables, *BS* 22 December 2016.
[93] Eindverslag van de commissie "basiswet gevangeniswezen en rechtspositie van gedetineerden", *Parl.St.* Kamer 2000-01, nr. 1076/1, 54 & 118.
[94] *Ibid.*, p.118. The Dupont Commission made this observation regarding social services provided to prisoners, but the same reasoning currenlty applies to the provision of legal first-line support to prisoners.
[95] Voorstel van decreet houdende de justitiehuizen en de juridische eerstelijnsbijstand, *Parl.St.* Vl.Parl. 2017-18, nr. 1438/1.

be done via consultation and cooperation agreements although there is a risk of a complex fragmentation of interwoven competences and responsibilities, in which no one assumes responsibility.[96]

There was a clear desire to imbed digital tools in prisons further a couple of years ago. However, policy papers show that the focus of a further digitalisation has moved from digital tools for prisoners to a digitalisation of the prison administration, enabling a more swift management of prisoners.[97]

[96] Eindverslag van de commissie "basiswet gevangeniswezen en rechtspositie van gedetineerden", *Parl.St.* Kamer 2000-01, nr. 1076/1, 110.
[97] Algemene Beleidsnota Justitie, *Parl.St.* Kamer 2015-16, nr. 1428/8; Algemene Beleidsnota Justitie, *Parl.St.* Kamer 2016-17, nr. 2111/21; Algemene Beleidsnota Justitie, *Parl.St.* Kamer 2017-18, nr. 2708/29.

3. LEGAL AID

As a reminder, legal aid refers to the coverage of legal costs and legal representation fees. In Belgium, covering **legal representation fees** falls within the system of legal second-line support[98] and covering **legal costs** falls within the system of legal assistance.[99] Lawyers offering their services using the legal second-line support system are referred to as ***pro deo* lawyers**. Pro deo is the common term in Belgium, since these lawyers are not working for free, as *pro bono* would mean, but are paid by the state.

3.1 FEES AND MANDATORY CHARACTER OF LEGAL REPRESENTATION

3.1.1 MANDATORY CHARACTER OF LEGAL REPRESENTATION DURING PRISON LITIGATION

All kinds of issues may lead to prison litigation procedures. However, the Prison Act only explicitly foresees legal proceedings in the context of prison discipline, in the context of prisoner complaints against decisions of the prison-director and when prisoners object against their placement in and transfers to specific prisons.

In **prison disciplinary proceedings**, art. 144 § 4 Prison Act foresees that the prisoner has the right to be assisted by a lawyer. Legal assistance is thus not mandatory, except for internees (art 167 §1 & 4). In case the internee does not choose a lawyer himself, the prison-director informs the head of the bar of the judicial district in which the prison is located, so a lawyer can be assigned to the internee *ex officio*.

The Prison Act contains the same non-mandatory right to legal assistance for prisoners wishing to **file a complaint** against a decision of the prison director. Legal assistance is foreseen during the initial proceedings as well as during the appeals procedure and for complaints against the placement in or transfer to another prison facility (art. 155 § 1, 161 § 2 & 164 §1). Just as is the case for disciplinary proceedings, legal assistance is mandatory for internees involved in complaints procedures (art. 167 § 1, 2 & 4). However, internees cannot contest their placement or transfer to a prison facility through the aforementioned channels, since this decision is taken by a court, not by the prison administration. Thus, the Prison Act provisions regarding legal assistance do not apply to internees contesting their placement.[100]

The provisions regarding the right of complaint will enter into force on 1 April 2010 (RD2018). This means that prisoners currently rely on the legal remedies available for all citizens. Art. 144 Prison Act foresees that prisoners are eligible to all legal support available to all citizens. Therefore, the general arrangements regarding the representation by a lawyer before court are equally applicable to prisoner. Whether or not legal representation is mandatory depends on the Court dealing with the case. Legal representation is not mandatory before **the Court of First Instance** (civil proceedings, criminal proceedings, interlocutory proceedings (art. 728 § 1 JC), nor before **the Constitutional Court**.[101] Before **the Council of State**, legal representation depends on the nature of the proceedings. Representation by a lawyer is mostly optional, except for appeal procedures against a decision

[98] *Aide judirique de deuxième ligne* in French, *juridische tweedelijnsbijstand* in Dutch.
[99] *Assistance judiciaire* in French, *rechtsbijstand* in Dutch.
[100] The decision is taken by the 'Chamber for the Protection of Society', which is part of the sentence enforcement courts. The right to legal assistance before the Chambers for the Protection of Society is provided by the Law on internment (Wet van 5 mei 2014 betreffende de internering, *BS* 9 July 2014).
[101] Art. 5 Bijzondere wet van 6 januari 1989 op het Grondwettelijk Hof, *BS* 7 January 1989.

of the Court of Cassation.[102] Before **the Court of Cassation** itself, legal representation is mandatory in civil (including administrative), criminal and social cases.

3.1.2 FEES RELATED TO ACCESS TO COURTS

In Belgium, access to court is subject to the payment of a **court fee**.[103] This fee covers the rights of registration of the case on the register. The amount of this fee depends on the court that is petitioned, irrespective of the nature of the proceedings.[104] The court fees are as follows:

- Justice of Peace and Police Court: € 50;
- Court of First Instance: € 165;
- Courts of Appeal: € 400;
- Court of Cassation: € 650.

Legal assistance beneficiaries are exempted from the payment of court fees (art. 664 JC).

3.2 LEGAL AID SCHEME

3.2.1 TEXTS ORGANISING THE LEGAL AID SCHEME

Legal aid refers to the coverage of legal representation fees and the coverage of legal costs. **Legal representation fees** are covered by the legal support system in Belgium. The concept of legal support comprises two elements according to Belgian law, legal first-line support and legal second-line support. Whereas legal first-line support merely covers the provision of information and has nothing to do with any financial aspect of litigation, legal second-line support provides the litigant with legal assistance from a lawyer, partially or completely free, depending on the means of subsistence of the litigant. Legal second-line support is thus definitely linked with the financial aspect of litigation, since it (partly) covers the legal representation fees of a lawyer. The right to legal support in general is protected by art. 23 of the **Constitution**. This right is elaborated further in art. 508/7-508/18 **Judicial Code**.

Besides the legal representation fees, there are also other costs arising from litigation, referred to as the **legal costs**. These legal costs are for instance costs for copies of the case file or the costs of the bailiff. Details on legal costs are found in art. 664-699*ter* **Judicial Code** and the **Code of Registration Fees**.[105]

In addition to the Judicial Code, several Royal Decrees cover different aspects of the organisation of legal aid. The conditions that must be met to enjoy complete or partial free of charge legal second-line support and legal assistance are determined by a **Royal and Ministerial Decrees**.[106]

[102] Art. 19 Gecoördineerde wetten van 12 januari 1973 op de Raad van State, *BS* 21 March 1973.
[103] *Droits de mise au rôle* in French, *rolrechten* in Dutch.
[104] Art. 269 Wetboek der registratie-, hypotheek- en griffierechten.
[105] *Ibid.*
[106] Koninklijk besluit van 20 december 1999 houdende uitvoeringsbepalingen inzake de vergoeding die aan advocaten wordt toegekend in het kader van de juridische tweedelijnsbijstand en inzake de subsidie voor de kosten verbonden aan de organisatie van de bureaus voor juridische bijstand, *BS* 30 December 1999; Koninklijk besluit van 18 december 2003 tot vaststelling van de voorwaarden van de volledige of gedeeltelijke kosteloosheid van de juridische tweedelijnsbijstand en de rechtsbijstand, *BS* 24 December 2003; Ministerieel

3.2.2 FUNDING OF THE LEGAL AID SYSTEM

The legal aid system in Belgium thus comprises two different systems, one for legal representation fees and one for other legal costs, such as registration fees and costs for copies of the case file. These two legal aid systems are funded in different ways.

A. FUNDING LEGAL REPRESENTATION FEES RELATED TO LEGAL SECOND-LINE SUPPORT

Fees covering legal representation fees during legal second-line support funded in two ways. Firstly, there is an **annual grant** provided by the federal government, in particular by the Federal Public Service of Justice. This grant is meant to cover the remuneration of lawyers providing legal second-line support and the costs organisation costs for the Bureaus of Legal Support (art. 508/19 § 3 & 508/19*bis* JC), the latter receiving a little more than 8 per cent of the grant. The grant is a so-called 'closed budget', implying that the amount of the grant is determined regardless of the caseload.

The increased demand for legal second-line support has nonetheless compelled the government to provide an additional grant to ensure that lawyers' remuneration remains at the same level as it was in previous years. Thus, a **Budgetary Fund for Legal Support** was established in 2017 to provide additional funding for legal second-line support.[107] The fund was deemed necessary to keep justice accessible for the less affluent applicants and to ensure lawyers working in the legal second-line support system receive a fair remuneration.[108] As lawyers earn credits for their legal second-line support, each credit corresponding to a fixed remuneration. To insure that the remuneration for each credit does not reduce, the government has provided additional funds.[109] Thus, in practice, there is a semi-closed budget system in Belgium covering the costs for legal second-line support.

The Budgetary Fund for Legal Support is managed by the Justice department, whilst the department of Finance is responsible for collecting contributions, which are mandatory. In civil cases, these contributions are paid by the claimant, unless he enjoys legal second-line support or legal assistance. The Court will determine who is ultimately responsible for the contribution. In criminal cases, all sentenced person have to pay a contribution, unless they enjoy legal second-line support. Civil parties, too, have to pay a contribution, in case they took the initiative for the proceedings and eventually lose the case, unless, again, they enjoy legal second-line support. For applications before the Council of State, a provision is foreseen for mandatory contributions from every applicant, unless he enjoys legal second-line support or legal assistance, but it hasn't entered into force yet. The contribution is set at € 20.

B. FUNDING COVERING LEGAL COSTS OF THE LEGAL ASSISTANCE BENEFICIARY

besluit van 19 juli 2016 tot vaststelling van de nomenclatuur van de punten voor prestaties verricht door advocaten belast met gedeeltelijk of volledig kosteloze juridische tweedelijnsbijstand, *BS* 10 August 2016.

[107] Wet van 19 maart 2017 tot oprichting van een Begrotingsfonds voor de juridische tweedelijnsbijstand, *BS* 31 March 2017; Koninklijk besluit van 26 april 2017 tot uitvoering van de wet van 19 maart 2017 tot oprichting van een Begrotingsfonds voor de juridische tweedelijnsbijstand, *BS* 27 April 2017.

[108] Federale Overheidsdienst Justitie, Directoraat-Generaal Rechterlijke Organisatie, Omzendbrief nr. 256 betreffende de richtlijnen voor de toepassing en verwerking van de invorderingen ten bate van het begrotingsfonds voor juridische tweedelijnsbijstand.

[109] Wetsontwerp tot wijziging van het Gerechtelijk Wetboek met betrekking tot de juridische bijstand. Verslag namens de Commissie voor de Justitie, *Parl.St.* Kamer 2015-16, nr. 1819/3, 5.

Legal costs other than legal representation fees (which are discussed above) are almost completely **borne by the state** if an applicant meets the conditions to enjoy legal aid. The applicant may be required to bear part of the costs himself, depending on his means of subsistence. If so, this contribution must be transferred to the administration of the department of Finance, which must use these revenues to pay the bailiffs, notaries, experts and witnesses involved (art. 669 & 696 JC).

While the State bears advances the legal costs other than legal representation fees, this decision is not definite. The State may recover the expenses made to provide legal aid from the legal assistance beneficiary in case his financial situation has improved to such an extent since the application for legal assistance, allowing him to bear the legal costs himself (art. 693 JC).

3.3 EMERGENCE OF A RIGHT TO LEGAL AID IN PRISONS?

The right to legal aid in prisons stems from the right to legal support for all citizens. Therefore, we will firstly explain when and under which conditions this general right has emerged and we will then outline how this general right to legal support is guaranteed for prisoners.

3.3.1 EMERGENCE OF A GENERAL RIGHT TO LEGAL SUPPORT

The current legal arrangements on the right to legal support for all citizens date back to the nineties. In 1993, two politicians of the Walloon socialist party (the PS or Parti Socialiste) submitted a proposal to review the Constitution in order to implement economic and social rights. At the time, the Constitution only guaranteed political and civil rights. The two politicians, Taminiaux and Lallemand, argued that due to the economic, social and cultural changes in society, the Constitution did no longer offer sufficient protection. They managed to get guarantee several economic and social rights to citizens, amongst which the right to legal support. Hence, the right to legal support is constitutionally protected since 1994.[110] Art. 3 Constitution reads: "*Each has the right to live a human life in dignity. Therefore, the law, (…), guarantees the economic, social and cultural rights (…). These rights include: (…) 2° the right to social security, health protection and social, medical and legal support; (…).*"

The right to legal support thus became a fundamental right. In the following years, several legislative proposals were submitted by different political parties as to have more detailed provision on how to organise legal support. One proposal was, again, made by the Walloon socialist party, while other proposals were made by the Walloon PSC or Parti Social Chrétien and the Flemish Christian-Democratic party (CD&V), eventually leading to a law on legal support in 1998.[111] The law defined, for the very first time, objective criteria for determining whether an applicant was eligible for free legal support. As such, the right to legal support became an enforceable right.

3.3.2 EMERGENCE OF THE RIGHT TO LEGAL SUPPORT AND LEGAL AID IN PRISONS

[110] Wetsvoorstel tot herziening van titel II van de Grondwet, om een artikel 24bis in te voegen betreffende de economische en sociale rechten, *Parl.St.* Senaat 1991-92, nr.100 /2.
[111] Wetsvoorstel betreffende de rechtsbijstand, *Parl.St.* Kamer 1990-91, nr. 1588/1; wetsvoorstel tot wijziging van het Gerechtelijk Wetboek in verband met de rechtsbijstand aan minvermogenden, *Parl.St.* Kamer 1990-91, nr. 1599/1; Wet van 23 november 1998 betreffende de juridische bijstand, *BS* 22 December 1998.

While drafting the Prison Act, thought was given on how prisoners should have their right to legal support guaranteed. The Prison Act starts from the idea that prisoners are *rechtsburgers* ("legal citizens"), entitled to all rights of free citizens.[112] Prisoners should thus enjoy the right to legal support applicable to all citizens. To this aim, a specific article was foreseen in the Prison Act.

3.4 LIMITS TO LEGAL SUPPORT FOR PRISON LITIGATION

Pro deo lawyers are paid based on a credits system (see *supra*). Pro deo lawyers collect credits per performance and are paid only after the service has been provided. The performances for which credits are given are determined in the list in the appendix of the Ministerial Decree of 19 July 2016.[113] Currently, the decree only provides a remuneration for legal assistance offered during prison disciplinary proceedings. The decree does not foresee any remuneration for legal assistance offered during complaints proceedings, as the legal provisions in the Prison Act enabling prisoners to file a complaint have not yet entered into force. As the complaints procedure will enter into force in April 2020, the decree will have to be updated.

Other than in prison disciplinary proceedings, prisoners need to turn to general legal remedies available to all citizens. These general legal remedies are also remunerated via the credits system foreseen in the appendix of the Ministerial Decree. Hence, one could argue that legal second-line support for prison litigation is not limited, except for the more general limits that are applicable to all citizens.

3.5 SCOPE OF THE REMUNERATION

3.5.1 REMUNERATION VIA THE CREDIT SYSTEM

Credits are awarded by the Bureau for Legal Support awards. Each performance is awarded with a certain number of credits and one credit corresponds, at least in theory, to one hour of work. Different performances are thus awarded with a different number of credits, depending on the estimated amount of work arising from a specific performance.[114]

As stated earlier, the number of credits is determined by decree.[115] In some instances, a number of credits is awarded for the overall handling of a case, encompassing all necessary steps that have to be undertaken. For

[112] The concept of a prisoner as a *rechtsburger* was elaborated by Constantijn Kelk and strongly influenced prison law and prison policy in the Netherlands as well as Belgium. See Kelk, C., *Recht voor gedetineerden*, Alphen Aan De Rijn, Samson, 1978,

[113] Ministerieel besluit van 19 juli 2016 tot vaststelling van de nomenclatuur van de punten voor prestaties verricht door advocaten belast met gedeeltelijk of volledig kosteloze juridische tweedelijnsbijstand, *BS* 10 August 2016.

[114] Art. 2, 1° Koninklijk besluit van 20 december 1999 houdende uitvoeringsbepalingen inzake de vergoeding die aan advocaten wordt toegekend in het kader van de juridische tweedelijnsbijstand en inzake de subsidie voor de kosten verbonden aan de organisatie van de bureaus voor juridische bijstand, *BS* 30 december 1999; Art. 1 Ministerieel besluit van 19 juli 2016 tot vaststelling van de nomenclatuur van de punten voor prestaties verricht door advocaten belast met gedeeltelijk of volledig kosteloze juridische tweedelijnsbijstand, *BS* 10 August 2016.

[115] Art. 2 & annex Ministerieel besluit van 19 juli 2016 tot vaststelling van de nomenclatuur van de punten voor prestaties verricht door advocaten belast met gedeeltelijk of volledig kosteloze juridische tweedelijnsbijstand, *BS* 10 August 2016.

example, applying for annulment before the Constitutional court awards a pro deo lawyer with nine credits. In other cases, the decree is more detailed. Such is the case for interlocutory proceedings before the court of first instance. In that case, credits are earned for each step undertaken, such as drafting the appeal, drafting conclusions, every consultation with the client (with a maximum of 3 consultations), written advices, etc., Transport costs are also covered. When a case demands an unexceptional amount of work, the pro deo lawyer may request an additional remuneration on top of the credits awarded. However, he then has to substantiate his claim, e.g. by providing time sheets.

3.5.2 CREDITS AWARDED FOR PRISON LITIGATION ISSUES

Since prisoners may, generally, rely only on those legal remedies which are available in society at large, aforementioned decree does not distinguish between the amount of credits that can be earned in prison litigation and those, which can be earned in regular (non-prison related) proceedings. There is one exception to this rule however, as the decree foresees credits which are awarded for legal support provided in the context of prison discipline. Lawyers are awarded two credits for each legal aid provided during disciplinary proceedings.

Although the Court of Justice of the European Union ruled that pro deo work should be subject to the normal VAT-tariff (being 21%), the remuneration of pro deo work is currently subject to a zero-rating VAT-tariff.[116] The new VAT-tariff was planned to enter into force 1 April 2017 and has been postponed several times since then to 1 September 2017, to 1 January 2018 and to 1 September 2018. It has recently been postponed for un unlimited duration

3.5.3 NET REMUNERATION

A fixed budget is foreseen by the government, intended to remunerate all credits awarded in a given year. As this budget is divided by the total amount of credits earned by all pro deo lawyers, the exact remuneration for one credit will depend on the number and the nature of the services provided by the lawyers in a given year. In 2018, one credit amounted to 75 euros. Travel expenses are covered if a lawyer travels more than 20km.[117] One transport credit is awarded per 80km, or 0,0125 credits per km. An additional remuneration of 20% is foreseen for administration costs.[118] The simplified formula to calculate the remuneration of pro deo lawyers is: remuneration = (transport credits + (performance credits x 1,2)) x 75 euros).[119] Thus, lawyers providing legal support in prison disciplinary proceedings (2 credits) receive 180 euros plus transportation fees if applicable.

3.5.4 COMPARISON WITH LEGAL AID IN OTHER CASES

For a comparison with legal aid provided in other cases, see the table below. This table is an excerpt from the Ministerial Decree determining the amount of credits awarded per performance.

[116] CJEU C-543/14, *Ordre des barreaux francophones et germanophone v. Conseil des ministres*, 2016.
[117] Orde van Vlaamse Balies, *Compendium juridische tweedelijnsbijstand*, 2017, 57.
[118] Ministerieel besluit van 19 juli 2016 tot vaststelling van de nomenclatuur van de punten voor prestaties verricht door advocaten belast met gedeeltelijk of volledig kosteloze juridische tweedelijnsbijstand, *BS* 10 August 2016.
[119] Orde van Vlaamse Balies, "Waarde punt pro-Deovergoeding 75 euro", in *Nieuwsbrief 7*, 5 April 2018.

3. Civil proceedings		
3.2	**Court of first instance**	
3.2.3	Unilateral petition	3
3.3	**President of the Court of first instance**	
3.3.1	Preliminary proceedings	
3.3.1.1	Basis	4
3.3.1.2	Drafting petition/summons	2+
3.3.1.3	Drafting conclusions (irrespective of the amount of conclusions)	3+
3.3.1.4	Additional session in court, other than postponement	2+
3.3.1.5	Expert's report	3+
6. Criminal proceedings		
6.2	**Claim as civil party**	
6.2.1	Complaint as a civil party at the investigating judge	3
6.2.2	Statement of the civil party before the criminal court	4
6.16	**Discipline in prison**	**2**
8. Administrative law		
8.2	**Procedure before Council of State for cases other than immigration law**	
8.2.1	Basis	4
8.2.3	Suspension procedure	3+
8.2.4	Decision apparent inadmissibility	3+
8.2.5	Annulment procedure	5+
12. Cassation		
12.1	Memorandum	9
12.2	Request for legal assistance	1
13. Constitutional Court		
13.1	Request for annulment	9
13.2	After referral by the court with memorandum	4
14. International courts		
14.1	Rule 39	5
14.2	Submission request on the substance	3+
14.3	Continuation of procedure	3+
14.4	Session	3+

3.6 ELIGIBILITY TO LEGAL AID

As mentioned earlier, legal aid refers both to legal second-line support, i.e. a pro deo lawyer, as well as legal assistance that covers the legal costs other than legal representation fees. The eligibility for both systems differ.

3.6.1 ELIGIBILITY TO LEGAL SECOND-LINE SUPPORT

Legal second-line support is available to all natural persons: there is no requirement regarding the **nationality or legal residence** (art. 508/1 JC).[120] The appointment of a pro deo lawyer is however subject to (A) the applicant's income or other means of subsistence, and (B) the merits of the applicant's complaint.

A. THE MEANS OF SUBSISTENCE REQUIREMENT

Granting legal second-line support is subject to a '**means of subsistence' requirement** (art. 508/13 JC). This means that legal second-line support is only available for persons with inadequate means of subsistence and to persons equated to them. In 2016, the Belgian legislator has chosen to take into account all means of subsistence instead of focussing solely on the applicant's revenues. Since, revenues from capital, immovable property or savings and legal assistance insurance are also taken into account.

In practice, the beneficiaries of are divided in three categories: i) persons with inadequate means of subsistence, (ii) persons enjoying a rebuttable presumption of having inadequate means of subsistence, and (iii) persons enjoying a irrefutable presumption of having inadequate means of subsistence.[121]

Prisoners enjoy a rebuttable presumption of having inadequate means of subsistence. Hence, their means of subsistence are presumed to be insufficient to pay a lawyer themselves. However, this presumption is subject to evidence of the contrary.

Only prisoners who are fully deprived of their liberty enjoy a presumption of inadequate means of subsistence. Thus, persons in a limited detention regime (allowing them to leave the prison during to the day) or a suspended sentence do not enjoy the presumption. Persons under electronic surveillance only enjoy the presumption of inadequate means of subsistence when the surveillance measure is used as an alternative to pre-trial detention. The rebuttable presumption also covers mentally ill offenders who were interned.[122]

The only persons enjoying an irrefutable presumption of having inadequate means of subsistence are minors.[123] Hence, minors enjoy legal second-line support completely free of charge, irrespective their financial situation. In Belgium, minors are persons under the age of 18 years. Minors reaching the age of majority but who have appear before a juvenile for offences committed when they were a minor, continue to enjoy an irrefutable presumption. The parents' means of subsistence are not taken into account.

B. EXAMINATION OF THE MERITS OF THE APPLICANT'S COMPLAINT

[120] Orde van Vlaamse Balies, *Compendium juridische tweedelijnsbijstand*, 2017, 11.
[121] Art.1, §1, §2 & §4 Koninklijk besluit van 18 december 2003 tot vaststelling van de voorwaarden van de volledige of gedeeltelijke kosteloosheid van de juridische tweedelijnsbijstand en de rechtsbijstand, *BS* 24 December 2003.
[122] Orde van Vlaamse Balies, *Compendium juridische tweedelijnsbijstand*, 2017, 22.
[123] Art. 1 § 4 Koninklijk besluit van 18 december 2003 tot vaststelling van de voorwaarden van de volledige of gedeeltelijke kosteloosheid van de juridische tweedelijnsbijstand en de rechtsbijstand, *BS* 24 December 2003.

Legal second-line support is only provided after an **examination of the merits** of the applicant's complaint. Applications for cases which are apparently inadmissible or apparently unfounded, will be refused (art. 508/14 JC). Such is the case when a decision is no longer eligible for appeal. The Bureau for Legal Support decides on the merit of the case by means of a reasoned decision. The Bureau can also appoint a lawyer to give a first advice on the merits.[124]

3.6.2 ELIGIBILITY TO LEGAL ASSISTANCE

Granting **legal assistance** mean covering legal costs other than legal representation fees. To provide legal assistance, three requirements have to be met. As is the case for providing legal second-line support, there is a 'means of subsistence' requirement and an examination of the merits of the complaint. Additionally, there is a nationality requirement (art. 667 JC).

A. THE MEANS OF SUBSISTENCE REQUIREMENT

The rules and information on the 'means of subsistence' criterion with regard to legal second-line support, also apply to the 'means of subsistence' criterion with regard to legal assistance. Moreover, the decision to grant legal second-line support serves suffices in order to grant someone legal assistance (art. 667 JC).

B. EXAMINATION OF THE MERITS OF THE APPLICANT'S COMPLAINT

The rules and information on the 'merits of the case' criterion with regard to legal second-line support, also apply to the 'merits of the case' criterion with regard to legal assistance.

C. THE NATIONALITY REQUIREMENT

Third, there is the **nationality requirement** determining that legal assistance is provided to persons with the Belgian nationality (art. 667 JC). Moreover, legal assistance is provided to certain foreign nationals (art. 668 JC). More specifically, legal assistance may be granted to foreign nationals, in accordance with international conventions; to nationals of a Member State of the Council of Europe; to any other foreign national who legally resides in Belgium or in one of the other Member States of the European Union; and to all foreign nationals, in as far as it relates to procedures foreseen by the 1980 law on entry, stay, settlement and removal of foreign nationals (i.e. the 1980 Aliens Act, which also governs the asylum procedure).[125] The latter provision was added in order to comply with the Anakomba-ruling of the European Court of Human Rights (2009).[126]

3.7 THE RIGHT TO CHOOSE YOUR LAWYER FREELY

While a litigant can choose his lawyer freely, some restrictions apply.

[124] Orde van Vlaamse Balies, *Compendium juridische tweedelijnsbijstand*, 2017, 38.
[125] Wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *BS* 31 December 1980.
[126] ECHR, *Anakomba Yula v. Belgium*, 2009; Wetsontwerp tot wijziging van het Gerechtelijk Wetboek met betrekking tot de juridische bijstand, *Parl.st.* Kamer 2015-16; nr. 1819/3, 7-8.

A lawyer can only be appointed by the Bureau for Legal Support if that lawyer has declared that he or she provides legal second-line support. Thus, a lawyer has to be registered as providing second-line support with the local Bar attached to the Bureau for Legal Support. Lawyers, who are not registered on this list, cannot be appointed by the Bureau.

A litigant is requested to choose a lawyer from the list of registered lawyers, or will be appointed a lawyer by the Bureau itself in case the litigant does not choose anyone explicitly. The litigant may request the Bureau for Legal Support to appoint his trusted, usual, lawyer, but only when that lawyer is registered as providing second-line support (i.e. registered as a 'pro deo' lawyer) (art. 508/9 JC).

Lawyers who have provided legal first-line support to the litigant – and who are thus familiar with the case – cannot be appointed by the Bureau to provide legal second-line support, except in urgent cases or when the Bureau for Legal Support has explicitly agreed to it (art. 508/12 JC).

3.8 APPLYING FOR LEGAL AID

3.8.1 FORMALITIES WHEN APPLYING FOR A PRO DEO LAWYER

Applying for a pro deo lawyer can be done in writing or orally by the applicant or by his lawyer (in case the applicant contacted his lawyer independently). As prisoners are presumed to lack adequate means of subsistence, they are only required to prove that they are imprisoned. This can be done by providing a prison notice, an arrest warrant, a declaration of the prison director, or any other document supporting their imprisonment.[127]

In urgent cases, a pro deo lawyer can be provisionally appointed without providing supporting documents. The applicant has fifteen days to provide evidence of his imprisonment. In case he fails to so, legal support is discontinued automatically (art. 50/14 JC).

3.8.2 FORMALITIES WHEN APPLYING FOR LEGAL ASSISTANCE

The application for legal assistance has to be submitted to the judges of the competent Bureau for Legal Assistance, the exact Bureau depending on the kind of legal action, the court dealing with the case and the requesting party (art. 670 JC).

Before the court of first instance, a **written request, in duplicate**, **signed** by him or by his lawyer, should be submitted. The request can be done orally, if the Registrar prepares a concise note setting out the subject matter of the request. In any case, the applicant has to provide **the supporting documents** proving that he meets the requirements to enjoy legal assistance (i.e. proof of his imprisonment) (art. 675 & 676 JC).

3.9 EVALUATING APPLICATIONS AND GRANTING LEGAL AID

3.9.1 THE BODIES COMPETENT TO DECIDE WHETHER LEGAL AID WILL BE GRANTED

[127] Ministeriële Omzendbrief 1708/VII van 12 januari 2000.

While the Bars are responsible for organising legal second-line support, the **Bureau for Legal Support** decides whether an applicant is granted legal second-line support (i.e. pro deo lawyer) (art. 508/15 JC). A Bureau for Legal Support therefore exists within each Bar (art. 508/7 JC).

The **Bureau for Legal Assistance** decides whether other legal costs are covered. Whereas the Bureaus of Legal Support are located are part of the Bar's organisation, the Bureaus for Legal Assistance are established within the courts.

3.9.2 COMPOSITION AND DELIBERATION RULES

A. BUREAUS FOR LEGAL SUPPORT

The Bureaus for Legal Support are established by the local Bar (art. 508/7 JC). The composition of the Bureau for Legal Support is not determined by the Judicial Code or other legal documents, but internally within the Council.

The Bureaus for Legal Support decide upon the appointment of a pro deo lawyer and thus verify whether an applicant has adequate means of subsistence. Applications which are **apparently inadmissible or apparently unfounded**, are refused (art. 508/14 JC). Clear-cut examples hereof are cases in which a decision is no longer eligible for appeal, or when a request is made up. In that case, the decision of refusal can be taken by the Bureau for Legal Support immediately. In less obvious cases, the Bureau can appoint a lawyer to provide a first advice, in order to ascertain whether or not the case is apparently inadmissible or apparently unfounded. The applicant or his lawyer can be heard on the applicant's request or when deemed appropriate by the Bureau for Legal Support (art. 508/14 JC).

B. BUREAUS FOR LEGAL ASSISTANCE

The Bureaus for Legal Assistance are established within each Court of First Instance, within each Court of Appeal and within the Court of Cassation. Every Bureau for Legal Assistance, except for the Bureau of the Court of Cassation, consists of one or more chambers. Each chamber of the Bureaus of the Courts of First Instance consists of one working judge, while the chambers of the Bureaus of the Court of Appeal consist of one chairman of the chamber or counsellor at the court each. The Bureau at the Court of Cassation consists of one counsellor (art. 86, 105 & 130 JC).

The Bureaus for Legal Assistance verify whether the means of subsistence of the applicant are insufficient and whether the application is admissible. The decision of the Bureau for Legal Support to appoint a pro deo lawyer serves as sufficient proof in order to grant legal assistance.[128] However, in case legal assistance is requested more than a year after the appointment of the pro deo lawyer, the Bureau for Legal Assistance checks whether the applicant's means of subsistence are still insufficient. In case the Bureau for Legal Support decides to no longer grant a pro deo lawyer, because the applicant does not meet the requirements anymore, the pro deo lawyer informs the Bureau for Legal Assistance immediately (art. 667 JC).

Both the Bureau for Legal Support and the Bureau for Legal Assistance can turn to the litigant or to third parties, (government bodies included) to request any information necessary (including the final tax notice) to ensure that the requirements for legal second-line support and legal aid are met.[129]

[128] Voet, S., "Rechtsbijstand (en juridische tweedelijnsbijstand): een update", in Lecocq, P. en Dambre, M. (eds.), *Rechtskroniek voor de vrede- en politierechters*, Brugge, Die Keure, 2012, 393.
[129] Art.1, §3 Koninklijk besluit van 18 december 2003 tot vaststelling van de voorwaarden van de volledige of gedeeltelijke kosteloosheid van de juridische tweedelijnsbijstand en de rechtsbijstand, *BS* 24 December 2003.

3.9.3 APPEALS AGAINST A REFUSAL TO GRANT LEGAL SUPPORT OR LEGAL AID

A. APPEAL AGAINST DECISIONS OF THE BUREAU FOR LEGAL SUPPORT

The decision to refuse (even partial) legal support has to be reasoned in order to allow the applicant to appeal the decision (art. 508/15 JC). However, the applicant cannot contest the pro deo lawyer appointed nor the decision to replace a lawyer by another lawyer.

Appeal has to be lodged **before the labour court**, **within a month** after the applicant or his lawyer is informed of the decision (art. 508/16 JC). When the Labour Court rules that the applicant should be granted legal support, legal support is granted retroactively (i.e. all costs relating to legal assistance will be free of charge).

B. APPEAL AGAINST DECISIONS OF THE BUREAU FOR LEGAL ASSISTANCE

Applicants can appeal refusals to grant legal aid, except if this decision was taken by the Bureau of Legal Assistance of the Court of Appeal or the Court of Cassation (art. 688 JC). There are discussions on whether appeal is possible against decisions taken in urgent matters, as the Judicial Code does not give further detail on this. Jurisprudence indicates appeals are not possible in that case.[130]

The appeal has to be lodged within a month after being notified of a refusal to grant legal assistance, in writing (art. 689 JC).

3.10 SUPPORT FOR NON-NATIVE SPEAKERS

In case the **beneficiary of legal second-line support** does not speak the language of the administration of justice, the Bureau for Legal Support appoints a lawyer who speaks his language or another language he understands. In the absence of a lawyer speaking the applicant's language, an interpreter will be appointed. The costs of the services of the interpreter are borne by the State (art. 508/10 JC).

In case the **legal assistance beneficiary** does not understand the language used before the Bureau for Legal Assistance, whether in first instance or in appeal, the intervention of an interpreter is mandatory. The costs are borne by the State. For some documents, translation is requested by law or by the judge. These translation costs are also borne by the State (art. 691 & 692 JC).

3.11 EXEMPTION OF COSTS FOR THE LEGAL AID BENEFICIARY

The prisoner as a **beneficiary of legal second-line support** is automatically exempted from the payment of a contribution to the Budgetary Fund for Legal Support (€20), which is normally mandatory for the unsuccessful party in the proceedings.[131] He is however not automatically exempted from the payment of other legal costs,

[130] Schollen, P. & Vangeebergen, B., "Juridische bijstand", *Jura Falconis* 2000-01, afl. 3, footnote 137.
[131] Omzendbrief nr. 256 van 21 april 2017 betreffende de richtlijnen voor de toepassing en de verwerking van de invorderingen ten bate van het begrotingsfonds voor juridische bijstand.

such as the payment of registration fees, registry fees, costs for copies of the file or fees regarding the support of a technical advisor in forensic expert enquiries. Said costs are covered by the legal assistance scheme (art. 664 JC). Legal assistance is granted on a case-by-case basis by the Bureau for Legal Assistance. The applicant has to determine precisely and exhaustively for which procedure(s) he requests legal assistance. Although art. 665 JC lists the procedures in which legal assistance can be requested exhaustively, this list hardly constitutes a limitation since it is so extensive.[132] In case legal assistance is granted, it covers all *necessary* and *future* costs (art. 671 JC).

Interpretation costs provided to the beneficiary of legal second-line support and to the beneficiary of legal assistance are automatically covered (art. 508/10 & 691 JC). This is also the case for costs relating to the translation of documents, when such is required by law or requested by the judge (art. 692 JC).

3.12 LOSING A CASE: FINANCIAL CONSEQUENCES FOR THE LEGAL AID BENEFICIARY

There are two possible financial consequences for the legal aid beneficiary that arise from the failure of the proceedings. Firstly, the unsuccessful party has to **pay a lump-sum reimbursement to the successful party to cover its legal representation fees**.[133] The exact amount is determined by a Royal Decree.[134] In case the unsuccessful party is also a legal second-line support beneficiary, this legal compensation is set at the minimum, which is € 75 in most cases (art. 1022 JC).[135]

Secondly, legal costs (other than legal representation fees) are *advanced* by the State. It may recover the expenses, in case the final judgment orders the counterparty to bear the costs of the proceedings (art. 693 JC). In Belgium, every final verdict renders the unsuccessful party liable for the costs of the proceedings, unless otherwise determined by special law (art. 1017 JC). The State can thus recover its advances from the counterparty (art. 693 JC). When a legal aid beneficiary's petition is unsuccessful, the legal aid beneficiary will **bear the legal costs of the counterparty**, since the legal assistance provided only covers the own legal costs.[136]

3.13 WHEN THE LEGAL SUPPORT BENEFICIARY IS NOT SATISFIED WITH HIS COUNSEL

The beneficiary of legal second-line support who is unsatisfied with his counsel cannot appeal the appointment of a pro deo lawyer.[137] However, he can lodge a complaint against the lawyer with the Bar Council. The complaint has to be written, signed and dated, and has to contain the full identity of the complainant. The president of the Bar Council has to investigate the complaints filed against lawyers of his Bar. He can forward the case to a disciplinary council, which can decide to warn or reprimand the lawyer. The lawyer can also be suspended for a maximum period of one year or be forbidden to continue his profession (art. 458 § 1 & 460 JC).

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[132] Schollen, P. & Vangeebergen, B., "Juridische bijstand", *Jura Falconis* 2000-01, afl. 3, 407-442.
[133] *Indemnité de procédure* in French, or *rechtsplegingsvergoeding* in Dutch. This is not applicable to criminal proceedings.
[134] Koninklijk besluit van 26 oktober 2007 tot vaststelling van het tarief van de rechtsplegingsvergoeding bedoeld in artikel 1022 van het Gerechtelijk Wetboek en tot vaststelling van de datum van inwerkingtreding van de artikelen 1 tot 13 van de wet van 21 april 2007 betreffende de verhaalbaarheid van de erelonen en de kosten verbonden aan de bijstand van de advocaat, *BS* 9 November 2011.
[135] Art.2-3 *Ibid.*
[136] Schollen, P. & Vangeebergen, B., "Juridische bijstand", *Jura Falconis* 2000-01, afl. 3, 407-442.
[137] Orde van Vlaamse Balies, *Compendium juridische tweedelijnsbijstand*, 2017, 73.

3.14 MAJOR LEGAL DEVELOPMENTS REGARDING LEGAL AID

3.14.1 FACTORS ENDANGERING A DECENT REMUNERATION LEVEL FOR PRO DEO PERFORMANCES

The federal budget available for pro deo performances is a so-called **closed budget**, which means that the budget remains the same no matter how many cases the pro deo lawyers handle. Hence, the more pro deo services offered in a given year, the less the remuneration for one performance will be. As there is an increased demand for legal second-line support, the remuneration of pro deo lawyers has been the topic of debate. The increased demand is believed to be caused by the **economic crisis** since 2008, an increase of the **income threshold** to qualify for legal second-line support and the relatively new **Salduz-legislation**.[138]

3.14.2 ACCOUNTABILITY OF THE LEGAL AID BENEFICIARY

Several Royal and Ministerial Decrees regarding legal aid were adopted quite recently, in particular in 2016. These decrees changed the nomenclature on the amount of credits remunerated per pro deo performance. Credits were re-evaluated to promote mediation and legal advice with a view to settle disputes out-of-court and envisaged an improved remuneration of pro deo performances.

While wanting to increase the value of a pro deo performance credit, the government also sought to minimize the impact on government spending. First, since 1 September 2016, the legal second-line support beneficiary is expected to make two **lump-sum contributions,** one for the appointment of the lawyer (€ 20) and another one per legal proceeding (€ 30).[139] The latter contribution was introduced to encourage mediation and to avoid legal proceedings where possible.[140] However, the lump-sum contributions to be paid by legal second-line support beneficiaries were heavily contested by several organisations, which argued that the contributions created a serious threshold to start a procedure for the most vulnerable groups in society. A complaint was filed with the Constitutional Court, which judged on 21 June 2018 that the lump sums curtail the protection offered by the right to legal aid.[141] Consequently, the **lump sums were abolished**.

Secondly, while the income threshold to qualify for legal second-line support was increased, what qualifies as income is now determined differently. **All means of subsistence** of the client are now taken into account in order to assess the eligibility for legal second-line support, instead of only the client's income.[142] Signs of a higher wealth than would appear from the means of subsistence that were reported have to be taken into account (e.g.

[138] Wetsontwerp tot wijziging van het Gerechtelijk Wetboek met betrekking tot de juridische bijstand, *Parl.st.* Kamer 2015-16; nr. 1819/3, 15.
[139] Art. 7 Wet van 6 juli 2016 tot wijziging van het Gerechtelijk Wetboek met betrekking tot de juridische bijstand, *BS* 14 July 2016; Art. 3 Koninklijk besluit van 3 augustus 2016 tot wijziging van het koninklijk besluit van 18 december 2003 tot vaststelling van de voorwaarden van de volledige of gedeeltelijke kosteloosheid van de juridische tweedelijnsbijstand en de rechtsbijstand, *BS* 10 August 2016.
[140] Wetsontwerp tot wijziging van het Gerechtelijk Wetboek met betrekking tot de juridische bijstand, *Parl.st.* Kamer 2015-16; nr. 1819/3, 30.
[141] GwH 21 June 2018, nr. 77/2018, B.15.3.
[142] Wetsontwerp tot wijziging van het Gerechtelijk Wetboek met betrekking tot de juridische bijstand, *Parl.st.* Kamer 2015-16; nr. 1819/3, 6.

possessing a luxury car or owning real estate).[143] Moreover, all **presumptions of inadequate means of subsistence** have become **rebuttable** with the exception of minors. Thus, the means of subsistence of all people enjoying a rebuttable presumption, amongst which prisoners, will be verified to assess whether they have the means to afford a lawyer.[144]

Furthermore, if the judge awards a monetary compensation to the applicant, the lawyer can be granted a fee which should be paid by the applicant (art. 508/19ter § 1 JC).

Lastly, a **budgetary fund for legal second-line support** was established. Every unsuccessful party in civil proceedings and every convicted person in criminal proceedings has to contribute to the fund unless these parties are granted legal second-line support.[145]

In conclusion, the government has made legislative efforts to guarantee a decent remuneration for lawyers providing legal second-line support. The burden of these measures was put mainly on the legal second-line support beneficiary.

3.14.3 CURRENT UNCERTAINTY ABOUT THE REMUNERATION

Pro deo services were remunerated at around € 25 per credit for many years. The Bar Associations successfully campaigned with the Minister of Justice however, who raised the remuneration to € 75 per credit in 2018.[146]

This substantial increase has been somewhat overshadow recently by the debate on the applicability of a 21% VAT rate on legal second-line support. Since the Court of Justice of the European Union judged in 2016 that pro deo services are subject to VAT, no decision has been taken yet on who should pay this VAT. While the Minster of Justice made it clear that lawyers nor litigants should pay the VAT (implying the state will bear the costs), a definitive solution has not yet been found.

3.14.4 CASELOAD AND QUALITY OF LEGAL SECOND-LINE SUPPORT

Since the 2016 reform, Bar Councils can oblige lawyers to offer their services to legal second-line support beneficiaries, insofar as this is necessary for the legal support system to work effectively (art. 508/7 JC). Several lawyers have made an objection against this provision, asking the Constitutional Court to give its opinion on the matter. The court argued that the compulsory nature of the pro deo services was justified as it contributed to the proper administration of justice.

Furthermore, the Bar Councils are now able to impose more disciplinary sanctions. This should guarantee legal second-line support of a higher quality (art. 508/5 JC).

[143] Art. 2 ter Koninklijk besluit van 18 december 2003 tot vaststelling van de voorwaarden van de volledige of gedeeltelijke kosteloosheid van de juridische tweedelijnsbijstand en de rechtsbijstand, *BS* 24 December 2003.
[144] Orde van Vlaamse Balies, *Hervorming tweedelijnsbijstand: noodzakelijk, maar financiering blijft pijnpunt*, 30 August 2016, www.advocaat.be.
[145] Art. 4 Wet van 19 maart 2017 tot oprichting van een Begrotingsfonds voor de juridische tweedelijnsbijstand, *BS* 31 March 2017.
[146] Orde van Vlaamse Balies, "Waarde punt pro-Deovergoeding 75 euro", in *Nieuwsbrief 7*, 5 April 2018.

4. ORGANISATION OF BARS AND LAWYERS IN PRISON

4.1 HOW BARS PROVIDE LEGAL SUPPORT TO PRISONERS

4.1.1 ORGANISATION OF THE BARS IN BELGIUM

There are two bar associations, one for each main language Community (Flanders and the French Community). Together they represent twenty-five bars in the whole country (art. 495 JC). The Flemish Bar Association (*Orde van Vlaamse balies*, further: OVB) is responsible for thirteen local bars, being the twelve Lawyers' Associations of each Flemish judicial arrondissement plus the Dutch Association of Lawyers at the Bar of Brussels. The Association of French speaking and German speaking bars of Belgium (*Ordre des barreaux francophones et germanophone de Belgique*, further: OBFG) groups twelve local bars, being the Lawyers' Associations of each Walloon judicial arrondissement, the French Lawyers' Association at the Bar of Brussels and the only German speaking Bar of Lawyers. While both bar associations are separate organisations, the two associations can work together on specific matters. The OVB, the OBFG and the local bars have a shared responsibility when it comes to organising legal support (art. 495 & 508/7 JC).

4.1.2 INVOLVEMENT OF THE BARS IN LEGAL **FIRST-LINE** SUPPORT: THE **COMMISSION** FOR LEGAL SUPPORT

Prisoners have access to the legal support system provided to all citizens (art. 104 § 1 Prison Act). Prisoners can thus make use of the services of the Commissions for Legal Support, which are responsible for organising of legal first-line support. Commissions are established in each judicial district. They operate independently from the bars, although half of the members of the Commission are members of the bar (art. 508/2 § 1 & 3 JC). Each year the Bar Councils send a list to the Commission for Legal Support, mentioning all lawyers wishing to provide legal first-line support. The Bar Council also checks the quality of first-line support (art. 508/5 JC).

The Commissions for Legal Support organise duty shifts for lawyers providing legal first-line support. There is no obligation to organise duty shifts within penitentiary facilities (art. 508/3 JC).

The Commissions for Legal Support are legally obliged to inform people on the existence of legal support and the access conditions hereto. The Commission should hereby focus on the most socially vulnerable groups. Information should be distributed where legal support is provided, as well as at the registries, at the public prosecutor's office, the bailiffs, in the municipal authorities and the public social welfare centres of the judicial district. There is no legal provision explicitly requiring that information should be disseminated in prisons (art. 508/3 JC).

4.1.3 INVOLVEMENT OF THE BARS IN LEGAL **SECOND-LINE** SUPPORT: **BUREAU** FOR LEGAL SUPPORT

Prisoners are also entitled to all forms of legal second-line support available to all citizens (art. 104 § 1 Prison Act). The local bars are responsible for organising legal second-line support. The Bar Council establishes a Bureau for Legal Support with each bar, which organises duty shifts. There are no further provisions detailing how and where these standby duties take place. Just as is the case for legal first-line support, the Bar Councils sends a list to the Commission for Legal Support, mentioning all lawyers who wish to provide legal second-line support. The Bar Council checks the efficacy and quality of legal second-line support (art. 508/7 JC).

4.1.4 LEGAL SUPPORT TO PRISONERS

The Judicial Code does not detail how legal support has to be ensured to prisoners. In turn, the Prison Act only determines that the prison administration has to consult with the Commission for Legal Support on how prisoners can exercise their rights to legal support. The prison administration must also consult with the Commission for Legal Support on organising collective information and training initiatives on important legal issues in prison (art. 104 § 2 Prison Act).

4.2 LAWYERS SPECIALISED IN DETENTION ISSUES AND PRISON LAW

The OVB and the OBFG are responsible for the training of all lawyers they represent (art. 495 JC). The Bar Association's Deontological Code determines that all lawyers should continuously (re)train in legal matters or matters supporting the lawyer's profession in order to fulfil this duty. This can be done by taking courses, giving lectures or writing publications on legal matters. Lawyers can freely compose their annual training programme, as long as they obtain the required number of credits (i.e. there is no obligation to specialise in a certain area).[147]

Lawyers providing legal first-line support or legal second-line support are required to indicate their preferred area of law, which is registered by the Commission for Legal Support. Lawyers should give proof of their knowledge of the given area of law or should commit to receive appropriate training (art. 508/5 § 1 & 508/7 JC). This should ensure the quality of the legal support provided. There are no other training obligations imposed on lawyers working in legal support, nor special statutory qualifications required for lawyers specialised in a certain matter, such as prison law.

4.3 PRACTICAL ARRANGEMENTS FOR CARRYING OUT LEGAL SUPPORT MISSIONS

4.3.1 LEGAL SUPPORT IN PRISON: PRACTICAL ARRANGEMENT

A room is to be made available in the prison for legal support. This room is available for a number of hours on which agreements are made with the prison governor. The material circumstances in which legal support and legal aid are provided should ensure the confidentiality of the conversations with the prisoner. Only visual supervision should be exercised (art. 67 § 3 & 104 § 4 Prison Act). The internal prison rules provide more detail on the practical arrangements.[148]

Art. 67 § 1 Prison Act determines that lawyers who assert their legal capacity may visit those prisoners who have called upon their services or whose interests they defend. Lawyers may access prisons between 7 a.m. and 8.30 p.m. Consultations end at 9 p.m. at the latest (art. 26 RD2011(III/V)). Lawyers are subject to the applicable security and control measures.

Prisoner have the right to make daily telephone calls, between 8 a.m. and 8.30 p.m. with their lawyer at their own expense. The length of this telephone conversation can be limited to fifteen minutes if the availability telephones in prison do not allow more time to be allocated. Correspondence between a prisoner and his lawyer on legal matters is not subject to control of the prison director. When there are serious doubts on the whether

[147] Art. II.3 Codex Deontologie voor Advocaten van 25 juni 2014, *BS* 30 September 2014.
[148] Daems, T., Eechaudt, V., Maes, E., Vander Beken, T., "De basiswet van 12 januari 2005 betreffende het gevangeniswezen en de rechtspositie van de gedetineerden: een status quaestionis", *Tijdschrift voor strafrecht* 2014, afl. 1, 33.

or not the correspondence concerns legal matters, the prison director may send the correspondence to the Bar Association to check the contents (art. 66 & 68 § 1 Prison Act, art. 27 RD2011(III/V)).

4.3.2 LAWYER'S ACCESS TO ACCOMMODATION FACILITIES

Access to prisoner's accommodation facilities is restricted. In principle, lawyers only meet prisoners in a dedicated area (see *supra*). Art. 7 RD1965 provides that specific persons can access prison without prior authorization, e.g. members of parliament or prison monitoring bodies. However, lawyers are not mentioned here and, hence, they cannot access the inhabited areas/accommodation facilities of a prison, except if they have prior authorisation by the Minister of Justice. This rule does not only apply to lawyers, but to anyone who wishes to visit a prison. If they are authorised, they should be accompanied by a prison director-advisor or a member of the personnel appointed by the prison director-advisor. During the visit, one cannot enter inhabited prison cells or have contact with prisoners or other prison staff, unless they have received prior permission to do so by the Minister. Access to the prison can be refused for 'serious reasons' (art. 8 RD1965).

While art. 32-34 Prison Act also contains rules on access to prison, these have not entered into force. In analogy with RD1965, the Prison Act determines that people, including lawyers, can only access prisons if they are authorised to do so by the Minister of Justice. In order to visit occupied accommodation facilities, they have to get special approval of the minister. Art. 113 & 137 Prison Act regulating visits to the prisoner in a safety cell or punishment cell have entered into force. According to these provisions, prisoners in a safety cell of punishment cell are entitled to legal support and legal assistance, just like any other prisoner.

4.3.3 LAWYER'S ACCESS TO THE CLIENT'S PRISON FILE

The Prison Act refers to the medical file of prisoners (art. 92) and the disciplinary file of prisoners (art. 144).

Regarding the **prisoner's medical file**, art. 92 Prison Act foresees that a prisoner can request that a copy be sent to the prisoner's confidential advisor after a written request hereto. Amongst other, a prisoner can appoint a lawyer as his confidant. The prisoner himself cannot get a copy of his own medical file. As the articles regarding the medical file of the prisoner have not entered into force yet, access to a prisoner's medical file is currently regulated by the 2002 Law on Patient Rights.[149] For now, a prisoner is allowed to keep a copy of the medical file and he can share it with his lawyer if he deems this is useful.

Art. 144 Prison Act on prison discipline foresees that prisoners can consult their **disciplinary file** and may receive legal assistance during the disciplinary procedure.[150] The lawyer is thus allowed to access the prisoner's disciplinary file.

[149] Wet van 22 augustus 2002 betreffende de rechten van de patiënt, *BS* 26 September 2002. See Eechaudt, V., Vander Laenen, F. & Vander Beken, T., *Organisation of health care in Belgian prisons – legal framework. KCE Reports 293*, Brussels, Belgian Health Care Knowledge Centre (KCE), 2017.
[150] Prison Act, article 144, §3 en 4.

5. INVOLVEMENT OF NGOS, LEGAL CLINICS AND NATIONAL MONITORING BODIES (IF PROVIDING LEGAL ADVICE)

5.1 INTERVENTIONS IN PRISON

5.1.1 ACCESS TO PRISONS WITHOUT NEED OF PRIOR AUTHORIZATION

Members of the National Monitoring Body[151] as well as **members of the local Independent Monitoring Board**[152] have unrestricted access to prisons (art. 23 & 27 Prison Act). They have unrestricted access to the whole facility, in so far as necessary for the performance of the tasks assigned to them and they can access the individual accommodation provided to the prisoner upon prior consent of the prisoner. The Prison Act explicitly entitles the National Monitoring Body and the Independent Monitoring Boards to access the safety cell or punishment cell. Prior authorization by the prison administration is not required. The aforementioned legal provisions will enter into force in 2019 (RD2018).

Members of human rights NGOs and actors of legal clinics can only access prisons after prior authorization of the Minister of Justice, just as is the case for other persons. If they received authorization, they can only access the prison accompanied by the prison director-advisor or a member of the personnel appointed by the prison director-advisor. They can also be denied access to the prison due to serious reasons (art. 8 RD1965).

Members of parliament can enter prison without need for prior authorisation. They have to demonstrate their legal capacity and they should be accompanied by the prison director or a personnel member appointed by the prison director (art. 33 Prison Act).

5.1.2 PROVIDING LEGAL ADVICE

The **National Monitoring Body** is responsible for an independent monitoring of prisons, the treatment of prisoners and a prison's compliance with relevant regulations. Furthermore, it has to advise the Parliament, the Minister of Justice and the Minister of Public Health regarding the prison system, write an annual activity report, and coordinate and support the Independent Monitoring Boards. **Independent Monitoring Boards** are tasked with monitoring the local prison, its treatment of prisoners and its compliance with the relevant regulations. They also have to mediate between prisoners and the prison governor if problems are brought to their attention, advise the National Monitoring Body, and write an annual report. Providing legal advice is not part of the National Monitoring Body nor the Independent Monitoring Board's work package and hence, they are not entitled to provide legal advice to prisoners.

Since **human rights NGOs and actors of legal clinics** are not allowed to access prisons without prior authorization and always have to be accompanied by prison staff, they do not have the opportunity to provide legal advice to prisoners either.

5.1.3 ABILITY TO CORRESPOND AND MEET CONFIDENTIALLY WITH PRISONERS

[151] L*e conseil central de surveillance pénitentiaire* in French or c*entrale toezichtsraad voor het gevangeniswezen*" in Dutch.
[152] *Commission de surveillance* in French, or *Commissie van toezicht* in Dutch.

Members of the National Monitoring Body as well as members of the Independent Monitoring Boards are entitled **to correspond with prisoners without any control** of their correspondence. Letters from or addressed to members of the national monitoring bodies are not subject to checks by the prison administration. Furthermore, they can **engage with prisoners without supervision** being executed by the personnel of the prison facility (art. 23 § 2, 27 § 2 & 57 § 1 Prison Act),

Human rights NGOs and members of legal clinics are not legally entitled the right to correspond and interact confidentially with prisoners.

5.2 LEGAL ACTION IN COURT

5.2.1 PROOF OF A LEGITIMATE INTEREST

To be able to take legal action before court, the claimant must be able to show a legitimate interest. This interest must exist when the claim is filed (art. 17 & 18 JC). Thus, a legal claim cannot be filed when the claimant has no 'interest' in doing so. However, legal provisions do not detail what is to be understood by a 'legitimate interest' and there is no unanimity in legal doctrine on a definition of the concept. Jurisprudence shows that a narrow interpretation of the concept is enforced, which means that a claimant must demonstrate a personal and immediate advantage that can be gained from the claim. This advantage should be an effective, non-theoretical, material or moral in nature.[153]

5.2.2 LEGAL PERSONS AS CLAIMANTS

Apart from natural persons, legal persons are allowed to file a claim, keeping in mind that they too need to show a legitimate interest in doing so. Thus, a claim filed by a legal person cannot be admitted in case the legal person has no personal and immediate interest in doing so. This is referred to with the adage '**no interest, no legal action**'. The self-interest of a legal person encompasses all of which touches upon the legal person's existence, its material goods and its moral rights. These three elements are considered sufficient to initiate a claim.[154] Other case law has also accepted the honour and good name of the legal person.[155]

In December 2018, the legislator has added an additional legal provision to art. 17 JC, which provides an explicit legal basis for legal persons to file a claim before courts and tribunals.[156] Certain restrictions apply however. The claim must relate to the protection of fundamental rights mentioned in the Constitution or in international instruments (e.g. ECHR or CFREU). Moreover, legal persons must be able to demonstrate that the protection of human rights or fundamental freedoms is the organisation's objective is (e.g. by referring to the organisation's statutes). Thus, NGO's active in the field of the protection of prisoners' fundamental rights may file a claim before the appropriate judicial body. However, art. 17 JC refers only to claims before judicial courts and tribunals, such as the court of first instance (interlocutory proceedings). Art. 17 JC does not regulate claims before the Council of State, which is an administrative court. That said, The Council of State has in the past accepted that legal persons may have a legitimate interest and may file a claim, notwithstanding the lack of an explicit legal provision

[153] Vanlersberghe, P., "Artikel 17 Ger.W." in Gerechtelijk recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer, Mechelen, Kluwer, 2002, 9.
[154] Cass. 4 February 2008, *Rechtskundig Weekblad* 2010, 197.
[155] Cass. 4 February 2008, *Rechtspraak Antwerpen Brussel Gent* 2008, afl. 11, 635, noot Verbeke, R.
[156] Art. 137 Wet van 21 december 2018 houdende diverse bepalingen betreffende justitie, *BS* 31 December 2018.

in art. 19 Coordinated laws of on the Council of State. Thus, NGO's may petition the Council of State (e.g. to annul a certain legal provision), in as far as the NGO pursues a specific social goal and in as far as they defend a collective interest.[157]

5.2.3 NGOS' AND NATIONAL MONITORING BODIES' ABILITY TO ACT ON BEHALF OF A PRISONER OR REPRESENT HIM

Only in the matter of non-discrimination legislation, organisations are explicitly provided with the right to take legal action in name of or in support of the victim. In other matters, the claim of organisations in name of the victim will be declared inadmissible due to lack of an interest by the organisation itself. In order to act on behalf of a prisoner, organisations have to be explicitly entitled with the right to take legal action in name of victims. By lack of such a general right in Belgian legislation, organisations are not eligible to act on behalf of a prisoner unless the claim is situated in the matter of the non-discrimination legislation. Victims can only be represented by a lawyer in Belgium.

5.2.4 NGOS' AND NATIONAL MONITORING BODIES' ABILITY TO CHALLENGE GENERAL AND IMPERSONAL NORMS

In order for a claim to be declared admissible, the claimant has to demonstrate a personal and immediate interest. This is impossible for general and impersonal norms. Belgian NGOs or monitoring boards are thus not able to challenge general and impersonal norms before court. This applies in Belgium both to proceedings before ordinary courts and to a claim as civil party before the criminal courts.

[157] For more information, see Lefranc, P., "Artikel 17, tweede lid Ger.W.: Hooglied van het algemeen collectief vorderingsrecht voor de hoven en rechtbanken of de zwanenzang van de Eikendaeldoctrine", *Tijdschrift voor Milieurecht*, to be published in 2019.