

LUXEMBOURG

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François Moyse
Cathy Nelson

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Executive summary

Definitions

- [1]. Luxembourg uses the term persons with mental disorder (*personnes atteintes de troubles mentaux/trouble mental*), which it began using in 1988. The law did not expressly define the term at that time. Prior to that, Luxembourg referred to treatment of lunatics/insane persons (*aliénés*). Luxembourg continues to use the term persons with mental disorder, and the current law does not distinguish between persons with mental disorder and persons with intellectual disability.

Anti-discrimination

- [2]. Luxembourg's constitutional anti-discrimination framework as it relates to persons with mental disorder would fall under Article 10bis of the Luxembourg Constitution which states that all Luxembourgers are equal before the law. It further states that they are eligible for all public employment, including civilian and military, and that the law will determine non-Luxembourgers' eligibility for those posts.
- [3]. Luxembourg's legislative anti-discrimination framework as it relates to persons with mental disorder falls under the discrimination rules regarding persons with handicaps. Our case law search revealed no cases on this topic.

Specific fundamental rights

- [4]. Several fundamental rights are protected under the Luxembourg Constitution. However, the Luxembourg Constitution exempts from the right to vote individuals serving criminal sentences; those who have been deprived of their right to vote by a criminal court; and adults under conservatorships/guardianships. Thus, handicapped individuals under conservatorships and guardianships cannot exercise the right to vote. However, this is in conflict with the Article 29 of the CRPD's requirement that Signatory States guarantee persons with disabilities the right to exercise their political rights as universal rights, on the same basis as other citizens. Once Luxembourg ratifies the CRPD, legislators will be obligated to deal with this conflict.

Involuntary placement and involuntary treatment

- [5]. Luxembourg's legal framework on involuntary placement and involuntary treatment is currently undergoing reform to continue with the decentralisation of institutional psychiatry in Luxembourg begun prior to 2006, which included reducing the stigmatisation of patients and preventing their chronic institutionalisation. The law that has been in force since 1988, as amended, will be repealed by the recently-adopted Luxembourg law on hospitalisation without their consent of persons with mental disorders (the '2009 Law').
- [6]. Luxembourg's legal framework regulating involuntary placement and involuntary treatment dates back to a very general law passed in 1843 providing that person's threatening public order could be confined in sanatoriums. In 1880 came a more specific law, based on early French and Belgian legislation, regarding the treatment of lunatics/insane persons (*aliénés*) (the '**1880 Law**'), which provided certain protective measures for involuntary placement. That law was amended twice, and repealed in 1988 by a law that transitioned from the old vocabulary referring to a person as a lunatic/insane person (*aliéné*), to a person with mental disorders (*personnes atteintes de troubles mentaux*). (the '**1988 Law**'). One of the 1988 Law's most significant amendments was in 2006 to replace 'placement in a closed psychiatric establishment or ward' with 'placement in a specialized psychiatric establishment or psychiatric ward in a general hospital', the latter to be created in designated hospitals.

Competence, capacity and guardianship

- [7]. Luxembourg's law on legally incapable adults is governed by a 1982 law (the "**1982 Law**") which provides for the management of affairs of persons whatever form of protection they are under. The 1982 Law provides for conservatorships (*tutelle*) and guardianships (*curatelle*). Both forms of protection are supervised by judges dealing with juvenile and conservatorship/guardianship matters.

Miscellaneous

- [8]. NTR

Definitions

- [9]. Luxembourg uses the term persons with mental disorder (*personnes atteintes de troubles mentaux/trouble mental*), which it began using in 1988. A law on the placement of persons with mental disorder without their consent in closed psychiatric establishments or wards transitioned from the old vocabulary referring to a person as a lunatic/insane person (*aliéné*), to a person with mental disorders (*personnes atteintes de troubles mentaux*) (the ‘**1988 Law**’). The law did not expressly define the term at that time.¹
- [10]. Luxembourg continues to use the term persons with mental disorder, and the current law, the 2009 Law as defined below, on the hospitalisation without their consent of persons with mental disorder, does not distinguish between persons with mental disorder and persons with intellectual disability.²
- [11]. Prior to that, Luxembourg referred to treatment of lunatics/insane persons (*aliénés*). It did so in a very general law passed in 1843 providing that persons threatening public order could be confined in sanatoriums. Luxembourg continued to use that term in 1880 under a more specific law, based on early French and Belgian legislation, which provided certain protective measures for involuntary placement regarding the treatment of lunatics/insane persons.³
- [12]. Our case law search revealed no cases contributing the definition of the national terminology used.⁴

¹ Luxembourg/*Loi du 26 mai 1988 relative au placement des personnes atteintes de troubles mentaux dans des établissements ou services psychiatriques fermés*, *Mémorial* A-N° 28, 16.06.1988, as amended at p. 560, and Luxembourg/*Loi du 11 août 1982 portant réforme du droit des incapables majeurs*, *Mémorial* A-N° 72, 26.08.1982, at p. 1515

² Luxembourg/*Loi du 11 août 1982 portant réforme du droit des incapables majeurs*, *Mémorial* A-N° 72, 26.08.1982, at p. 1515, and Luxembourg/*Projet de loi No. 5856 relatif à l’hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, adopted by the Chamber of Deputies on 27.10.2009 (the Council of State waived the second constitutionally-required vote on 10.11.2009), and will soon be published in Luxembourg’s legislative journal. As for the date of publication, the legislative journal service referred us to the Health Ministry which has not responded to our e-mail of 01.12.2009 requesting an anticipated publication date.

³ Luxembourg/*Loi du 4 juillet 1843, relative à l’observation de l’arrêté du 23 février 1815, permettant la séquestration temporaire de personnes dont la liberté compromet l’ordre public*, *Mémorial* A-N° 34, 1842, at p. 477, and, Luxembourg/*Loi du 7 juillet sur le régime des aliénés*, *Mémorial* A-N° 46, 21.07.1880, at p. 445.

⁴ Letter of 20.07.2009 to the Court of Appeals Documentation Service using search terms: illnesses, persons with mental disorder(s), mental disorders, handicapped, mentally handicapped, voluntary placement, involuntary placement, psychiatry, mental capacity, guardianship. We also asked that a search be made for cases regarding handicapped with

respect to the right to life; the right to freedom from torture or inhumane and degrading treatment; the right to privacy (*vie privée*) including access to one's medical records; the right to freedom and security; the right to freedom from exploitation; the right to a fair trial (guarantees of justice); the right to marry; the right to start a family; the right to have children and maintain one's parental rights; the right to property; and, the right to vote.

1. Anti-discrimination

1.1. Incorporation of United Nations standards

- [13]. Luxembourg signed the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol on 30.03.2007, but has not yet ratified it.⁵ As set forth in Section V, the main text appearing to have an impact on legislation regarding persons with mental disorders appears to be the Europe Recommendation (2004)10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder ('Recommendation (2004)10').

1.2. The anti-discrimination national framework

- [14]. Luxembourg's constitutional anti-discrimination framework as it relates to persons with mental disorder would fall under Article 10bis of the Luxembourg Constitution which states that all Luxembourgers are equal before the law. It further states that they are eligible for all public employment, including civilian and military, and that the law will determine non-Luxembourgers' eligibility for those posts.⁶
- [15]. Luxembourg's legislative anti-discrimination framework as it relates to persons with mental disorder falls under the discrimination rules regarding persons with handicaps. The Law of 12 September 2003 on handicapped persons (the '**2003 Law**') deals with the handicapped individuals in the employment context as does the Law of 28 November 2006 on equal treatment (the '**2006 Law**'). The 2003 Law defines a handicapped employee as a person with a diminished ability to work of at least 30 percent resulting from, among other things, a physical, mental sensorial or psychological deficiency caused by

⁵ UN Enable website for the Rights and Dignity of Persons with Disabilities at: <http://www.un.org/disabilities/countries.asp?id=166> (11.11.2009).

⁶ Luxembourg/ Constitution 2009, Arts. 10bis and 111, updated as at 01.04.2009, available at : http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/Page_de_garde.pdf (04.12.2009), and F. Moysse (2009) *Echec à la discrimination*, Brussels: Bruylant, pp. 13-15, discussing the Constitution as Luxembourg's primary non-discrimination instrument.

psychosocial problems that worsen the condition, and who is recognized as fit for work on the regular labour market or in a protected workshop. The 2003 Law covers employment, social benefits and revenue for those individuals, and for handicapped persons who cannot work. The 2006 Law transposed Directive 2000/43/EC, the Racial Equality Directive (RED), and Directive 2000/78/EC, the Employment Directive, into domestic law.⁷

- [16]. The 2006 Law does not define handicap to include persons with mental disorder. However, given that the 2006 Law transposes both Directive 2000/43/EC, the Racial Equality Directive (RED), and Directive 2000/78/EC, the Employment Directive, the scope of anti-discrimination protection is extended to social protection (including social security and healthcare), social benefits, education and the access to goods and services provided to the public (including housing).⁸
- [17]. Our case law search revealed no cases on this topic.⁹
- [18]. Luxembourg has no constitutional, legislative or jurisprudential preferential treatment arrangements specifically for persons with mental disorder. However, the 2003 Law provides that handicapped persons can be oriented to protected workshops, when they are unfit for work on the regular labour market. Persons under conservatorship or wards would also be eligible for this type of employment.¹⁰

⁷ Luxembourg/*Loi du 12 septembre 2003 relative aux personnes handicapées*, *Mémorial A-N° 144*, 29.09.2003, at p. 2938, as amended. Luxembourg/*Loi du 28 novembre 2006 sur l'égalité de traitement*, *Mémorial A-N° 207*, 6.12.2006, at p. 2584, as amended. See also F. Moyses (2009) *Echec à la discrimination*, Brussels: Bruylant, pp. 145-147 (discussing definition of handicap that includes those of the WHO and UN).

⁸ Luxembourg/*Loi du 28 novembre 2006 sur l'égalité de traitement*, *Mémorial A-N° 207*, 6.12.2006, as amended, Art. 2.

⁹ Letter of 20.07.2009 to the Court of Appeals Documentation Service using search terms: illnesses, persons with mental disorder(s), mental disorders, handicapped, mentally handicapped, voluntary placement, involuntary placement, psychiatry, mental capacity, guardianship. We also asked that a search be made for cases regarding handicapped with respect to the right to life; the right to freedom from torture or inhumane and degrading treatment; the right to privacy (*vie privée*) including access to one's medical records; the right to freedom and security; the right to freedom from exploitation; the right to a fair trial (guarantees of justice); the right to marry; the right to start a family; the right to have children and maintain one's parental rights; the right to property; and, the right to vote.

¹⁰ Letter of 20.07.2009 to the Court of Appeals Documentation Service using search terms: illnesses, persons with mental disorder(s), mental disorders, handicapped, mentally handicapped, voluntary placement, involuntary placement, psychiatry, mental capacity, guardianship. We also asked that a search be made for cases regarding handicapped with respect to the right to life; the right to freedom from torture or inhumane and degrading treatment; the right to privacy (*vie privée*) including access to one's medical records; the right to freedom and security; the right to freedom from exploitation; the right to a fair trial (guarantees of justice); the right to marry; the right to start a family; the right to have children and maintain one's parental rights; the right to property; and, the right to vote.

- [19]. There are no reasonable accommodation legal provisions that are specific to persons with mental disorder. The 2006 Law amended the 2003 Law to include a reasonable accommodation clause stipulating that employers will take appropriate measures to allow handicapped employees to gain access to, perform and progress in or receive training on their jobs, as long as the measures do not represent a disproportionate expense to the employer. Under certain conditions, the State will cover part or all of the expense. We have found no case law on point.¹¹
- [20]. The national equality body, the *Centre pour l'égalité de traitement* [Centre for Equal Treatment] (CET), would not be competent to deal with cases of discrimination on the grounds of intellectual disability. Its purpose is solely to provide general advice and orientation, not to get directly involved on behalf of discrimination victims. The CET is not empowered to take discrimination claims before a court. However, in on 21.04.2009, the CET held a press conference to release the results of a survey it had conducted regarding discrimination. The CET found that of the of the 1002 persons questioned, 91% responded that the CET would be useful for the discrimination based on handicap, and 51% of that 91% felt that the CET would be very important and useful.¹² This would include persons with mental disorder.

Luxembourg/*Loi du 12 septembre 2003 relative aux personnes handicapées, Mémorial A-N° 144, 29.09.2003, as amended, Arts. 17-24.*

¹¹ Luxembourg/*Loi du 28 novembre 2006 sur l'égalité de traitement, Mémorial A-N° 207, 6.12.2006, as amended, Art. 30. See also F. Moysse (2009) Echee à la discrimination, Brussels: Bruylant, pp. 148-151 (discussing reasonable accommodations). Letter of 20.07.2009 to the Court of Appeals Documentation Service using search terms: illnesses, persons with mental disorder(s), mental disorders, handicapped, mentally handicapped, voluntary placement, involuntary placement, psychiatry, mental capacity, guardianship. We also asked that a search be made for cases regarding handicapped with respect to the right to life; the right to freedom from torture or inhumane and degrading treatment; the right to privacy (*vie privée*) including access to one's medical records; the right to freedom and security; the right to freedom from exploitation; the right to a fair trial (guarantees of justice); the right to marry; the right to start a family; the right to have children and maintain one's parental rights; the right to property; and, the right to vote.*

¹² Information on the CET is available in Luxembourgish, English, German, French and Portuguese at: www.cet.lu, and the press conference presentation is available in French at: <http://www.cet.lu/en/Actualites> (04.12.2009).

2. Specific Fundamental Rights

2.1. The Right to life

[21]. While the Constitution does not expressly guarantee the right to life, Article 11 of the Constitution guarantees the natural rights of the person, and Article 12 provides for the right to individual liberty. These rights are qualified by, among others, the laws on involuntary placement and treatment, and conservatorships/guardianships as provided in Sections V and VI below. We have found no case law on point.¹³

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

[22]. While the Constitution does not expressly guarantee the right to freedom from torture or cruel, inhuman or degrading treatment or punishment, it does provide for the right to individual liberty, including the right not to be arrested or put in placement except as provided by law. It also provides that no one can be punished except as provided by law and that the death penalty cannot be instituted. These rights are qualified by, among others, the laws on involuntary placement and treatment, and conservatorships/guardianships as provided in Sections V and VI below. We have found no case law on point.¹⁴

¹³ Luxembourg/ Constitution 2009, Arts. 11 and 12, updated as at 01.04.2009, available at : http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/Page_de_garde.pdf (04.12.2009), and Letter of 20.07.2009 to the Court of Appeals Documentation Service using search terms: illnesses, persons with mental disorder(s), mental disorders, handicapped, mentally handicapped, voluntary placement, involuntary placement, psychiatry, mental capacity, guardianship. We also asked that a search be made for cases regarding handicapped with respect to the right to life; the right to freedom from torture or inhumane and degrading treatment; the right to privacy (*vie privée*) including access to one's medical records; the right to freedom and security; the right to freedom from exploitation; the right to a fair trial (guarantees of justice); the right to marry; the right to start a family; the right to have children and maintain one's parental rights; the right to property; and, the right to vote.

¹⁴ Luxembourg/ Constitution 2009, Arts. 12, 14 and 18, updated as at 01.04.2009, available at : http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/Page_de_garde.pdf (04.12.2009), and Letter of 20.07.2009 to the Court of Appeals Documentation Service using search terms: illnesses, persons with mental disorder(s), mental disorders, handicapped,

2.3. The right to freedom from exploitation

- [23]. While the Constitution does not expressly guarantee the right to freedom from exploitation, it does provide for the right privacy, the scope of which includes the right to social security, healthcare workers' rights, the fight against poverty and the social integration of persons with handicaps. These rights are qualified by, among others, the laws on involuntary placement and treatment, and conservatorships/guardianships as provided in Sections V and VI below. We have found no case law on point.¹⁵

2.4. The right to liberty and security

- [24]. The Luxembourg Constitution expressly provides for the right to individual liberty, to include the right not to be arrested or put in placement except as provided by law. It also provides that no one can be punished except as provided by law and that the death penalty cannot be instituted. These rights are qualified by, among others, the laws on involuntary placement and treatment, and conservatorships/guardianships as provided in Sections V and VI below. We have found no case law on point.¹⁶

mentally handicapped, voluntary placement, involuntary placement, psychiatry, mental capacity, guardianship. We also asked that a search be made for cases regarding handicapped with respect to the right to life; the right to freedom from torture or inhumane and degrading treatment; the right to privacy (*vie privée*) including access to one's medical records; the right to freedom and security; the right to freedom from exploitation; the right to a fair trial (guarantees of justice); the right to marry; the right to start a family; the right to have children and maintain one's parental rights; the right to property; and, the right to vote.

¹⁵ Luxembourg/ Constitution 2009, Art. 11, updated as at 01.04.2009, available at : http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/Page_de_garde.pdf (04.12.2009), and Letter of 20.07.2009 to the Court of Appeals Documentation Service using search terms: illnesses, persons with mental disorder(s), mental disorders, handicapped, mentally handicapped, voluntary placement, involuntary placement, psychiatry, mental capacity, guardianship. We also asked that a search be made for cases regarding handicapped with respect to the right to life; the right to freedom from torture or inhumane and degrading treatment; the right to privacy (*vie privée*) including access to one's medical records; the right to freedom and security; the right to freedom from exploitation; the right to a fair trial (guarantees of justice); the right to marry; the right to start a family; the right to have children and maintain one's parental rights; the right to property; and, the right to vote.

¹⁶ Luxembourg/ Constitution 2009, Arts. 12, updated as at 01.04.2009, available at : http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/Page_de_garde.pdf (04.12.2009), and Letter of 20.07.2009 to the Court of Appeals Documentation Service using search terms: illnesses, persons with mental disorder(s), mental disorders, handicapped, mentally handicapped, voluntary placement, involuntary placement, psychiatry, mental capacity, guardianship. We also asked that a search be made for cases regarding handicapped with respect to the right to life; the right to freedom from torture or inhumane and degrading treatment; the right to privacy (*vie privée*) including access to one's medical records; the right to freedom and security; the right to freedom from exploitation; the right to a fair trial

2.5. The right to fair trial

- [25]. While the Luxembourg Constitution does not expressly provide for the right to a fair trial, it provides for the right to individual liberty (as described above) and the right to maintain the judge assigned to one by law. These rights are qualified by, among others, the laws on involuntary placement and treatment, and conservatorships/guardianships as provided in Sections V and VI below. We have found no case law on point.¹⁷

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

- [26]. The Luxembourg Constitution expressly provides for the right to privacy (*L'Etat garantit la protection de la vie privée*) and the inviolability of the home and correspondence. These rights are qualified by, among others, the laws on involuntary placement and treatment, and conservatorships/guardianships as provided in Sections V and VI below. We have found no case law on point.¹⁸

(guarantees of justice); the right to marry; the right to start a family; the right to have children and maintain one's parental rights; the right to property; and, the right to vote.

¹⁷ Luxembourg/ Constitution 2009, Arts. 11, 15, 28 and 13, updated as at 01.04.2009, available at : http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/Page_de_garde.pdf (04.12.2009), and Letter of 20.07.2009 to the Court of Appeals Documentation Service using search terms: illnesses, persons with mental disorder(s), mental disorders, handicapped, mentally handicapped, voluntary placement, involuntary placement, psychiatry, mental capacity, guardianship. We also asked that a search be made for cases regarding handicapped with respect to the right to life; the right to freedom from torture or inhumane and degrading treatment; the right to privacy (*vie privée*) including access to one's medical records; the right to freedom and security; the right to freedom from exploitation; the right to a fair trial (guarantees of justice); the right to marry; the right to start a family; the right to have children and maintain one's parental rights; the right to property; and, the right to vote.

¹⁸ Luxembourg/ Constitution 2009, Arts. 12 and 13 updated as at 01.04.2009, available at : http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/Page_de_garde.pdf (04.12.2009), and Letter of 20.07.2009 to the Court of Appeals Documentation Service using search terms: illnesses, persons with mental disorder(s), mental disorders, handicapped, mentally handicapped, voluntary placement, involuntary placement, psychiatry, mental capacity, guardianship. We also asked that a search be made for cases regarding handicapped with respect to the right to life; the right to freedom from torture or inhumane and degrading treatment; the right to privacy (*vie privée*) including access to one's medical records; the right to freedom and security; the right to freedom from exploitation; the right to a fair trial

2.7. The right to marry, to found a family and to respect of family life

- [27]. The Luxembourg Constitution expressly provides for the right to respect of family life and the natural rights of a person. These rights are qualified by, among others, the laws on involuntary placement and treatment, and conservatorships/guardianships as provided in Sections V and VI below. We have found no case law on point.¹⁹

2.8. The right to have children and maintain parental rights

- [28]. The Luxembourg Constitution expressly provides for the right to respect of family life and the natural rights of a person. These rights are qualified by, among others, the laws on involuntary placement and treatment, and conservatorships/guardianships as provided in Sections V and VI below. We have found no case law on point.²⁰

(guarantees of justice); the right to marry; the right to start a family; the right to have children and maintain one's parental rights; the right to property; and, the right to vote.

¹⁹ Luxembourg/ Constitution 2009, Art. 11 updated as at 01.04.2009, available at : http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/Page_de_garde.pdf (04.12.2009), and Letter of 20.07.2009 to the Court of Appeals Documentation Service using search terms: illnesses, persons with mental disorder(s), mental disorders, handicapped, mentally handicapped, voluntary placement, involuntary placement, psychiatry, mental capacity, guardianship. We also asked that a search be made for cases regarding handicapped with respect to the right to life; the right to freedom from torture or inhumane and degrading treatment; the right to privacy (*vie privée*) including access to one's medical records; the right to freedom and security; the right to freedom from exploitation; the right to a fair trial (guarantees of justice); the right to marry; the right to start a family; the right to have children and maintain one's parental rights; the right to property; and, the right to vote.

²⁰ Luxembourg/ Constitution 2009, Art. 11 updated as at 01.04.2009, available at : http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/Page_de_garde.pdf (04.12.2009), and Letter of 20.07.2009 to the Court of Appeals Documentation Service using search terms: illnesses, persons with mental disorder(s), mental disorders, handicapped, mentally handicapped, voluntary placement, involuntary placement, psychiatry, mental capacity, guardianship. We also asked that a search be made for cases regarding handicapped with respect to the right to life; the right to freedom from torture or inhumane and degrading treatment; the right to privacy (*vie privée*) including access to one's medical records; the right to freedom and security; the right to freedom from exploitation; the right to a fair trial (guarantees of justice); the right to marry; the right to start a family; the right to have children and maintain one's parental rights; the right to property; and, the right to vote.

2.9. The right to property

- [29]. The Luxembourg Constitution provides for the right to property, apart from cases of public utility. The Constitution also provides for the inviolability of the home, and that punishment by the confiscation of assets cannot be imposed. These rights are limited by, among others, the laws on involuntary placement and treatment, and conservatorships/guardianships as provided in Sections V and VI below. We have found no case law on point.²¹

2.10. The right to vote

- [30]. The Luxembourg Constitution exempts from the right to vote individuals serving criminal sentences; those who have been deprived of their right to vote by a criminal court; and adults under conservatorships/guardianships. Thus, handicapped individuals under conservatorships and guardianships cannot exercise the right to vote. However, this is in conflict with the Article 29 of the CRPD's requirement that Signatory States guarantee persons with disabilities the right to exercise their political rights as universal rights, on the same basis as other citizens. Once Luxembourg ratifies the CRPD, legislators will be obligated to deal with this conflict. The right to vote is also limited by, among others, the laws on involuntary placement and treatment, and conservatorships/guardianships as provided in Sections V and VI below. We have found no case law on point.²²

²¹ Luxembourg/ Constitution 2009, Arts. 15-17, updated as at 01.04.2009, available at : http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/Page_de_garde.pdf (04.12.2009), and Letter of 20.07.2009 to the Court of Appeals Documentation Service using search terms: illnesses, persons with mental disorder(s), mental disorders, handicapped, mentally handicapped, voluntary placement, involuntary placement, psychiatry, mental capacity, guardianship. We also asked that a search be made for cases regarding handicapped with respect to the right to life; the right to freedom from torture or inhumane and degrading treatment; the right to privacy (*vie privée*) including access to one's medical records; the right to freedom and security; the right to freedom from exploitation; the right to a fair trial (guarantees of justice); the right to marry; the right to start a family; the right to have children and maintain one's parental rights; the right to property; and, the right to vote.

²² Luxembourg/ Constitution 2009, Art. 53, updated as at 01.04.2009, available at : http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/Page_de_garde.pdf (04.12.2009), and Letter of 20.07.2009 to the Court of Appeals Documentation Service using search terms: illnesses, persons with mental disorder(s), mental disorders, handicapped, mentally handicapped, voluntary placement, involuntary placement, psychiatry, mental capacity, guardianship. We also asked that a search be made for cases regarding handicapped with respect to the right to life; the right to freedom from torture or inhumane and degrading treatment; the right to privacy (*vie privée*) including access to one's medical records; the right to freedom and security; the right to freedom from exploitation; the right to a fair trial

3. Involuntary placement and Involuntary Treatment

- [31]. The Report on *Compulsory Admission and Involuntary Treatment of Mental Ill Patients – Legislation and Practice in EU-Member States* (2002) covers Luxembourg. Since the writing of the report, Luxembourg's legal framework continues to undergo reform in an effort to reduce the stigmatisation of patients and prevent their chronic institutionalisation. The main changes to Luxembourg's psychiatric care system are that the *Centre Hospitalier de Neuropsychiatrie* [Neuropsychiatry Hospital] (CHNP) has been 'decentralized' and new facilities have taken its place, thus allowing the CHNP to focus on long-term psychiatric care, as opposed to the acute psychiatric care it was obligated to ensure in the past. A new law, the 2009 Law as described below, now provides that a judge must order involuntary placement. Thus, the decision to order involuntary placement is now a non-medical decision. A patient's release, however, remains a medical decision. The 2009 Law also provides minimal regulation of involuntary treatment and seclusion and physical restraint measures. Involuntary placement, is the culmination of a process that begins with admission by an establishment director, initial assessment and keeping the person under observation (6 days), the judicial decision to continue keeping the person under observation (within 3 days), temporary observation (21 days), and placement or release (ending admission and temporary observation). Finally, the 2009 Law has specific provisions for the involuntary placement of offenders. Thus points 3 and 4 at page 113 of the Report are being dealt with. It is, however, too soon to judge the impact of the 2009 Law's changes to the system. Nonetheless, as stated further below, the situation of minors with social/psychological problems needs to be addressed as the deficiencies identified at page 113 of the report have not been dealt with.
- [32]. While the CAT's most recent findings regarding Luxembourg do not expressly cover involuntary placement and involuntary treatment, they do highlight the lack of proper facilities, and thus treatment, for minors. The CAT recommended that Luxembourg 'keep children in conflict with the law separate from minors with social or behavioural

(guarantees of justice); the right to marry; the right to start a family; the right to have children and maintain one's parental rights; the right to property; and, the right to vote.

problems, do everything possible to ensure that minors are never tried as adults, and set up an independent monitoring body to inspect juvenile facilities regularly.²³

- [33]. The CPT visited Luxembourg from 22.04.2009 to 27.04.2009. The delegation visited the CHNP at Ettelbruck, where it apparently paid ‘special attention to the living conditions and treatment of patients placed in the closed units for minors and adults,’ and ‘the legal safeguards for the procedure of involuntary placement of mentally ill persons were also examined.’ The visit report is not on the CPT website, but apparently a brief report was developed in 06.2009, and a complete report will be published at the end of 2009. The CPT delegation did not visit the CHNP on its 02.2003 visit. The 2009 visit report would have the most pertinent information for us to summarize. Nonetheless, during the CPT’s 2003 visit to Luxembourg, the delegation visited the prison at Schrassig and was lead to understand that the closure of a specialised unit for problem detainees at the CHNP made difficult transfer of offenders not held criminally liable for their actions. Also during the 2003 visit, the CPT delegation encountered a psychotic detainee at the prison and requested information on the outcome of the unacceptable situation. Finally, the CPT requested detailed information on the then-Health Minister’s comments to the delegation on a future hospital reform that would increase the number of therapeutic apartments for the housing and monitoring of people with mental disorders.²⁴

3.1. Legal Framework

- [34]. Luxembourg’s legal framework is currently undergoing reform to continue with the decentralisation of institutional psychiatry in Luxembourg begun prior to the 2006 amendment of the 1988 Law defined below, which included reducing the stigmatisation of patients and preventing their chronic institutionalisation.²⁵ The 1988 Law, as

²³ *Conclusions and recommendations of the Committee against Torture (Luxembourg)*, 38th Session, U.N. Doc. CAT/C/LUX/CO/5 (2007), at p. 5, and reminder letter of 17.11.2008 from UNCHR to Permanent Mission of Luxembourg to the UN Office in Geneva.

²⁴ ‘Visit to Luxembourg by the Council of Europe anti-torture Committee’, CPT News Flash available in English at: <http://cpt.coe.int/documents/lux/2009-04-30-eng.htm> (23.11.2009); Luxembourg/Ombuds-Comité fir d’Rechter vum Kand (2009) *Rapport 2009 au Gouvernement et à la Chambre des députés*, at p. 59, available in French at: <http://www.ork.lu/PDFs/rapport2009.pdf> (30.11.2009); and, CPT (2003) *Rapport au Gouvernement du Grand-Duché de Luxembourg relative à la visite effectuée au Luxembourg par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT)*, at p. 30.

²⁵ *Article d’actualité : Présentation du rapport Rössler sur l’évaluation et la poursuite de la décentralisation de la psychiatrie au Luxembourg* (27.06.2005), available at: http://www.gouvernement.lu/salle_presse/actualite/2005/06/27di_bartolomeo_rapport/index.h

amended, will be repealed by the recently-adopted Luxembourg law on hospitalisation without their consent of persons with mental disorders (the ‘2009 Law’).²⁶ The 2009 Law passed the first vote in the Luxembourg Chamber of Deputies on 27.10.2009, the Council of State waived the second constitutionally-required vote on 10.11.2009, and it is currently awaiting publication in the legislative journal. As concerns the publication date, the legislative journal service referred us to the Health Ministry which has not responded to our e-mail of 01.12.2009 requesting an anticipated publication date.²⁷

- [35]. Luxembourg’s legal framework regulating involuntary placement and involuntary treatment dates back to a very general law passed in 1843 providing that person’s threatening public order could be confined in sanatoriums.²⁸ In 1880 came a more specific law, based on early French and Belgian legislation, regarding the treatment of lunatics/insane persons (*aliénés*) (the ‘1880 Law’), which provided certain protective measures for involuntary placement such as the requirement of a certificate from a doctor independent of the establishment no more than 8 days old (the current law requires that the certificate be no more than 3 days old).²⁹ The 1880 Law also had an implementing regulation.³⁰ That law was amended twice, and

[tml](#) (19.11.2009), and ‘La réforme de la psychiatrie au Luxembourg’ [press conference presentation] (27.06.05), available at: http://www.gouvernement.lu/salle_presse/actualite/2005/06/27di_bartolomeo_rapport/presentation.pdf (19.11.2009).

²⁶ Luxembourg/*Projet de loi No. 5856 relatif à l’hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, soon to be published in the legislative journal. All Luxembourg legislation is available in French on the legislative website Legilux, at: <http://www.legilux.public.lu/leg/search/index.php>.

²⁷ See Chamber of Deputies website at: http://www.chd.lu/wps/portal/public/lut/p/c1/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gXI5e_wIE8TIwN380ATAYMvVy_z0GA_Ywt3Y6B8pFm8kYVFcJC7o6-rpWWok4GngbNhsGugk5GBpxEB3X4e-bmp-pH6UeZiQsJ8DQ2MnDyNA70CLi0tXA31I3NS0xOTK_ULciPK8x0VFOGcGq-6/dl2/d1/L0IJSklna21BL0IKakFBRXIBQkVSO0pBISEvWUZOQTFOSTUwLTVGd0EhIS83X0QyRFZSSTQyMEDWTTEwMkJJM1FKUDkzOEUXL3BuOUpwNzU2NjAwMDY!/?PC_7_D2DVRI420GVM102BI3QJP938E1_action=doDocpaDetails&PC_7_D2DVRI420GVM102BI3QJP938E1_id=5856&PC_7_D2DVRI420GVM102BI3QJP938E1_displayLink=true&PC_7_D2DVRI420GVM102BI3QJP938E1_numPage=2&PC_7_D2DVRI420GVM102BI3QJP938E1_positionInHistory=&PC_7_D2DVRI420GVM102BI3QJP938E1_display=1&PC_7_D2DVRI420GVM102BI3QJP938E1_EtatDossier=Evacué&PC_7_D2DVRI420GVM102BI3QJP938E1_TypesDeTri=Numero&PC_7_D2DVRI420GVM102BI3QJP938E1_SortOrder=D ESC&PC_7_D2DVRI420GVM102BI3QJP938E1_numPageTop=2&PC_7_D2DVRI420GVM102BI3QJP938E1_numPageBottom=2#7_D2DVRI420GVM102BI3QJP938E1 (23.11.2009), and E-mail of 01.12.2009 requesting an anticipated publication date.

²⁸ Luxembourg/*Loi du 4 juillet 1843, relative à l’observation de l’arrêté du 23 février 1815, permettant la séquestration temporaire de personnes dont la liberté compromet l’ordre public*, *Mémorial A-N° 34*, 1842, at p. 477.

²⁹ Luxembourg/*Loi du 7 juillet sur le régime des aliénés*, *Mémorial A-N° 46*, 21.07.1880, at p. 445.

³⁰ Luxembourg/*Arrêté grand-ducal du 1^{er} décembre 1880, concernant le règlement général et organique sur le régime des aliénés*, *Mémorial A-N° 86*, 24.12.1880, at p. 769.

repealed in 1988 by a law that transitioned from the old vocabulary referring to a person as a lunatic/insane person (*aliéné*), to a person with mental disorders (*personnes atteintes de troubles mentaux*). (the ‘**1988 Law**’).³¹ In 2000, the 1988 Law was amended to incorporate the Criminal Code amendments regarding the placement of persons who, given their mental disorders, were found guilty of crimes but deemed not criminally liable.³² One of the 1988 Law’s most significant amendments was in 2006 to replace ‘placement in a closed psychiatric establishment or ward’ with ‘placement in a specialized psychiatric establishment or psychiatric ward in a general hospital’, the latter to be created in designated hospitals. Also the term ‘patient’ was changed to ‘the person concerned’, and henceforth initial placement of a person could only be in a general hospital psychiatric ward.³³

- [36]. We analyse the current legal framework under the adopted law in its final draft bill form, as yet not published. As with the Law of 1988, the 2009 Law applies to the entire country which is divided into three hospital regions or districts (*regions / arrondissements hospitalières*), as currently defined in the national Medical Care Facility Plan.³⁴
- [37]. While in many respects the 2009 Law resembles the 1988 Law, its amendments were of the sort that legislators decided it best to redraft it. Its main new elements are that, apart from the first few days, hospitalisation for psychiatric care, and admission into and placement in psychiatric treatment of persons without their consent is done only under the orders of a judge, instead of simply by a hospital director or head of a psychiatric ward, as provided in the 1988 Law. This means that each judicial district will have a judge charged with monitoring the admission of these persons in medical care facilities (*juge-contrôleur*), and to take decisions related to keeping the persons under observation, their release or monitor possible future admission or placement. The judge is empowered to request reports from and hear anyone deemed necessary for a sufficiently clear understanding of the situation on which to base the decision. Additionally, the 2009 Law introduces provisions regarding involuntary treatment and seclusion

³¹ Luxembourg/*Projet de loi No. 5490 modifiant la loi modifiée du 26 mai 1988 relative au placement des personnes atteintes de troubles mentaux dans des établissements ou services psychiatriques fermés* (12.07.2005), preamble, and Luxembourg/*Loi du 26 mai 1988 relative au placement des personnes atteintes de troubles mentaux dans des établissements ou services psychiatriques fermés*, *Mémorial A-N° 28*, 16.06.1988, at p. 560.

³² Luxembourg/*Loi du 8 août 2000 sur le placement de personnes atteintes de troubles mentaux*, *Mémorial A- N° 95*, 07.09.2000, as amended, at p. 2170.

³³ Luxembourg/*Loi du 22 décembre 2006 modifiant la loi modifiée du 26 mai 1988 relative au placement des personnes atteintes des troubles mentaux dans des établissements ou services psychiatriques fermés*, *Mémorial A-N° 237*, 29.12.2006, as amended, at p. 4618.

³⁴ Luxembourg/*Règlement grand-ducal du 13 mars 2009 établissant le Plan Hospitalier National*, *Mémorial A-N°54*, 23.03.2009, at p. 704.

and restraint measures. Finally, medical care facilities are to install after-care centres which persons having been released from an establishment may ‘consult’ free of charge.³⁵

[38]. A few other laws relate to involuntary placement and involuntary treatment in Luxembourg. First, the Law of 11 August 1982 reforming the law of legally incapable adults, which ended automatic guardianship/wardship for persons placed in establishments, henceforth requiring a judge’s order.³⁶ Second, the Law of 27 July 1997 reorganising the penitentiary system provides for a special medical section that treats prisoners with mental disorders and who are drug addicts.³⁷ Third, the Law of 28 August 1998 on medical care establishments, under Article 40 of which provides that doctors must duly inform patients on proposed treatment so that patients may give informed consent.³⁸

[39]. The 2009 Law distinguishes between involuntary placement and involuntary treatment. While the 2009 Law’s modalities for involuntary placement are ample, those for involuntary treatment are sparse. In involuntary placement, the person is first admitted to a hospital psychiatric ward, placed under observation, and finally a decision for or against involuntary placement is issued. An involuntary placement decision can now only be issued by a specially-appointed judge in each judicial district. The director of the hospital can only admit a person at the request of one of the following:

- a. the guardian of a legally incapacitated adult;
- b. a family member of the person to be admitted or any other person involved with that person, the request to state the relationship;
- c. the local government head, or replacement, of the place in which the person is located;
- d. the heads of rescue service centres or local police precinct, and if none, the criminal investigation department; or a State Prosecutor in the judicial district in which the person is located; or

³⁵ Luxembourg/*Projet de loi No. 5856 relatif à l’hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended.

³⁶ Luxembourg/*Loi du 11 août 1982 portant réforme du droit des Incapables majeurs*, *Mémorial* N° 72, 26.08.1982, at p. 1515.

³⁷ Luxembourg/*Loi du 27 juillet 1997 portant réorganisation de l’administration pénitentiaire*, *Mémorial* A-N° 62, 28.08.1997, as amended, at p. 1942.

³⁸ Luxembourg/*Loi du 28 août 1998 sur les établissements hospitaliers*, *Mémorial* A-N° 78, 18.19.1998, at p. 1564.

e. the State Prosecutor of the judicial district in which the person concerned is located.³⁹

[40]. The request must be accompanied by an explanation of the situation and the person is admitted to the psychiatric ward of a hospital of his or her region. A medical certificate describing the person's condition on the day of examination, and no more than three days old, to be issued by a doctor who is independent of the hospital's psychiatric ward must accompany the request. The certificate cannot be issued by the person's spouse, close relative or presumptive heir. The hospital director receiving the person to be admitted records the documents described above in a register. However, in cases of imminent danger to the health of the person concerned or the safety of others, danger that is duly-documented by a doctor from the establishment but not on the psychiatric ward staff, the director can admit the person without the request described above. However, the request must be submitted with 24 hours of the admission. If that is not done, the director must inform the person that he or she may immediately leave the hospital, without prejudice to the person's right to continue suggested therapy.⁴⁰

[41]. The day of admission, the judge is informed in writing of the admission. The judge verifies that the requirements as to the admission's merits and form have been fulfilled, and if not, requests their fulfilment. Immediately upon admission, the person is informed of his or her right to communicate in writing with the judge.⁴¹

[42]. After admission, the person is put under observation for no longer than 30 days. During this period, the attending physician carries out the necessary investigation to determine whether the person should be kept in the hospital, and if so, to diagnose the illness. On the sixth day after admission the attending physician provides the judge with a reasoned report regarding the possibility of keeping the person under observation. Within three days of receiving the report, the judge must either (1) inform the attending physician that there is nothing to prevent temporarily keeping the person under observation; (2) decide that keeping the person under observation is not or no longer necessary and order the release of the person (in which case the person requesting the admission is so informed); or (3) request additional information from the attending physician. Before making the above determination, the judge can visit the person admitted and hear any

³⁹ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Arts. 4 and 7(1).

⁴⁰ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Arts. 7(2)-8.

⁴¹ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Art. 11.

person who can provide information useful for such determination.⁴² In its opinion on the draft bill, the *Commission Consultative des Droits de l'Homme* or CCDH [Advisory Human Rights Commission] states that given that the aim of the law is to 'judicialise' (*judiciariser*) hospitalisation of persons without their consent, a judge should be required to visit the person (to include hearing the person concerned, the physician, or any other medical care personnel or person who can furnish useful information) in the hospital during the person's initial days therein, the period prior to the judge's decision regarding temporary keeping of the person under observation, described below. This is especially necessary given that a person could potentially be locked up in a psychiatric ward and wait for 30 days for a judge to hear him or her, and that the decision to keep a person under observation is not subject to appeal.⁴³

- [43]. If the judge determines that the person is to be kept under observation, the observation can only continue for a maximum of 21 days after the determination. If the judge requests additional information from the attending physician, the time it takes for the physician to provide the additional information is included in the 21-day period, so that the total observation period cannot exceed 30 days, with the exception of the extension of the time limit for the judge to receive additional information for the placement decision described below. The determination to keep a person under observation cannot be appealed.⁴⁴
- [44]. Prior to the end of the observation period, the attending physician provides the judge with a duly-reasoned report on maintaining the person's hospitalisation beyond the 30-day period, which constitutes placement of the person. If, prior to the end of the period, the attending physician is convinced that maintaining the hospitalisation is necessary, the physician provides the judge with a report to that effect. Such report will trigger the judge's placement decision procedure.⁴⁵
- [45]. Before taking the decision to end the admission/maintenance under observation, by either ordering the person's release or placement, the judge hears the admitted person in the treatment establishment. The person is given three days' notice of the hearing, and if applicable, his or her legal representative can attend the hearing, or be assisted by a

⁴² Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, Arts. 12-14.

⁴³ CCDH (2009) *Avis de la CCDH sur le projet de loi 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux*, p. 5. Available in French at : <http://www.ccdh.public.lu/fr/avis/2006/avispershosp.pdf> (11.06.2009).

⁴⁴ Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, Art. 15.

⁴⁵ Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, Art. 16.

person of his or her choosing. During the hearing, the judge informs the person of the conclusions of the attending physician's report and hears the person's comments. The judge may hear the person's comments in the presence of the attending physician, or hear the physician separately. If the judge does not deem to have sufficient information, the judge can order any additional measures deemed necessary, including an outside expert's opinion. In this case, the 30-day observation period is extended until the measure is completed, but no longer than an additional 30 days.⁴⁶

- [46]. Within 48 hours of the hearing or the completion of the additional measure(s), the judge then issues an order to either release or place the person in a psychiatric care establishment. This order is not in and of itself subject to appeal. However, a person placed in an establishment may petition for release at any time during placement before the district court of the psychiatric care establishment's locality. The judicial placement order thus informs the person of his or her right to petition for release. If the person is unable to comprehend the information, the person is informed by his or her attending physician as soon as he or she is able to understand its impact.⁴⁷
- [47]. The order is immediately communicated to the person and his or her attending physician. The physician must ensure that the order has effectively been delivered to the person concerned, explains the order to the person and has the person sign a receipt that is sent to the court clerk. If, when the order is delivered the person is unable to comprehend its impact, the formalities are performed as soon as the person is able to comprehend the order's impact. Placement is nonetheless effective from the date of the order. The judge gives the hospital director notice of the placement decision within 24 hours thereof. If the release is ordered, the director or person appointed for that purpose, informs the person that he or she may immediately leave the hospital or continue voluntarily with the proposed therapy.⁴⁸
- [48]. If, after placement is ordered, the attending physician deems that person's state requires long-term hospitalisation, the physician transfers the person to a specialised psychiatric establishment (the 'establishment'). The placement decision, a medical report tracing the evolution of the person's state since admission and a copy of the person's social assistance records are transferred to the director of the establishment. The transfer is mentioned in the registers of the

⁴⁶ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Arts. 18-19.

⁴⁷ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Art. 20.

⁴⁸ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Arts. 21-22.

hospital the person is departing and the establishment receiving the person.⁴⁹

- [49]. At least on a monthly basis, attending physicians record changes in the placed person's mental state in the register. At the end of the third month following the placement order, physicians re-examine the need to maintain persons in placement. At their own initiative, or that of the placed person or any other interested party, physicians may grant a person permission to leave the establishment on a trial basis. The physicians may set the length of the trial period which cannot exceed one year, and as applicable, any specifications for the person's residence or medical supervision. If the requirements are not fulfilled, or if the person's state changes to the point at which it becomes necessary to end the trial period, the attending physician informs the State Prosecutor of the person's residence, who then takes the necessary measures to have the person return to the establishment. At the end of the trial period, the physician decides whether the person can leave the establishment. The physician can also grant short-term, one-time, daily or weekly leave, depending on the person's state.⁵⁰
- [50]. If the attending physician deems that the person is cured or that his or her state has improved such that placement is no longer necessary, the physician makes a statement to that effect in the register and so informs the person who can immediately leave the establishment or be voluntarily hospitalised. The judge is informed of these developments. If the person leaves the establishment, the physician can include residence and medical supervision requirements in the conditions of release. If the requirements are not fulfilled the person who requested the placement can have the person readmitted to the establishment by simple request, without having to produce a medical certificate, but by submitting documents proving that the person did not comply with the release requirements. This mechanism can only be used for three months from the date of the person's release.⁵¹
- [51]. If the person leaves the establishment without the attending physician's authorisation or does not comply with the release requirements, the State Prosecutor in the judicial district in which the establishment is located can take all necessary measure to have that person return to the establishment. One year after the placement decision a commission made up of a magistrate of the judicial district, a physician specialising in psychiatry or in child psychiatry and of an

⁴⁹ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Art. 23.

⁵⁰ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Arts. 24-25.

⁵¹ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Arts. 26-27.

environmental health officer or social worker independent from the establishment, named by the Health Ministry for a three-year period, and after having solicited the attending physician's advice and acquired all necessary information, decides whether keeping the person in placement is justified. The establishment's director must inform the commission two weeks prior to the expiration of the one-year period. If the commission deems that the placement is no longer necessary, the person is immediately released and the judge is duly informed. If the placement is kept in effect, the commission carries out a re-examination of the person every two years. The commission can also decide that the person should benefit from a leave for a maximum of three months, at the end of which a definitive decision will be taken.⁵²

- [52]. The 2009 Law eliminates the 1988 Law's provision on home confinement/restraint (*séquestration à domicile*), provisions that had apparently fallen in to desuetude. Under the 1988 Law, home confinement/restraint was subject to authorisation from a judge supervising guardianship in the judicial district in which the confinement/restraint was to take place. Once granted, the judge would inform the State Prosecutor of the confinement/restraint and the two judges could visit the person at any time, or have other medical personnel visit.⁵³
- [53]. In contrast to the 1988 Law,⁵⁴ the 2009 Law does provide guidelines for involuntary treatment, however sparse those guidelines may be.

⁵² Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, Arts. 28-29.

⁵³ and Luxembourg/*Loi du 26 mai 1988 relative au placement des personnes atteintes de troubles mentaux dans des établissements ou services psychiatriques fermés*, *Mémorial A-N° 28*, 16.06.1988, Arts. 25-26, and Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, preamble at p. 13.

⁵⁴ Article 31 of the 1988 Law simply provided that 'Treatment that medical science has not yet generally recognized or that presents a serious risk of causing irreversible brain damage or harming the patient's personality, can only be administered if the doctor deems it indispensable and if the duly-informed patient expressly consents to it. When the patient is unable to understand the scope/extent of the treatment, the doctor must submit the question to committee made up of three experts, two of whom must be doctors, appointed by the Health Ministry. The treatment can only be administered if the committee, that has solicited the opinion of the patient's legal representative, issues an opinion in favour of such treatment. It is prohibited to carry out clinical trials of medical products or techniques that are not meant for use in psychiatric therapy. If they are meant for use in psychiatric therapy, they must be submitted for prior authorisation to the Health Ministry, which takes the advice of the Medical Board.' Luxembourg/*Loi du 26 mai 1988 relative au placement des personnes atteintes de troubles mentaux dans des établissements ou services psychiatriques fermés*, *Mémorial A-N° 28*, 16.06.1988, at p. 560. The *Commission Consultative des Droits de l'Homme* or CCDH [Advisory Human Rights Commission] found this situation alarming. In its 2006 Report on the fundamental rights of persons hospitalised or placed in psychiatric institutions (thus dealing with the recently-repealed 1988 Law, as amended), the CCDH noted

Under the 2009 Law a person cannot undergo involuntary traitement related to his or her mental disorder unless his or her state represents a risk of serious harm to the health of the person or of others. The involuntary treatment, designed to treat specific clinical signs and symptoms, must be in proportion to the person's state of health. If choosing between two forms of treatment with equal effectiveness, preference is to be given to the least invasive form of treatment. During the course of treatment, the patient's support for the treatment applied or for alternative treatment should be sought. The patient and, if applicable, his or her legal representative, and if none, another trusted individual should be consulted before the application of involuntary treatment. The person's opinion should be taken into consideration. Involuntary treatment can only be given under the responsibility of a physician specialising in psychiatry or child psychiatry with at least two years of experience in a psychiatric hospital environment. The application of involuntary treatment, the modalities of that treatment and its duration must be recorded in the person's medical records.⁵⁵

- [54]. In its preamble to the bill, the government states that involuntary treatment involves two fundamental rights, the right to assistance, and the right to the autonomy of the human being. The *Compulsory Admission and Involuntary Treatment of Mentally Ill Patients – Legislation and Practice in EU-Member States* (2002) Report's findings that involuntary placement without treatment is possible in 6 out of the 15 Member States studied, but that informed consent is required in 5 of those countries, even though involuntary treatment would be allowed in emergency situations or when the patients lack the mental capacity to consent. The government further states that, while a treatment of last resort, involuntary treatment is generally accepted in international circles, and that while considered degrading, it aims to end the even more degrading measure that is the involuntary placement. The decisive argument in favour of involuntary treatment is that, accompanied by medico-social care, it can provide relief to the point at which, if not the release of the person, at least to obtain his or her support for the hospitalisation and suggested treatment and

the lack of differentiation between involuntary placement and involuntary treatment; the inexistence of procedures when treatment is refused; and, the inexistence of any general regulation of restraint and seclusion measures. With respect to the regulation of restraint or seclusion measures, the CCDH had knowledge of a restraint and/or seclusion procedure file at the *Centre Hospitalier de Neuropsychiatrie* [Neuropsychiatry Hospital] (CHNP), but according to the CCDH's information, that internal document did not appear to be routinely used. CCDH (2006) *La Protection des droits fondamentaux de la personne hospitalisée ou placée en institution psychiatrique*, pp. 10-11. Available in French at : <http://www.ccdh.public.lu/fr/avis/2006/avispershosp.pdf> (11.06.2009).

⁵⁵ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Art. 43.

eventually end both the involuntary placement and involuntary treatment. The government also points out that the 2009 Law subjects involuntary treatment to restrictive conditions taken from the Council of Europe Recommendation (2004)10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder ('Recommendation (2004)10').⁵⁶

[55]. The manner in which this legislative history is phrased appears to somewhat soften the requirement for strict adherence to the informed consent requirement for involuntary treatment because neither the 2009 Law nor its preamble expressly state, as does Article 12(2) of Recommendation (2004)10 that involuntary treatment may only be given with the person's consent, 'or, when the person does not have the capacity to consent, with the authorization of a representative, authority, person or body provided for by law.' The 2009 Law simply states that the opinion of the person, or trusted person, legal representative, as applicable, will be 'taken into consideration.'⁵⁷ The fact that Article 12(3) of Recommendation (2004)10 provides that involuntary treatment may be administered in emergency situations in which appropriate consent cannot be obtained is an insufficient basis on which not to further elaborate on the informed consent requirement.

[56]. Further, while Article 43 of the 2009 Law does provide for the information and consultation of the patient and those close to the patient, and the taking into account of their opinions, as well as the obligation that administering physicians have a certain professional experience and record the treatment in the patient's medical records. While the 2009 Law mentions that a person's treatment should be based on a personalised treatment plan, the section on involuntary treatment does not expressly state that involuntary treatment should form part of a written treatment plan, as set forth in Article 19.1.i of Recommendation (2004)10. While encouraging the solicitation of patient support for treatment, nowhere does the 2009 Law mention the individually prescribed treatment plan under Article 12.1 of Recommendation (2004)10. Thus, it would seem that these elements are a bit less than the minimum one could expect from a modern healthcare system, and no mention is made for regulation or

⁵⁶ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, preamble at p. 13.

⁵⁷ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Art. 43.

procedures regarding involuntary placement or treatment within the establishments themselves.⁵⁸

[57]. In its opinion on the draft 2009 Law, the CCDH reiterates its opinion that hospitalisation of a person without his or her consent does not automatically confer the right to a physician to administer treatment under restraint. The CCDH points out that two fundamental rights, the right to freely move about and the right to psychophysical integrity and the prohibition of inhumane and degrading treatment, are at issue. Thus, hospitalisation without consent should not automatically imply the right to treatment under restraint. The individual is hospitalised against his or her will not only because of the serious mental symptoms for which the person refuses to receive treatment, but also because those problems render the person dangerous to him or herself and to others. Given that involuntary placement is already in and of itself a severe intrusion.⁵⁹

[58]. Moreover, the CCDH points out that today, involuntary treatment is mostly given through the administration of psychotropic drugs. While not intending to detract from the possible benefits of those drugs, the CCDH points out that those drugs can have dangerous long-term effects which could entail ethical and even criminal liability if the patient does not give informed consent. Administration of those drugs can at times entail physical violence or mental threats. Thus, the CCDH expresses great reserve with respect to outpatient medication treatment under restraint, and recommends the implementation in psychiatric wards of mechanisms promoting negotiation with patients to receive their support for the treatment. The 2009 Law does not mention outpatient treatment or the use of psychotropic drugs. Moreover, the CCDH would have preferred that the 2009 Law provide that the 2009 Law provide that a person cannot undergo involuntary treatment related to his or her mental disorder unless his or her state represents a risk of serious, *and acute* harm to the health of the person or of others, as opposed to simply serious harm. With respect to the patient's opinion being taken into consideration, the CCDH recommended that the 2009 Law provide for a living will so that in the event of hospitalisation without consent, a person would have made a prior determination regarding treatment.⁶⁰

⁵⁸ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Arts. 6 and 43.

⁵⁹ CCDH (2009) *Avis de la CCDH sur le projet de loi 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux*, at p. 8. Available in French at : <http://www.ccdh.public.lu/fr/avis/2006/avispershosp.pdf> (06.11.2009).

⁶⁰ CCDH (2009) *Avis de la CCDH sur le projet de loi 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux*, at pp. 8-9.

- [59]. For the above reasons, while separate articles of the 2009 Law cover involuntary placement and involuntary treatment, implying organisation of involuntary placement without treatment, it does not expressly state that involuntary placement can, or should, be organised without involuntary treatment. Thus, it does not make a significantly clear distinction between involuntary placement and involuntary treatment in practice.
- [60]. As stated above, the current reform of Luxembourg's legal framework emphasises the decentralisation of institutional psychiatry in Luxembourg begun prior to the 2006 amendment of the 1988 Law, which included reducing the stigmatisation of patients and preventing their chronic institutionalisation. The decentralisation of psychiatry in Luxembourg means that day medical care centres are being reinforced and increased and thus the CHNP can be relieved from its exclusive focus on providing acute psychiatric care and devote its efforts to psychiatric rehabilitation.⁶¹
- [61]. As did the 1988 Law before it, the 2009 Law provides that during hospitalisation, patients have the right to medical treatment appropriate for their condition. The treatment is to be administered by qualified medical and health care personnel, with the aim of orienting the patient toward reintegration in society. And, without prejudice to the provisions covering involuntary treatment and seclusion and restraint, the 2009 Law provides that treatment should be administered in respect of the patient's freedom of opinion and religious and philosophic convictions. Treatment should also promote the patient's health, family and social contacts and social development.⁶²
- [62]. The 2009 Law provides that the government will establish or encourage the establishment of aftercare centres in each of the medical

Available in French at : <http://www.ccdh.public.lu/fr/avis/2006/avispershosp.pdf>
(06.11.2009).

⁶¹ *Article d'actualité : Présentation du rapport Rössler sur l'évaluation et la poursuite de la décentralisation de la psychiatrie au Luxembourg* (27.06.2005), available at: http://www.gouvernement.lu/salle_presse/actualite/2005/06/27di_bartolomeo_rapport/index.html (19.11.2009); 'La réforme de la psychiatrie au Luxembourg' [press conference presentation] (27.06.05), available at: http://www.gouvernement.lu/salle_presse/actualite/2005/06/27di_bartolomeo_rapport/presentation.pdf (19.11.2009); and Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, preamble at p. 11.

⁶² Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, Art. 6.

care regions. The 2009 Law mentions no other specific aftercare activities or facilities.⁶³

[63]. The 2009 Law provides no special regulation for involuntary treatment of children and/or young adults. The 2009 Law mentions children solely for the proposition that specialists in child psychology must be consulted, or form part of a special commission, to determine whether to maintain patients in placement, and that involuntary treatment can only be given under the care of such a specialist. However the 2009 Law's preamble states that since the end of 2006 the CHNP has a unit for young people experiencing psychological difficulties which will be complemented with reintegration facilities.⁶⁴ The law on youth provides that in cases of grave and immediate danger to the life or health of a minor and when the persons with custody of the child refuse to agree, a doctor can take all medical measures required by the situation. In such instances, the doctor must within three days file a report with the State Prosecutor on the medical measures taken. Moreover, that law provides that the Juvenile Court can take measures for placement or treatment of minors, including placing them in any special establishment appropriate to the minor's condition. The bill to amend that law, a bill that has been before the Chamber of Deputies since June of 2004, provides no provisions specifically addressing minors with respect to involuntary placement or treatment for a mental disorder. The comments to Article XI of the draft bill do, however state that the Government intends to explore the possibility of entering into agreements for placement of minors with foreign closed centres for minor delinquents with psychiatric problems.⁶⁵

[64]. In its 2009 report, the *Ombudskimité fir d'Rechter vum Kand* [Childrens' Rights Ombudscommittee] (ORK) states that a study has been initiated for the development of national children and youth mental health action plan. Apparently, five workshops have taken place with multidisciplinary professionals from the judiciary, social and educational sectors. Until 2003, there were no inpatient facilities in Luxembourg for minors requiring psychiatric care. Until 2006, minors suffering from serious psychological or drug addiction problems were either locked up in the *Centre pénitentiaire de Luxembourg* [Luxembourg Penitentiary Centre] (CPL), or placed in

⁶³ Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, Art. 31.

⁶⁴ Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, Arts. 29 and 43, and preamble at p. 11.

⁶⁵ Luxembourg/*Loi du 10 août 1992 relative à la protection de la jeunesse, Mémorial A-N° 70*, 25.09.1992, as amended, Arts. 1, 6, 7, 8, 9 and 24, and Luxembourg/*Projet de loi No. 5351 portant modification de la loi modifiée du 10 août 1992 relative à la protection de la jeunesse* (09.06.2004), at p. 9.

the CHNP with the adults. Since then, a few inpatient facilities (approx. 48 beds) and outpatient facilities have been opened, but they do not meet the demand in Luxembourg. Approximately 163 minors are placed in specialised facilities in bordering countries, usually Belgium or Germany.⁶⁶ These facts are all testimony to the little framework in Luxembourg for psychiatric placement and treatment for minors, whether voluntary or involuntary. In its opinion on the draft bill for the 2009 Law, the CCDH expressed its surprise that the hospitalisation of minors without their consent was not revisited to given them or their legal representatives greater legal protections offered under international instruments. The CCDH also pointed out that while writing the advisory opinion, it received information that the number of minors placed in psychiatric care was quite high and many of them were placed in foreign establishments.⁶⁷

- [65]. The 2009 Law addresses involuntary placement for certain groups of persons. Persons in guardianship fall under the 2009 Law because the guardian of a legally incapacitated adult is one of the persons who can submit a written request that the legally incapacitated adult be admitted, thus initiating the placement process. Under the 2009 Law, offenders who in criminal proceedings are judged not criminally liable for their acts due to mental disorders under the penal code, and are deemed to still be a danger to themselves and others, are placed by court order in specialised psychiatric establishments other than hospital psychiatric wards. A special commission is made up of a magistrate from the local district, a public ministry magistrate and two Health Ministry appointees, one of whom must be a doctor specialising in psychiatry or child psychiatry. Within two months of the offender's placement, the attending physician submits a report to the commission on the offender's mental state. The commission must decide whether to keep the offender in placement within one month of receiving the report. If placement is maintained, the commission re-evaluates the offender's need for continued placement every year based on the physician's opinion. The special commission's head gives written notice the establishment's director and State Prosecutor of the decision to maintain the offender's placement within 48 hours. If the attending physician finds that the placement is no longer necessary, the commission is immediately so informed, and the commission must take a decision on whether to maintain the placement within one month. After receiving the treating physician's

⁶⁶ Luxembourg/Ombuds-Comité fir d'Rechter vum Kand (2009) *Rapport 2009 au Gouvernement et à la Chambre des députés*, at pp. 64-66, available in French at: <http://www.ork.lu/PDFs/rapport2009.pdf> (30.11.2009).

⁶⁷ CCDH (2009) *Avis de la CCDH sur le projet de loi 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux*, at p. 10. Available in French at : <http://www.ccdh.public.lu/fr/avis/2006/avispershosp.pdf> (06.11.2009).

opinion, the commission can order the offender's definitive or trial release, as well as short-term outings. Appeal procedures are essentially the same as those for non-offender patients, except that the appeal period appears to be only five days, and when an offender's release is decided, that offender is kept in placement during the period of appeal for the release decision. When the State Prosecutor appeals that decision, the offender is kept in placement during the entire appeals proceeding. If the special commission orders a trial outing/release, a medical, psychological and social guardianship is a condition of that release. If the offender does not comply with the conditions imposed, or is a danger for him or herself or others, the commission can end the release. Offenders not placed or benefiting from trial outings and releases are handed over to the prison administration.⁶⁸

- [66]. The 2009 Law does not expressly address treatment for persons with addictive behaviour, however, it could apply to addictive behaviour leading to a mental disorder causing danger to the persons or those around them. Given the international trend towards the creation of psychiatric wards in hospitals, shelters and other outpatient alternatives to psychiatric care, the number of beds at what is now the CHNP was reduced from 1,200 in 1980 to 200 in 2005. As a part of that trend, several addictive behaviour shelters and halfway houses housing 'communities' were set up in various parts of the country.⁶⁹

3.2. Criteria and Definitions

- [67]. Under the 2009 Law a person cannot undergo involuntary placement or traitement related to his or her mental disorder unless his or her state represents a risk of serious harm to the health of the person or of others. No specific danger thresholds are given for either involuntary placement or treatment the 2009 Law, except in cases of *imminent* danger to the health of the person concerned or the safety of others, danger that is duly-documented by a doctor who is independent of the psychiatric ward, when the director can admit the person without the request described above. The loss of mental faculties due to aging is not in and of itself a sufficient reason for admission or placement. A lack of adaptation to moral, social, political or other societal values cannot be considered in and of itself a mental disorder. The 2009 Law

⁶⁸ Luxembourg/*Code Pénal*, Art. 71, updated as 01.01.2008, and Luxembourg/*Projet de loi No. 5351 portant modification de la loi modifiée du 10 août 1992 relative à la protection de la jeunesse* (09.06.2004), Arts. 26 and 32-38.

⁶⁹ Luxembourg/*Projet de loi No. 5490 modifiant la loi modifiée du 26 mai 1988 relative au placement des personnes atteintes de troubles mentaux dans des établissements ou services psychiatriques fermés* (12.07.2005), preamble at p. 6.

makes no suggestion for less intrusive alternatives to involuntary placement, neither does the 2009 Law expressly state that the person's opinion is to be taken into account. However, before making the determination regarding keeping the person under observation, the judge can visit the person admitted and hear any person who can provide information useful for such determination. And, before taking the decision to end the admission/maintenance under observation, by either ordering the person's release or placement, the judge hears the person in the treatment establishment. During the placement hearing, the judge informs the patient of the attending physician's conclusions and listens to the person's comments.⁷⁰

- [68]. Involuntary treatment, designed to treat specific clinical signs and symptoms, must be in proportion to the person's state of health. If choosing between two forms of treatment with equal effectiveness, preference is to be given to the least invasive form of treatment. During the course of treatment, the patient's support for the treatment applied or for alternative treatment should be sought. The patient and, if applicable, his or her legal representative, and if none, another trusted individual should be consulted before the application of involuntary treatment. The person's opinion should be taken into consideration.⁷¹

3.3. Assessment, Decision Procedures and Duration

- [69]. The 2009 Law specifies that the request to have a person admitted should be accompanied by a medical certificate from a physician (*médecin*) not on the staff of the admitting hospital's psychiatric ward. The attending physician (*médecin traitant*) then carries out the necessary activities to determine whether the person should be kept in the establishment, and if so, to establish a diagnosis of the illness. The attending physician can also perform additional examinations at the judge's request, and the judge can order any form of external expert examination deemed necessary. In contrast, the maintenance or end of involuntary placement of non-offender and offender patients is determined by a commission composed of, among others, a physician specialising in psychiatry or child psychiatry. The same is true for

⁷⁰ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Arts. 3, 8, 14, 18(3), 19 and 43.

⁷¹ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Art. 43.

involuntary treatment, which can only be given under the responsibility of a physician specialising in psychiatry or child psychiatry with at least two years of experience in a psychiatric hospital environment. Article 6 of the 2009 Law simply specifies that the patient's treatment must be administered by qualified medical and health care personnel.⁷²

- [70]. While the judge may order as many additional expert opinions as necessary to assess the psychiatric condition for the taking of the placement decision, the 2009 law requires no more than the attending physician's opinion. For non-offenders, the specially-appointed judge in the district in which the person is located decides on involuntary placement. For offenders, the tribunal or magistrate hearing the criminal case orders involuntary placement.⁷³
- [71]. Termination of involuntary placement for non-offenders and offenders is decided by a commission, after that commission has received the attending physician's opinion. Termination of involuntary placement for non-offenders is decided by a commission made up of a magistrate of the judicial district, a physician specialising in psychiatry or in child psychiatry and of an environmental health officer or social worker independent from the establishment, named by the Health Ministry for a three-year period, and after having solicited the attending physician's advice and acquired all necessary information. Termination of involuntary placement for offenders is decided by a special commission made up of a magistrate from the local district, a public ministry magistrate and two Health Ministry appointees, one of whom must be a doctor specialising in psychiatry or child psychiatry. If the attending physician finds that the placement is no longer necessary, the commission is immediately so informed, and the commission must take a decision on whether to maintain the placement within one month. After receiving the treating physician's opinion, the commission can order the offender's definitive or trial release, as well as short-term outings. The 2009 Law has no specific provisions for the termination of involuntary treatment. The terminating authority for involuntary treatment could thus be the physician specialising in psychiatry or child psychiatry under whom the involuntary treatment is administered, or the applicable commission with the attending physician's opinion.⁷⁴

⁷² Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, Arts. 6, 12, 13, 19, 29, 33 and 43.

⁷³ Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, Arts. 4(2), 12(1) and 31,

⁷⁴ Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, Arts. 29 and 34.

- [72]. When a voluntary placement becomes an involuntary placement, it appears the initial placement procedure would apply. Before amendment in the Chamber of Deputies, the draft bill of the 2009 Law kept a provision from the 1988 Law stating that persons who entered treatment voluntarily could leave the establishment if they desire, unless an involuntary placement procedure was undertaken under Article 7. No other provision makes reference to such a situation. Thus, we assume the initial placement procedure would apply.⁷⁵
- [73]. Under the 2009 Law, the maximum period of time between the initiation of psychiatric assessment and compulsory placement is designed to be a total of 30 days, but in exceptional circumstances an additional 30-day extension can be obtained for a total of 60 days. On the sixth day after admission the attending physician provides the judge with a reasoned report regarding the possibility of keeping the person under observation. Within three days of receiving the report, the judge must either (1) inform the attending physician that there is nothing to prevent temporarily keeping the person under observation; (2) decide that keeping the person under observation is not or no longer necessary and order the release of the person (in which case the person requesting the admission is so informed); or (3) request additional information from the attending physician.⁷⁶
- [74]. If the judge determines that the person is to be kept under observation, the observation can usually only continue for a maximum of 21 days after the determination. If the judge requests additional information from the attending physician, the time it takes for the physician to provide the additional information is included in the 21-day period, so that the total observation period cannot exceed 30 days, with the exception of the extension of the time limit for the judge to receive additional information for the placement decision.⁷⁷ Prior to the end of the observation period, the attending physician provides the judge with a duly-reasoned report on maintaining the person's hospitalisation beyond the 30-day period, which constitutes placement of the person. If, prior to the end of the period, the attending physician is convinced that maintaining the hospitalisation is necessary, the physician provides the judge with a report to that effect. Such report will trigger the judge's placement decision procedure.⁷⁸

⁷⁵ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended.

⁷⁶ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Arts. 12-14.

⁷⁷ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Art. 15.

⁷⁸ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Art. 16.

- [75]. Before taking the decision to end the admission/maintenance under observation, by either ordering the person's release or placement, the judge hears the admitted person in the treatment establishment. If the judge does not deem to have sufficient information, the judge can order any additional measures deemed necessary, including an outside expert's opinion. In this case, the 30-day observation period is extended until the measure is completed, but no longer than an additional 30 days.⁷⁹
- [76]. No duration would apply in emergency situations as the 2009 Law provides initially for admission before placement, and that in cases of imminent danger to the health of the person concerned or the safety of others, danger that is duly-documented by a doctor from the establishment but not on the psychiatric ward staff, the director can admit the person without the written request usually required. However, the request must be submitted with 24 hours of the admission. If that is not done, the director must inform the person that he or she may immediately leave the hospital, without prejudice to the person's right to continue suggested therapy. Following that are the periods described above for the attending physician's report, and the judge's maintenance under observation and placement decisions.⁸⁰
- [77]. The maximum duration of an initial placement is one year. One year after the placement decision a commission made up of a magistrate of the judicial district, a physician specialising in psychiatry or in child psychiatry and of an environmental health officer or social worker independent from the establishment, named by the Health Ministry for a three-year period, and after having solicited the attending physician's advice and acquired all necessary information, decides whether keeping the person in placement is justified. The establishment's director must inform the commission two weeks prior to the expiration of the one-year period. If the commission deems that the placement is no longer necessary, the person is immediately released and the judge is duly informed. If the placement is kept in effect, the commission carries out a re-examination of the person every two years. The commission can also decide that the person should benefit from a leave for a maximum of three months, at the end of which a definitive decision will be taken.⁸¹
- [78]. There is no express regulation for mental health care interventions such as electro-convulsive therapy, chemical convulsive shock

⁷⁹ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Arts. 18-19.

⁸⁰ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Art. 8.

⁸¹ Luxembourg/Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux (07.03.2008), as amended, Art. 29.

therapy, pharmaceutical intervention or forced feeding. However, the 2009 Law provides very general regulation on such therapy. Treatment that medical science has not yet generally recognized or that presents a serious risk of causing irreversible brain damage or harming the patient's personality, can only be administered if the doctor deems it indispensable and if the duly-informed patient expressly consents to it. When the patient is unable to understand the scope/extent of the treatment, the doctor must submit the question to committee made up of three experts, two of whom must be doctors, appointed by the Health Ministry. The treatment can only be administered if the committee, having solicited the opinion of the patient's legal representative, if there is one issues an opinion in favour of such treatment. It is prohibited to carry out clinical trials of medical products or techniques that are not meant for use in psychiatric therapy. If they are meant for use in psychiatric therapy, they must be submitted for prior authorisation to the Health Ministry, which takes the advice of the *Comité National d'Ethique de Recherche* (CNER) [National Committee on Research Ethics].

- [79]. The 2009 Law does regulate seclusion and physical restraint. A patient cannot be subjected to seclusion or physical restraint measure unless the aim is to prevent any imminent harm for the patient or others. The measure must be applied according to the principle of least restraint, so that the measure is proportionate to the risks posed to the patient or others. Seclusion and physical restraint measures can only be used under medical supervision, unless the physical restraint is very brief and necessary to deal with an urgent situation. The personnel applying the brief physical restraint in the absence of a physician must immediately inform the ward's physician of the brief physical restraint. A patient must be regularly monitored while in seclusion or under physical restraint. The reasons for using seclusion or physical restraint, as well as their duration must be recorded in the patient's medical records.⁸²
- [80]. At any time, patients can appeal their placement by requesting their release before the district court in which the establishment is located. Interested parties can also petition the court. In their petitions, interested parties must indicate their family relationship with the patient in question or the nature of their relationship with him or her. The court cannot admit a new petition for release unless it has definitively ruled on a preceding request. Under the 1988 Law the petition was not admissible until one year after the denial of a previous release petition. The release petition is transmitted from the court to the public prosecutor's office, which then request the

⁸² Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, Art. 44.

establishment director's opinion and orders any other necessary verifications. The patient is heard by the court in closed session or by a judge designated for such hearings. A report on the decision is rendered at a public hearing by the designated judge, as applicable. A decision to release the patient is provisionally enforceable, regardless of appeal of that decision. Appeal of it can be filed within 15 days of the court clerk's service of the decision. The appeal is filed in the form of either an argued brief or a letter briefly setting forth the arguments and signed by a qualified person. The appeal goes before the Court of Appeals sitting in closed session and is adjudicated in the same manner as the decision being appealed. Under the 2009 Law periodic review of the lawfulness of the patient's placement is carried out after the first year of placement by the commission made up of a magistrate of the judicial district, a physician specialising in psychiatry or in child psychiatry and of an environmental health officer or social worker independent from the establishment, named by the Health Ministry. After having solicited the attending physician's advice and acquired all necessary information, it decides whether keeping the person in placement is justified. The establishment's director must inform the commission two weeks prior to the expiration of the one-year period. If the commission deems that the placement is no longer necessary, the patient is immediately released and the judge is duly informed. If the placement is kept in effect, the commission carries out a re-examination of the patient every two years.⁸³ The appeal process appears to allow the patient to effectively exercise the right. However, the 2009 Law does not mandate legal assistance for such proceedings, nor does it expressly state that the patient's representative should have access all materials and have the right to challenge evidence before the court as set forth in Article 25 of Recommendation Rec(2004)10.

- [81]. Appeal procedures for offenders are essentially the same as those for non-offender patients, except that the appeal period appears to be only five days, and when an offender's release is decided, that offender is kept in placement during the period of appeal for the release decision. When the State Prosecutor appeals that decision, the offender is kept in placement during the entire appeals proceeding.⁸⁴
- [82]. Free legal support is not mandatory under the 2009 Law, but theoretically, a person with mental disorders could receive free legal

⁸³ Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, Art. 30 ; Luxembourg/*Loi du 26 mai 1988 relative au placement des personnes atteintes de troubles mentaux dans des établissements ou services psychiatriques fermés, Mémorial A-N° 28, 16.06.1988*, as amended, Art. 18 ; and, and Luxembourg/*Nouveau code de procédure civile*, Art. 1089, revised as at 01.09.2009.

⁸⁴ Luxembourg/*Projet de loi No. 5856 relatif à l'hospitalisation sans leur consentement de personnes atteintes de troubles mentaux* (07.03.2008), as amended, Art. 37.

aid as long as the person qualified as having insufficient financial resources to pay for legal services and proceedings, and the legal aid the person required did not involve frivolous or vexatious legal action. Additionally, minors involved in legal proceedings can not receive legal aid regardless of their parents' financial resources.⁸⁵

⁸⁵ Luxembourg/*Loi du 18 août concernant l'assistance judiciaire*, *Mémorial A- N° 81*, 03.09.1995, at p. 1913; Luxembourg/*Règlement grand-ducal du 18 août concernant l'assistance judiciaire*, *Mémorial A- N° 81*, 03.09.1995, at p. 1916 ; and Luxembourg/*Loi du 10 août 1991 sur la profession d'avocat*, *Mémorial A-N° 58*, 27.08.1991, as amended, at p. 1110.

4. Competence, Capacity and Guardianship

- [83]. The *Comparative Study on the Legal Systems of the Protection of Adults Lacking Legal Capacity* (2008) does not cover Luxembourg. However, it does state that Luxembourg would soon follow in signing the Hague Convention of 13 January on the International Protection of Adults. According to the Hague Conference on Private International Law, Luxembourg signed the Convention on 18.09.2008.⁸⁶
- [84]. The *Second Disability High Level Group Report* (2009) does cover Luxembourg. Its findings and conclusions of June 2009 are still valid. On 12 June 2009, the Ministry of the Family and Integration sent Bill No. 6057 to the Parliament, a bill providing for the government's financial participation in the construction of a facility in the Luxembourg municipality of Mondorf-les-Bains for individuals living with handicaps. The government would provide over EUR 18 million for a facility that includes a day and overnight facility with a special-accommodation workshop for individuals living with handicaps. The facility will thus provide a uniform setting for those individuals to work and receive the care they need in an appropriately accessible facility.⁸⁷

⁸⁶ http://www.hcch.net/index_en.php?act=conventions.status&cid=71 (03.12.2009).

⁸⁷ Available in French on Luxembourg's Chamber of Deputies' website at :
http://www.chd.lu/wps/portal/public/lut/p/c1/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gXI5ewIE8TIwN380ATyMvVy_z0GA_Ywt3Y6B8pFm8kYVFcJC7o6-rpWWok4GngbNhsGugk5GBpxEB3X4e-bmp-gW5EeUAwR8Qyw!!/dl2/d1/L0IDU0IKSWdrbUEhIS9JRFJBQUlpQ2dBek15cXchL1ICSkoXtkExTkk1MC01RncvN19EMkrWUkk0MjBHVk0xMDJCSTNRSIA5MzhFMS9hNzVYajgyMTAwMDU!/?PC_7_D2DVRI420GVM102BI3QJP938E1_action=doDocpaDetails&PC_7_D2DVRI420GVM102BI3QJP938E1_id=6057&PC_7_D2DVRI420GVM102BI3QJP938E1_displayLink=true&PC_7_D2DVRI420GVM102BI3QJP938E1_numPage=1&PC_7_D2DVRI420GVM102BI3QJP938E1_positionInHistory=&PC_7_D2DVRI420GVM102BI3QJP938E1_display=1&PC_7_D2DVRI420GVM102BI3QJP938E1_EtatDossier=En+cours&PC_7_D2DVRI420GVM102BI3QJP938E1_TypesDeTri=Numero&PC_7_D2DVRI420GVM102BI3QJP938E1_SortOrder=DESC&
(03.12.2009).

4.1. Legal Framework

- [85]. Luxembourg's guardianship of legally incapable adults is governed by a 1982 law (the "1982 Law") which provides for the management of affairs of persons whatever form of protection they are under. The persons' housing and belongings should be kept at their disposition for as long as possible. When a person who is put under protection assigns a legal representative to take care his or her property, that mandate is valid. If no mandate for a legal representative is given, the rules for the administration of affairs are followed. The 1982 Law does not expressly define competence or capacity, but rather lists the possible situations in which an adult could require protection. The 1982 law provides that individuals who are unable to provide for themselves due to an alteration of their abilities (*facultés*), whether in the context of an single act or continuously. This could also include persons who, through their improvidence, excessive behaviour or idleness expose themselves to being in need or the inability to carry out their familial duties. The 1982 Law does not list mental health related causes determining legal incapacity, it simply refers to a mental disorder (*trouble mental*). Otherwise, the 1982 Law provides that the alteration of one's mental faculties by an illness, disability or old age are among the grounds for protection. The alteration of one's mental and physical facilities must be medically established.⁸⁸
- [86]. The 1982 Law provides for conservatorships (*tutelle*) and guardianships (*curatelle*). Both forms of protection are supervised by judges dealing with juvenile and conservatorship/guardianship matters. Adults placed under legal protection retain the exercise of their rights, but that individuals given power of attorney can perform certain legal acts as ordered by the judge supervising a trusteeship. Under a conservatorship or guardianship, and with the advice of the attending physician, a judge can enumerate a list of acts the protected person can perform. Appeal against an order for either form of protection is filed in the form of either an argued brief or a letter briefly setting forth the arguments and signed by a qualified person. The appeal goes before the Court of Appeals sitting in closed session and is adjudicated in the same manner as the decision being appealed. Neither form of protection appears to have a periodic review mechanism.⁸⁹

⁸⁸ Luxembourg/*Loi du 11 août 1982 portant réforme du droit des incapables majeurs*, *Mémorial A-N° 72*, 26.08.1982, Arts. 490-2, 491-3, 488-490

⁸⁹ Luxembourg/*Loi du 11 août 1982 portant réforme du droit des incapables majeurs*, *Mémorial A-N° 72*, 26.08.1982, Arts. 491-5, 501 and 511, and Luxembourg/*Nouveau Code de procédure civile*, Art. 1089, updated as at 01.09.2009.

[87]. A conservatorship, is ordered when an adult needs to be continually represented in civilian life, and is requested by the person to be protected, a spouse with whom a community of life continues, ascendants, descendants, brothers and sisters or the public prosecutor. The alteration of mental faculties must be acknowledged by a specialist physician. Conservatorships can also be ordered for emancipated minors, or minors one year from majority age. A persons spouse is his or her conservator, unless their community of life no longer exists or there is another reason for the judge to order otherwise. Legal persons can also be appointed a conservator. Apart from spouses, descendants and legal persons, no one can be obliged to serve as conservator for over five years. At the end of the five-year period, the qualifying conservator requests, and must be granted, a replacement. Neither attending physicians nor treatment establishments can be appointed conservator. Instead of ordering a full conservatorship, a judge can appoint an appropriate family member or legal person to manage the person's assets. The judge can also appoint a staff member of the treatment establishment as manager of the conservatorship (*gérant de la tutelle*). In this case, the manager would collect the protected person's revenues to pay for the person's care and feeding. Wills made after the conservatorship is ordered are void by operation of law. Wills made afterwards are generally valid. The protected person can make donative gifts and get married only with the family council's approval, and always with the attending physician's approval. In emergency situations of serious and immediate danger to the life or health of the protected person, and to which the conservator does not consent, a physician can take necessary medical measures. The physician must then send a reasoned report to the State Prosecutor regarding the medical measures taken.⁹⁰

[88]. A guardianship is ordered when an adult's faculties have been altered, the person is not able to act, but requires advice and monitoring in civilian life. Guardianships are ordered and ended in the same manner as conservatorships. Spouses are guardians of each other as long as their community of life continues to exist or the judge finds another reason not to confer the guardianship. All other guardians are appointed by the judge. Guardians' responsibilities are similar to those of conservators except that only the supervising judge determines the end or disqualification of the guardianship, for whatever reason. Without their guardians, wards cannot carry out any of the activities for which persons under a conservatorship would require the approval of their family counsel. Neither can a ward receive capital or be employed without the guardian's assistance. If the guardian refuses,

⁹⁰ Luxembourg/*Loi du 11 août 1982 portant réforme du droit des incapables majeurs, Mémorial A-N° 72, 26.08.1982, Arts. 492-507.*

the ward can petition the judge for authorisation. The judge can order the guardian to receive the ward's revenue and have an account for the purpose of paying the ward's expenses. The guardian makes an annual accounting to the judge. A ward can freely bequeath assets but can make donative gifts only with the guardian's assistance. A ward requires the guardian's consent to marry, failing that, a judge's consent.

5. Miscellaneous

[89]. NTR

Annexes-Case Law

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

Case title	None available
Decision date	
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	

Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

Proposal of key words for data base	
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Please attach the text of the original decisions in electronic format (including scanned versions as pdf).