Problems Regarding the Fitness For Trial in Thailand: A Comparative Study with the Jurisdiction of England and Wales, and the Netherlands[*]

ปัญหาเรื่องความสามารถในการต่อสู้คดี: กรณีศึกษาเปรียบเทียบกฎหมายประเทศไทย อังกฤษและเวลส์ และเนเธอร์แลนด์

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This paper conducts a study regarding the fitness for trial test in Thailand, through a comparative study with the jurisdictions of England and Wales, the Netherlands and the proposal of Law Commission of England and Wales. This paper aims to propose suggestions to amend the law of Thailand regarding the fitness for trial test as well as regulations related to it. This research found that the law of England and Wales and the proposal of the Law Commission of England and Wales had a solid fitness for trial test as well as the regulations regarding the handling of those who found unfit for trial. Ultimately, this paper suggested that the law of England and Wales and the proposal of the Law Commission of England and Wales should be used as models to reform the fitness for trial test and regulation relating to the fitness for trial test in Thailand. Additionally, this paper made a proposal for a new statutory test and regulations relating to fitness for trial to be amend in the Criminal Procedure Code.

Keywords: Fitness for Trial, Criminal Justice System, Vulnerable Defendants, Criminal Procedure Law

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บทคัดย่อ

บทความชิ้นนี้มีวัตถุประสงค์เพื่อศึกษากฎหมายของประเทศไทยในส่วนที่เกี่ยวข้องกับความสามารถในการต่อสู้คดีของจำเลยในคดีอาญา โดยการศึกษาวิเคราะห์เปรียบเทียบกฎหมายของไทย อังกฤษและเวลส์ และเนเธอร์แลนด์ รวมถึงข้อเสนอการแก้ไขกฎหมายของคณะกรรมการกฎหมายแห่งอังกฤษและเวลส์ (Law Commission of England and Wales) ผลการศึกษาพบว่า กฎหมายของอังกฤษและเวลส์และข้อเสนอของคณะกรรมการกฎหมายแห่งอังกฤษและเวลส์ (Law Commission of England and Wales) นั้นได้มีการกำหนดการทดสอบความสามารถในการต่อสู้คดีของจำเลยในคดีอาญาไว้ค่อนข้างละเอียด อีกทั้งยังได้มีการกำหนดกระบวนการในการดูแลรักษาจำเลยที่ไม่สามารถต่อสู้คดีได้อย่างชัดเจน ดังนั้น งานวิจัยฉบับนี้จึงเสนอให้มีการแก้ไขปรับปรุงบทบัญญัติที่เกี่ยวข้องกับความสามารถในการต่อสู้คดีของจำเลยในคดีอาญาตามแบบของอังกฤษและเวลส์และข้อเสนอของคณะกรรมการกฎหมายแห่งอังกฤษและเวลส์ โดยเสนอให้มีการแก้ไขประมวลกฎหมายวิธีพิจารณาความอาญา โดยเพิ่มบทบัญญัติใหม่ที่กำหนดบททดสอบที่ชัดเจนว่าด้วยเรื่องการทดสอบความสามารถในการต่อสู้คดีและบทบัญญัติอื่น ๆ ที่เกี่ยวข้องกับความสามารถในการต่อสู้คดีของจำเลยในคดีอาญา

คำสำคัญ: ความสามารถในการต่อสู้คดี, กระบวนการยุติธรรมอาญา, จำเลยที่เป็นกลุ่มเปราะบาง, กฎหมายวิธีพิจารณาความอาญา

1. Introduction

Fitness for trial is a legal procedure under the criminal justice system that aims to separate defendants who lacks capacity to participate in a criminal trial. As it provides a delay of trial for them, in cases that they suffer from health problems, whether physical or mental. It is part of the criminal justice system, which related to incapacitated and mentally disordered defendants and offenders. These rules commonly composite of fitness for trial (also known as 'unfitness to plead' or 'capacity to stand trial'), criminal defences based on mental conditions (such as insanity, automatism, diminished responsibility, infanticide, intoxication) and non-punitive measures for dealing with mentally disordered and incapacitated offenders (normally referred as 'disposals').[1]

Fitness for trial is founded upon the principle that the trial would be deemed unfair if it allows 'incapacitated' defendants, who are unable to understand the legal proceedings or unable to communicate with their lawyers, to stand trial. [2] One of its objectives is also to preserve justice in the legal system while balancing the delivery of justice and the safety of the public[3] as it may be viewed that proceeding with a trial, when the defendant is unable to participate effectively in it, is an abuse of individual rights and the rule of law. [4] Furthermore, fitness for trial is also concerned the right to represent oneself in court and the concept that mentally disordered offenders should receive treatment, not punishment. [5] In this regard, it also allows vulnerable offenders to be diverted from the conventional criminal justice system, which is a punitive-based, to a therapeutic criminal justice system.[6]

The essential rationale behind determining fitness for trial may be concluded as follows: to ensure the accuracy of the criminal proceedings, to maintain the dignity of the judicial process, to ensure the fairness of the trial and to maximise the efficacy of punishment.[7] Or some would refer to the above rationale simply as 'reasons of humanity'.[8]

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[1] RD Mackay, *Mental Condition Defences in the Criminal Law* (Clarendon Press 1995).

[2] See Ronnie Mackay and Warren Brookbanks, *Fitness to Plead: International and Comparative Analysis* (OUP 2018) 2-3.

[3] P Brown, 'Unfitness to Plead in England and Wales: Historical Development and Contemporary Dilemmas' (2019) 59 Med Sci Law, 187.

[4] RA Duff, *Trials and Punishments* (Cambridge University Press 1991) 29.

[5] Law Commission, *Unfitness to Plead: A Consultation Paper, Law Com CP No 197* (Her Majesty's Stationery Office 2010) 3-4.

[6] Mackay and Brookbanks (n 2) 1.

[7] I Freckelton, 'Rationality and Flexibility in Assessment of Fitness to Stand Trial' (1996) International Journal of Law and Psychiatry, 9, 39–59; S.N. Verdun-Jones, 'The Doctrine of Fitness to Stand Trial in Canada: The Forked Tongue of Social Control' (1981) International Journal of Law and Psychiatry, l4, 363–389; Richard Bonnie, 'The Competence of Criminal Defendants: Beyond 'Dusky and Drope' (1993) 47 U. MIA L. REV. 539, 554.

[8] Law Reform Commission of Canada, *Study paper: Fitness to Stand Trial* (Ontario 1973).

In conclusion, determining fitness for trial is about establishing whether the defendant's physical condition and/or mental disorder, affects his ability effectively to participate in a trial.[9] Thus, set of rules must be imposed to do so. In this regard, Thailand, England and Wales, and the Netherlands also recognised the concept of fitness for trial and offered fitness for trial tests and related regulations under their jurisdictions. Nevertheless, it can be difficult to apply the concept in practice since it may be complicated to formulate the best test and/or procedure to evaluate fitness for trial. Therefore, this paper would conduct a comparative study of fitness for trial tests in the jurisdictions of Thailand, England and Wales, and the Netherlands. As the jurisdictions of England and Wales and the Netherlands have, over the years, developed the fitness for trial tests and the management of the disposition of incapacitated defendants, these two jurisdictions will be used as models in a comparative study to reform the fitness for trial test and related procedure in Thailand. Additionally, England and Wales Law Commission's proposal regarding the issue will be analysed. Thereafter, it would make a proposal for amendments of fitness for trial tests and regulations related to it in the jurisdiction of Thailand.

2. A comparative analysis of fitness for trial in England and Wales, the Netherlands, Thailand, and the Law Commission's proposal

2.1 The jurisdiction of Thailand

In Thailand, the issue of the suspect/defendant's fitness for trial may be raised in an inquiry state, a preliminary hearing state or a trial state. All these fitness issues are subjected under the test under Section 14 of the Criminal Procedure Code of Thailand, which states;

'*In the course of an inquiry, preliminary hearing or trial, should there be a reasonable belief that the accused or defendant is insane and therefore unfit to plead, the inquirer or court, as applicable, shall order a medical official to hold a psychiatric evaluation of the person in question and thereafter make a personal appearance to give statement or testimony as to the outcome of the evaluation*.'[10]

It could be seen that section 14 does not lay out a precise test of what it means to be 'fit or unfit for trial' as it only requires that if the defendant is mentally disordered (referred to as 'insane' or 'Vi-kon-ja-rit' in the provision) and unable to put up a defence, the court may suspend the trial. Thereafter, the court would make an order for the defendant to receive a medical evaluation and treatment if required. After that, a case psychiatrist has to make the evaluation report of fitness for trial and submit it to the court. If the defendant is found not fit for trial, he will remain in care until he has recovered or found to be fit for trial.

In practice, the evaluation of fitness for trial is further detailed in the Mental Health Act B.E.2551 (2008) and supplemental regulation of the Mental Health Act B.E.2551 (2008). Section

[9] RA Duff (n 4) 29-35.

[10] Section 14 Criminal Procedure Code

35[11] and 36 of the Act provide an additional regulation regarding the evaluation of fitness for trial. Nonetheless, the Act itself did not provide a specific fitness for trial test, as it only stated that the psychiatrist shall examine the defendant and prepare an opinion to be given to the court, regarding fitness for trial, within 45 days of the admission date and that the defendant may be involuntarily detained for evaluation and treatment.

The closest equivalent to a legal fitness for trial test is offered in the evaluation of fitness for trial test form, called a Criminal Case-patient Form 1, which may be found in the supplement regulation of the act.[12] The form requires the psychiatrist to evaluate the defendant and complete the form. The following information about the defendant is requested in the form: 1. The ability to know the date, time, place, and surroundings. 2. The understanding and appreciation of the charge against him, the ability to explain the situation relating to the fact of the alleged charge and the ability to talk and answer questions relating to what has been asked. 3. The ability to know what the possible outcomes of the case are. 4. The ability to control his behaviour and emotions. By the end of the questionnaire, the psychiatrist is required to check the box as to whether the defendant is fit for trial or not. The psychiatrist may offer an additional opinion if he has one.

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[11] Section 35 Mental Health Act B.E. 2551

Subject to Section 14 paragraph one of the Criminal Procedure Code, an investigating officer or the Court shall transfer a suspect or an accused, with the details of the circumstances of the case, to be examined at a treatment facility.

When the treatment facility admits the suspect or the accused, a psychiatrist shall examine the mental disorder and prepare an opinion to be used as part of the consideration of the Investigating Officer or the Court as to whether the suspect or the accused is fit to stand trial. The result of the examination and the assessment of capability to stand trial shall be reported to the investigating officer or the Court within forty-five days from the date that the suspect or the accused is admitted; the period may be extended for no more than forty-five days.

For the benefit of the assessment of capability to stand trial, the treatment facility shall have the power to request documents concerning the suspect or the accused from other health care facilities.

The provisions under Section 27 paragraph two shall apply to the examination of mental disorder under paragraph two, mutatis mutandis.

In this instance, when the suspect or the accused is detained and there is a need for the suspect or the accused to be admitted to the treatment facility for observation, examination, treatment, and assessment of capability to stand trial, the treatment facility may request the investigating officer or the Court to prescribe methods of prevention of escape or danger.

[12] Regulation of the National Mental Health Commission regarding the regulation and method of the reporting of the examination of the evaluation of the competency to stand trial and the treatment of the criminal case-patient B.E. 2551.

Up until now, the mental disorders which lead to unfitness for trial are psychosis and intellectual disabilities.[13]

Notably, since the finding of unfitness for trial is not a court order,[14] it is not subject to appeal.

After a psychiatric examination under Section 35 of the Mental Health Act has been conducted, if the case psychiatrist determines that the defendant is suffering from mental disorder(s) and unfit for trial, he must report back to the court. According to Section 14 of the Criminal Procedure Code, if the court is satisfied that the defendant is unfit for trial, the court will suspend the trial until the defendant has recovered or become fit for trial.[15] Moreover, the court may temporarily dispose of the case.[16]

If recovery is impossible, theoretically, the case against the unfit person can be withdrawn. Since the prosecutor has an authority to ask the court for permission to withdraw the case and, if the court is satisfied, the court can grant the permission to do so,[17] although, the case has not yet risen in practice.

Noteworthy, if the case is proceeded despite the defendant lacks capacity to stand trial that trial would be deemed to be an unlawful trial.[18]

The only available disposal for the defendant who is found to be unfit for trial is involuntary detention in a hospital. According to Section 36 of the Mental Health Act B.E. 2551 (2008), the defendant would be detained in a mental hospital and receive (involuntary)

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[13] Utaya Nakcharoen and Phawinee Butsaen, ‘ Effectiveness of the Galya Individualized Competency Restoration Program (Galya-ICRP) on Competency to Stand Trial in Forensic Psychiatric Patients’ (2019)27 Journal of Mental Health of Thailand,121-132.

[14] Technically, under Thailand’ s Criminal Procedure Code, there is no unfitness for trial order. Section 14 does not specify that the court has to make an order that the defendant is unfit for trial to suspend the case.

[15] Section 14 Paragraph 2 Criminal Procedure Code
In the event that the inquirer or court finds the accused or defendant insane and unfit to plead, the inquiry, preliminary hearing or trial shall be suspended until the person in question recovers his sanity or is fit to plead.

[16] Section 14 paragraph 4 Criminal Procedure Code In the event that the preliminary hearing or trial has been suspended pursuant to the foregoing paragraph, the case may be disposed of by the court for a provisional period.

[17] Section 35 Criminal Code of Thailand
A nolle prosequi may be entered at any time prior to the court of first instance’s delivery of judgment. The court may, by order, grant or dismiss it as deemed appropriate. If the nolle prosequi is entered after the defendant’s responsive plea has been filed, the court shall ask the defendant whether he would raise any objection thereagainst and note down his statement. The nolle prosequi must be dismissed if it meets with any objection by the defendant.

[18] Kanit Na-nakorn, *Criminal Procedure Law Vol. 1* (10th edn, Winyoochon 2021) 199-224.
See Supreme Court Judgment No. 3248/2532 (1989), 2594/2542 (1999).

treatment until he has recovered or become fit for trial.[19] In this regard, the case psychiatrist must submit the evaluation report to the court within 180 days upon admitting the patient. If the defendant still has not recovered, or is still unfit for trial, he may be further detained but the case psychiatrist must submit an evaluation/progress report to the court every 180 days.[20]

If the defendant has recovered or become fit for trial, the case psychiatrist has to make a report to the court.[21] Thereafter, if the court is satisfied, the court can make an order to resume the trial. Notably, there is no provision for the defendant to appeal against the court's order to resume the trial.

2.2 The jurisdiction of England and Wales

The fitness for trial test in the jurisdiction of England and Wales is known as 'unfitness to plead'. The test is originated from common law case of *Pritchard*,[22] which was decided in 1836. Additionally, the latter case of *Davies*[23] added the further requirement to the test that the defendant had to be able to instruct his legal advisor. The test was modernised in *John M*,[24] which was decided in 2003. Meanwhile, the procedure after the defendant is found unfit for trial and the disposals are formulated in the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 amended the Criminal Procedure (Insanity Act 1964 and the Domestic Violence, Crime and Victims Act 2004. Notably, the fitness for trial test is only available in the Crown Court.[25]

The current fitness for trial sets as follow: the defendant should be found unfit for trial if he lacks one of the following abilities: understanding the charge(s), deciding whether to

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[19] Section 36 paragraph 1 Mental Health Act B.E. 2551
Subject to Section 14 paragraph 2 of the Criminal Procedure Code, the infirmary shall admit the alleged offender or the accused for detention and treatment without his consent until the alleged offender or the accused has recovered or improved and become capable of defending his case, unless the inquiry official or the Court has ordered otherwise, or it is otherwise prescribed by law.

[20] Section 36 paragraph 2 Mental Health Act B.E. 2551
The psychiatrist who conducts treatment shall report the result thereof to the inquiry official or the Court within one hundred and eighty days from the date of admittance of the alleged offender or the accused. In the case where the psychiatrist is of opinion that the alleged offender or the accused is incapable of defending his case, the psychiatrist shall report the result of treatment every 180 days, unless the inquiry official or the Court has ordered otherwise.

[21] Section 36 paragraph 3 Mental Health Act B.E. 2551
During the course of treatment, if the psychiatrist who conducts treatment is of opinion that the alleged offender or the accused has recovered or improved and has become capable of defending his case, the psychiatrist shall report the result of treatment to the inquiry official or the Court without delay.

[22] (1836) 7 C & P 303.

[23] (1853) Car & Kir 328.

[24] M (John) [2003] EWCA Crim 3452, [2003] All ER (D) 199.

[25] Law Commission, *Unfitness to Plead Volume 1: Report Law Com No. 364* (Her Majesty's Stationery Office 2016) para 1.90.

plead guilty or not, exercising his or her right to challenge jurors, instructing solicitors and/or advocates, following the course of the proceedings, giving evidence in his defence.[26]

The question of the defendant's fitness for trial is usually raised by the defendant but it could be also raised by the courts or prosecutors[27] and it is up to the court to decide.[28] To decide whether the defendant is fit for trial, the defendant must fulfil the requirements under the Pritchard test and along with the submission of evidence from two or more registered medical practitioners.[29] Hence, in practice, the finding of fitness for trial usually requires a "*consensus of psychiatric opinion*"[30] (provided that the claim of fitness for trial is based on mental disorders).

The raising of the issue of fitness for trial is not limited to mental disorders as it only requires that the defendant must be 'under a disability',[31] thus, any form of disability is considered.[32] In practice, the disabilities which have given rise to a fitness for trial test are intellectual disability,[33] mental illness,[34] autism/ epilepsy,[35] schizophrenia,[36] depression/anxiety[37] and situations where the defendant is 'deaf and dumb'.[38] Meanwhile, amnesia regarding the offence[39] or a form of hysteria (leaving the defendant unable to communicate except in writing)[40] is not accepted as a ground for a finding of fitness for trial.

Noteworthy, it is possible to appeal against a determination of unfitness for trial to the Court of Appeal.[41]

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[26] (n 24) at 20.

[27] Section 4(1) Criminal Procedure (Insanity) Act 1964.

[28] Domestic Violence, Crime and Victims Act 2004 Section 22. Interestingly, from 1800 until 2004, a jury would decide whether the defendant was unfit for trial (referred as 'trial of issue'). See Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (OUP 2012) 98.

[29] Section 4(6).

[30] Law Commission (n 25) para 4.2.

[31] Section 4 Criminal Procedure (Insanity) Act 1964.

[32] Law Commission (n 5) para 1.5.

[33] *R v Burles* [1970] 2 WLR 597*; R v Grant* [2002] QB 1030; *R v Martin* [2003] 2 Cr App R 322.
It should be noted that it is held that having a low level of intelligence did not necessarily make the defendant unfit for trial. See *JD v R* [2013] EWCA Crim 465.

[34] *R v Antoine* [2001] 1 AC 340.

[35] RD Mackay (n 1) Table 5.6.

[36] ibid.

[37] ibid.

[38] *R v Berry*; *Rex v Dyson* (1831) 7 C & P 305; *R v Roberts* [1954] 2 QB 329.

[39] *R v Podola* [1960] 1 QB 325.

[40] *R v Holman* (Unreported) CA, 27 April 1994.

[41] Section 15 Criminal Appeal Act 1968.

If a defendant has been found unfit for trial, the court is had to stop the trial.[42] Thereafter, the court would be required to conduct a Section 4A hearing, usually referred to as the 'trial of facts'.[43] Notably, before processing the trial of facts, the court must formally appoint a representative 'to put the case for the defence',[44] so that the accused will have a person who may decide on his behalf. In this regard, the appointed representative does not always have to be the defence counsel.[45]

It should be noted that the trial of facts is not a criminal trial,[46] but a procedure to find whether the accused did the act, or made the omission, according to the charge. Thus, a jury must evaluate whether that it is satisfied beyond reasonable doubt that the accused 'did the act or made the omission charged against him as an offence'.[47] In this respect, the prosecution is required to prove only the external elements of the offence.[48] Lastly, if the jury is not satisfied that the accused 'did the act or made the omission', the jury must return a verdict of acquittal.[49]

As in the determination of unfitness for trial, appeal against the finding in a trial of facts may be made to the Court of Appeal.[50]

If an unfit person has been found to have 'done the act or made the omission', he will be subject to one of the three disposals listed below.[51]

(1) A hospital order (with or without a restriction order). In this regard, a person is securely treated in a (mental) hospital and, if a restriction order is in place, he cannot be released without the approval of the Secretary of State.[52] Noteworthy, the determination of the imposition the hospital order requires the written or oral evidence from two registered medical practitioners to ensure that the defendant is suffering from a mental disorder to a degree that it is appropriate to detain him in a hospital for treatment and that the hospital order is the most suitable disposal.[53]

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[42] Section 4A (2) Criminal Procedure (Insanity) Act 1964.

[43] RD Mackay, 'The Development of unfitness to plead in English Law' in Ronnie Mackay and Warren Brookbanks, *Fitness to Plead: International and Comparative Perspectives* (OUP 2018) 16.

[44] Section 4A (2)(b) Criminal Procedure (Insanity) Act 1964. .

[45] Norman [2008] EWCA Crim 1810, [2009] 1 Cr App R 192.

[46] As it is held in *R v H* [2003] UKHL 1. In this sense, it is not subject to Article 6 regarding right to a fair trial of the ECHR.For the difference between trial of facts and trial, see RA Duff, 'Fitness to plead and fair trials: Part 1: a challenge' (1994) Criminal Law Review 419, 420.

[47] Section 4A(2) Criminal Procedure (Insanity) Act 1964.

[48] Law Commission, (n 25) para 1.60.

[49] Section 4A(4) Criminal Procedure (Insanity) Act 1964.

[50] Criminal Appeal Act 1968 Section 15.

[51] Section 5(2) Criminal Procedure (Insanity) Act 1964.

[52] Section 37 and Section 41 Mental Health Act 1983.

[53] ibid

(2) A supervision order (with or without a treatment requirement). In this regard, a person is supervised by a probation officer or social worker in the community, further, he could be required to live in a particular place and to be treated as an out-patient by a doctor,[54]

(3) An absolute discharge. In this regard, a person is release without any condition.

It is possible to appeal against the imposed disposal order to the Court of Appeal.[55]

It should be noted that the trial could be resumed if the accused becomes fit for trial. Currently, the only possible circumstance of resumption of the trial is the case where the unfit person, who is a restricted patient (meaning that a hospital order with a restriction order is imposed on him and it is still in place), subsequently becomes fit for trial.[56] In this respect, if the Secretary of State, after consultation with the responsible clinician, is satisfied that such person can properly be tried, he may remit the person for trial.[57] Notably, if a person is found to be unfit for trial again, it is necessary to hold a Section 4A hearing (the trial of facts) for a second time.[58]

2.3 The jurisdiction of the Netherlands

The fitness for trial test in the Netherlands may be found in Section 16 under the Dutch Criminal Procedure Code (*Wetboek van Strafvordering*) which states: "*1. If the defendant suffers from such mental disease or defect to the extent that he lacks the capacity to understand the purpose of the prosecution instituted against him, the court shall suspend the prosecution, irrespective of the stage of prosecution.*"[59]

The test is simple, as it could be seen that section 16 only requires that the defendant is suffering from a mental disorder to the extent that he cannot understand the scope of his prosecution. The provision also allows the court to suspend the trial if it is found that the defendant is unfit for trial.

The current fitness for trial test originates from the landmark case of *Menten*[60] where the following criteria were given for the determination of understanding the scope of the defendant's prosecution: the ability to respond to the charges and to the matters raised during the proceedings, the ability to instruct counsel or the ability to give comments and

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[54] Part 1 Schedule 1A Criminal Procedure (Insanity) Act 1964.

[55] Section 15 Criminal Appeal Act 1968.

[56] Section 5A (4) Criminal Procedure (Insanity) Act 1964. See National Offender Management Service, Crown Prosecutor and HM Courts and Tribunals Service, 'Resuming a Prosecution when a patient becomes fit' (GOV.UK, 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/612502/resuming-guidance-prosecution-fit-to-plead.pdf> accessed 7 May 2022.

[57] Section 5A (4) Criminal Procedure (Insanity) Act 1964.

[58] *R (Julie Ferris) v DPP* [2004] EWHC 1221 (Admin), [2004] All ER (D) 102.

[59] Section 16(1) Dutch Criminal Procedure Code.

[60] Hoge Raad 5 februari 1980, NJ 1980, 104.0

explanations to counsel. Thus, if the defendant is found to lack any one of the above abilities, prosecution must be suspended. Notably, in practice, this criterion is still imposing.

In practice, fitness for trial is assessed with the help of a forensic medical team, which is a part of the Netherlands Institute of Forensic Psychiatry (NIFP).[61] The medical term makes an assessment report and submits it to the court. Generally, the court will rely on it but, nonetheless, the court is not bound to compliance with the report's opinion.[62]

Interestingly, the fitness for trial issue is rarely raised in the Netherlands.[63] In practice, it is mostly applied to defendants who suffer from severe mental disorders like psychosis, which causes them to have lost touch with all reality, [64] or conditions that result in cognitive impairment.[65] Up until now, conditions which have been successfully raised as a basis for unfitness for trial have included: a state of insanity,[66] intellectual disabilities,[67] a prison psychosis, because of solitary confinement (notably, in this case, decompensation had led to a vegetative existence)[68], a double brain haemorrhage leading to major cognitive dysfunction,[69] an advanced stage of Huntington's Disease,[70] and dementia.[71]

Once a defendant is found to be unfit for trial, his trial will be suspended and he will be committed to a mental hospital, where he will remain until he becomes fit for trial.[72] And it is required that the suspension of the trial must not exceed the period of pre- trial detention,[73] which is 110 days.[74]

Remarkably, in practice, there are some cases where recovery is impossible, in this regard, the prosecution is ended. For example, in some cases, like a 1997 case at the Court

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[61] F Koenraadt, 'Pre-Trial Forensic Mental Health Assessment in The Netherlands' in M. Herzog-Evans (ed.), *Transnational Criminology Manual* (Wolf Legal Publisher 2010) 529.

[62] Brants, Jackson, and Koenraadt, 'Culpability compared: Mental Capacity, Criminal Offences and the Role of the Expert in Common Law and Civil Law Jurisdictions' (2016) Journal of International and Comparative Law 3 (2), 411, 436.

[63] Bal and Koenraadt, *Het psychisch onvermogen terecht te staan: Waarborg of belemmering van het recht op een eerlijk proces*. (Boom Juridische uitgevers 2004) 39.

[64] Brants, Jackson, and Koenraadt (n 50) 431.

[65] Van der Wolf, Van Marle, Mevis and Roesch, 'Understanding and Evaluating Contrasting Unfitness to Stand Trial Practices: A Comparison between Canada and the Netherlands' (2010)9 International Journal of Forensic Mental Health, 245.

[66] District Court Heerenveen 09-02-1900, WvhR 7433 (1900).

[67] Court of Appeal Amsterdam 11-09-1997.

[68] Court of Appeal The Hague 05-11-1999, NJ 2000, 179 (1999).

[69] District Court Breda 26-09-2006, LJN AY8840 (2006).

[70] District Court Amsterdam 10-04-2009, not published (2009).

[71] Court of Zeeland-West-Brabant 04-12-2017, 02-800226-17.

[72] Brants, Jackson, and Koenraadt (n 62) 431.

[73] Dutch Criminal Procedure Code Section 17 2.

[74] Dutch Criminal Procedure Code Section 68-70.

of Appeal, Amsterdam, there was no resumption of the prosecution since the defendant was found to be suffering from intellectual disabilities. Thus, it was deemed that there be no chance of recovery.[75] In a 2006 case at the District Court of Breda,[76] where the defendant was suffering from major cognitive dysfunction, the prosecution was suspended, and immediately ended, because it could not be expected that the defendant would recover. In this situation, the prosecutor has the authority to make no prosecution under Section 167(2) of the Dutch Criminal Procedure Code since this provision allows the prosecution to withdraw a pointless prosecution which does not serve the public interest.[77] A recent example is the case where the cause of the defendant's unfitness for trial was that he had a stroke in 2016, which left him partially paralysed, unable to speak and cognitively impaired.[78] Remarkably, in a case at the District Court of The Hague, in 2004, the court had also used the mental age of the defendant to impose non-prosecution rather than a suspension of trial. In this case, the defendant suffered from mental disabilities and the court held that, since the lowest prosecution age under the law is 12 years old, if the mental age of the defendant is deemed to be under 12 years old, there cannot be a prosecution.[79]

In practice, the court has, instead of using the fitness for trial rule for suspending the trial, declared that the prosecution of a mentally disordered offender was inadmissible. This was done in the 2008 case at The Hague Court of Appeal[80] where the defendant could not understand the intention of the proceedings and there was no expectation of his recovery.

The only available disposal, once the prosecution is suspended in the jurisdiction of the Netherlands, is a hospital committal. This is done relying on the court's power according to Section 17 (1) of the Dutch Criminal Procedure Code.[81] Interestingly, a hospital committal is not done directly via the Dutch Criminal Code[82] but, rather, under the Compulsory Mental

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[75] Court of Appeal Amsterdam 11-09-1997.

[76] District Court Breda 26-09-2006, LJN AY8840 (2006).

[77] Section 167 Dutch Criminal Procedure Code

2. A decision not to prosecute may be taken on grounds of public interest. The Public Prosecution Service may, subject to specific conditions to be set, postpone the decision on prosecution for a period of time to be set in said decision.

See also PJP Tak, *The Dutch Criminal Justice System* (Wolf Legal Publishers 2008) 85.

[78] RTE, 'Dutch Father of Isolated Family Unfit for Trial, Prosecutors Say' (RTE, 18 February 2021) <https://www.rte.ie/news/europe/2021/0218/1197953-netherlands-family-farm/> accessed 9 May 2022.

[79] District Court The Hague 09-02-2004, LJN AO3757 (2004).

[80] Court of Appeal The Hague 27-11-2008, NbSr 2009, 52 (2008).

[81] Section 17 Dutch Criminal Code

1. In the case of suspension of the prosecution, the court may nevertheless order urgent measures to be taken.

[82] As, technically, a hospital committal under Section 37 or 39 of the Dutch Criminal Code may only be imposed in cases where the defendant cannot be held criminally responsible due to his mental disorder or had successfully raised the insanity defence. See PHPHMC van Kempen 'The Right to Fair Preliminary

Healthcare Act 2020 (*Wet verplichte geestelijke gezondheidszorg* or WVGGZ) which specifically handles compulsory care for people with a psychological condition. The WVGGZ allows the court to make a 'care authorisation' which may result in a hospital committal.[83] Notably, the WVGGZ only applies to people with a psychological condition as those with intellectual disabilities or dementia would be subject to a different law: the Care and Compulsion Act (Psychogeriatric and Intellectually Disabled Persons Act) or the WZD.[84] Noteworthy, under Section 17(2) of the Dutch Criminal Procedure Code, a hospital committal cannot last more than 110 days.

If the defendant is recovered and the trial should be resumed, thus, the resumption of prosecution upon recovery could be done according to Section 16 2. of the Dutch Criminal Procedure Code.[85] Notably, the time which the offender spent committed in a hospital may be deducted from any sentence, provided that the defendant might, later on, be found guilty and that a punishment of imprisonment is imposed.[86]

2.4 Law Commission's proposal

In 2016, the Law Commission of England and Wales published reports regarding unfitness to plead in which, in volume 2. is the draft legislation of a new fitness for trial test.[87] Notably, the draft legislation has not yet been enacted as the Government still has not provided a final response.[88]

The proposed fitness for trial test is as follows:

"*3. Capacity to participate effectively in a trial…*"

Investigation and Trial for Vulnerable Defendants: The Case of the Netherlands' in Ronnie Mackay and Warren Brookbanks (eds), *Fitness to Plead: International and Comparative Perspectives* (OUP 2018) 231, 245-246.

[83] Ministerie van Volksgezondheid, Welzijn en Sport, 'Care Authorisation' (July 2020) <https://www.dwangindezorg.nl/binaries/dwangindezorg/documenten/publicaties/informatiepunt/wvggz/brochures/care-authorisation---brochure/Care+authorisation+-+July+2020+1.1.pdf> accessed 9 May 2022.

[84] Government of the Netherlands, 'Compulsory Mental Healthcare' (22 November 2021) <https://www.government.nl/topics/mental-health-services/compulsory-mental-healthcare> accessed 9 May 2022.

[85] Section 16 Dutch Criminal Procedure Code

2. The suspension shall be revoked as soon as the defendant's recovery has been established.

[86] Section 68 of the Dutch Criminal Procedure Code allows the time during the pre-trial detention to be deducted from the sentence. Although, the law does not specifically state so in case of disposal, it is usually also deducted in practice. See Van der Wolf, Van Marle, Mevis and Roesch, (n 65) 255.

[87] Law Commission, *Unfitness to Plead Volume 2: Draft Legislation (Law Com. No. 364)* (Her Majesty's Stationery Office, 2016)

[88] Law Commission, 'Unfitness to Plead' (Law Commission, 2021) <https://www.lawcom.gov.uk/project/unfitness-to-plead/> accessed 9 May 2022.

(2) A defendant is to be regarded as lacking the capacity to participate effectively in a trial if the defendant's relevant abilities are not, taken together, sufficient to enable the defendant to participate effectively in the proceedings on the offence or offences charged.

(3) In determining that question, the court must take into account the assistance available to the defendant as regards the proceedings.

(4) The following are relevant abilities—

(a) an ability to understand the nature of the charge;

(b) an ability to understand the evidence adduced as evidence of the commission of the offence;

(c) an ability to understand the trial process and the consequences of being convicted;

(d) an ability to give instructions to a legal representative;

(e) an ability to make a decision about whether to plead guilty or not guilty;

(f) an ability to make a decision about whether to give evidence;

(g) an ability to make other decisions that might need to be made by the defendant in connection with the trial;

(h) an ability to follow the proceedings in court on the offence;

(i) an ability to give evidence;

(j) any other ability that appears to the court to be relevant in the particular case.

(5) For the purposes of subsection (4)(e) to (g), an ability to make a decision is to be regarded as consisting of—

(a) an ability to understand information relevant to the decision,

(b) an ability to retain that information,

(c) an ability to use and to weigh the information when making the decision, and

(d) an ability to communicate the decision…"[89]

The draft legislation, if adopted, would replace the common law of unfitness to plead under *Pritchard* and make the fitness for trial test a statutory test. It could be seen that the Law Commission terminates the term 'unfitness to plead', replacing it with a more neutral term like a 'capacity to participate effectively in a trial'. The draft legislation also specified the (impaired) abilities which could give rise to the issue of lack of capacity to participate effectively in a trial. Noteworthy, not all abilities have to be impaired, as the provision only requires that some of the abilities are impaired, and the impairment is sufficient to make the defendant unable to participate effectively in the proceedings on the offence or offences charged.

If the defendant is found to lack capacity to participate effectively in a trial, the defendant may not be tried or may not continue to be tried. He will be subject to the procedure called 'the alternative finding procedure', which may be found under the proposed

[89] Law Commission (n 87) 16-17.

Section 9-11.[90] Nonetheless, it should be noted that the court can make an order not to proceed with 'the alternative finding procedure' if it is in the interest of justice to do so.

Under the alternative finding procedure, a jury must determine whether the prosecution has proved the matter alleged against the defendant, in relation to the charge(s) which the defendant was being tried, by making a finding regarding the matter which the defendant is alleged. Subsequently, a jury would make a determination based on the evidence already given in the trial, on evidence that may be shown during the alternative finding procedure by the prosecution or by the person appointed or selected to put the case for the defence.[91] In this regard, the alternative finding procedure will operate in a similar way to a full trial, where full defences are also available. In the end, if a jury is not satisfied that the prosecution has proved the matter alleged against the defendant, that jury must return a verdict of acquittal on that count.[92]

When a special verdict of insanity is raised, a jury must determine whether it is satisfied that the defendant did the act or made the omission being charged against the defendant as the offence and whether it is satisfied that the defendant was, at the time of the act or omission charged as the offence, insane so as not to be responsible according to law for his actions.[93] If a jury is satisfied on both accounts, it must return a special verdict that the defendant is not guilty by reason of insanity. Conversely, if a jury is satisfied with only one account, it must return a verdict of acquittal as if, on the count in question, the trial had proceeded to a conclusion.[94] Notably, partial defences to murder, namely diminished responsibility, a pursuance of a suicide pact and loss of control, are not available for a defendant who is subject to the alternative finding procedure.[95]

Meanwhile, the proposed disposals for those who are found unable to participate effectively in a trial are found under Section 57. The available disposals are a hospital order (with or without a restriction order), a supervision order and an absolute discharge.[96] These are the same disposals under the current regulation regarding unfitness to plead. A hospital order may be found under the proposed Section 58 and it still clings to the regulation provided by the MHA 1983.[97] A supervision order requires the supervised person to be under the supervision of an officer of a local authority ('supervising officer') for a period of time, but not more than three years.[98] In this respect, the supervision order may include treatment as a

[90] ibid 20-22.

[91] ibid 21.

[92] ibid 20.

[93] ibid 20.

[94] ibid 20-21.

[95] ibid 22.

[96] ibid 43.

[97] ibid.

[98] ibid Section 59 Schedule 1.

non-resident patient in an institution or treatment by a registered medical practitioner.[99] Lastly, if it is deemed that a hospital order or a supervision order is not needed, the court can make an absolute discharge order, whereby the defendant would be released without any conditions.[100]

In case that a defendant has recovered, it is possible to resume the prosecution. In this regard, the defendant, or appropriate prosecutor, may apply to the court for permission to resume the prosecution. The court will grant permission if it is satisfied that the prosecution has reasonable grounds for believing that the person would have the capacity to participate effectively in a trial of their offence(s) and the court decides that it is in the interest of justice that the person should be tried.[101] The interest of justice here means the court would consider the following factors: *"the seriousness of the offence or offences allegedly committed, the alleged impact of the offence or offences, the views of the person or persons against whom, or in relation to whom, the offence was, or offences were, allegedly committed, the views of witnesses, their availability and their willingness to give evidence, how much time has passed since the alleged offence was, or offences were, committed, the fact that the person was subject to the alternative finding procedure and how much time has passed since the finding was made and the sentence that is likely to be imposed if the person is convicted of the offence(s)"*.[102] In this instance, it is also possible to institute a fresh proceeding.[103]

3. A comparative analysis of fitness for trial in England and Wales, the Netherlands, Thailand and Law Commission's proposal

3.1 The legal test

It could be seen that all jurisdictions require a link between the condition (or the diagnosis threshold) and the inabilities, which contribute to the unfitness for trial. However, there are some different details as it would be discussed below.

First, the diagnosis threshold, all jurisdictions allow mental disorders or mental conditions as a ground to raise the fitness for trial issue. However, only England and Wales allow physical conditions to be raised as a ground for fitness for trial as it is held that 'some disabilities' must be presented. On the other hands, the Netherlands and Thailand do not allow physical conditions as their provisions clearly state that only 'mental disease or defect'[104] or 'insanity'[105] are allowed. Thus, excluding physical condition would be disadvantage for some defendants would not allow to raise fitness for trial, even they might

[99] ibid.

[100] ibid 57.

[101] ibid 30.

[102] ibid.

[103] ibid 25-26.

[104] In the jurisdiction of the Netherlands

[105] In the jurisdiction of Thailand

be benefit from it. As for the Law Commission's proposal, it does not exclusively require any condition as a ground to raise fitness for trial. Therefore, as analysed above, this could be a problem since the test only focuses on the defendant's abilities rather than the link between the inabilities and condition(s), and the condition which could be raised. In this sense, the approach under the jurisdiction of England and Wales, which embrace both mental and physical condition, would mostly be beneficial for the defendants.

Second, the inabilities, which made the defendant considered to be unfit for trial. The jurisdiction of England and Wales aims to examine the defendant's abilities to have an active role to participate effectively in trial, rather than just the defendant's cognitive function like understanding the proceeding. This is due to the merit of the adversarial system, which views that both parties (the prosecutor and defendant) have equal responsibility to find evidence, therefore, they must have full capacities to participate in the proceedings. Nonetheless, the test does not take the defendant's rationale into consideration, therefore, as long as the defendant is able to make the decisions regarding the proceedings, despite that it might be irrational or not in the best interest of him, he is considered to be fit for trial. Contrary, in the jurisdiction of the Netherlands, the main focus relies on the defendant's cognitive function of understanding the purpose of the prosecution. Since under the inquisitorial system, it is the duty of the prosecutor and the judge to find evidence in the criminal trial, therefore, the defendant does not require to have an active role in the proceedings. Meanwhile, in the jurisdiction of Thailand, although no specific abilities have been given under the main fitness for trial test, however, the supplemental regulation, which is not part of the criminal procedure code, focuses on the defendant's cognitive function as well as some abilities to have an active role in the proceedings such as the ability to explain the situation relating to the fact of the alleged charge and the ability to talk and answer the questions relating to what has been asked.[106] Thus, it could be seen that although Thailand's criminal justice system is based on the adversarial system like England and Wales, but when it comes to the issue of fitness for trial, this part of Thailand's criminal justice system is more like the Netherlands' inquisitorial system where the defendant does not require to have such an active role in the proceedings. In this regard, it could be said that Thailand's criminal justice system is a mix system. As for the Law Commission's proposal, it focuses on the lack of capacity to participate effectively in trial. Therefore, they focus on the decision-making abilities, which includes the rationale in the decision-making, the cognitive understanding abilities as well as the abilities to have an active role in a trial. In this sense, the Law Commission's proposal specifies most preferable abilities as it is wide enough to cover both cognitive and rationale abilities.

[106] But as noted, it is not the main fitness for trial test since it exists as a guideline for the practitioner to evaluate the defendant.

3.2 The procedure for the defendant who lacks the capacity for trial

In the jurisdiction of England and Wales, the finding of unfit for trial would lead to the stopping of trial, and the court has an obligation to commit a hearing, called 'trial of fact' before a jury, which aims to conclude whether the defendant committed the alleged offence. Equivalently, the Law Commission's proposal also suggest that the trial would be stopped, but the court could choose whether to commit the alternative finding procedure, which is similar to the previous 'trial of fact', but the main difference is that it also takes the defendant's mental state (i.e. intent, belief, or dishonesty) at the time of committing the offence into consideration, unlike the 'trial of fact' which does not. Furthermore, the 'trial of fact' only focusses on the prosecutor proving all relevant parts of the offence beyond reasonable doubt. While the alternative finding procedure operates more like a full trial, where full defences are available, except that the defendant would not be directly cross-examined. On the other hands, under the jurisdictions of the Netherlands and Thailand, the finding of unfitness for trial would lead to the suspension of trial. And the trial would be resumed once the defendant becomes fit for trial. In this sense, the Law Commission's approach of the alternative finding procedure would be most beneficial for the unfit defendant, in which his trial would be stopped, and his alleged offence is proved through the alternative finding procedure, where full defences are also available. The availability of full defences in this process is important as it would create fairness for defendants and signify that they are acquitted on legal grounds such as self-defence or even insanity. Hence, it would also reflect their blameworthiness.

3.3 Disposals

Overall, disposals for all jurisdictions as well as the Law Commission's proposal composite of a hospital order, which are imposed under the mental health laws. Nonetheless, the disposals under the jurisdiction of England and Wales and the Law Commission's proposal, which are the same, offer the most variable disposals, and the court could choose the most suitable disposals for the defendant. Since the disposals range from a hospital order with or without a restriction order, a supervision order, and an absolute discharge. Unlike in the jurisdiction of Thailand and the Netherlands where only a hospital order is available, therefore, although the defendant might not need to be hospitalised, he must be if his fitness for trial is raised.

3.4 Resuming the prosecution on recovery

In the jurisdiction of the Netherlands and Thailand, the fitness for trial only led to the suspension of trial, thus, if the defendant becomes fit for trial, the trial could be resumed. Although, in practice, in the case where recovery is impossible, the prosecutor in the jurisdiction of the Netherlands could dropped the case against the defendant if he deemed that the prosecution is not of the public's interest. While, in the jurisdiction of Thailand, theoretically, it is also possible for the prosecutor to do so, although no case has risen in practice. As for the jurisdiction of England and Wales, currently, the only possible case for

resuming the prosecution is when the defendant, who is subjected to a restricted hospital order, becomes fit for trial. Thus, this means that defendants who are subjected to other type of disposals (i.e. supervision order) would not be allowed to apply for resuming the trial. Therefore, in the Law Commission's proposal, this narrowness is broadened by the wider application for resuming the trial. This would be beneficial for the defendant, who regain fitness for trial and wish to clear their name by entering the full trial.

4. Proposal for the fitness for trial test for Thailand

While Thailand might appear to have a functioning fitness for trial test, in practice it is doubtful whether it is workable. One of the main problems is that the main regulation regarding fitness for trial, Section 14 of the Criminal Procedure Code, does not provide specific details of the test. Consequently, this allows the court to exercise too much discretion on the issue and the law also fails to provide means to challenge the court's discretion.

Although the so-called fitness for trial test is constructed under the supplement regulation, it is far from complete and still fails critically to evaluate the abilities necessary to be fit for trial. More importantly, the law makers never clarified what it means to be fit, or unfit, for trial and even Supreme Court judgments are contradictory. Even if it is argued that the fitness for trial criteria is explained in some official notes and those are being used in practice, they are not endorsed as regulation hence they have no legal status. There is also the question of reliability of the examination for fitness for trial in practice since it only involves one psychiatrist.

Moreover, it is not clear whether fitness for trial is a legal or a medical issue. In practice, a psychiatrist examines the defendant's fitness for trial and reports the court of the outcome. Nevertheless, the court is not legally bound to accept such testimony when considering the issue of fitness for trial, as Section 14 grants the court solely authority to consider that by itself. The critical question here is that, if a general legal fitness for trial criteria is not available, how can the court consider whether a defendant is fit for trial or not? At present, a case might theoretically arise in which the defendant is suffering from mental disorder(s), even a severe one which renders him irrational and not fit for trial in the medical practitioner's opinion, but he still may be found fit for trial by the court. Ultimately, there is also a problem regarding the absence of a clear procedure for the resumption of trial in the case that the defendant is found to be unfit for trial at first. This problem may eventually lead to an unfair detention of the mentally disordered defendant and deprives him of liberty longer than required.

Thus, without proper criteria to establish fitness for trial, these problems will never be solved and even the most irrational agent may be deemed fit for trial. More importantly, the fair trial could not be guaranteed, especially, for the mentally disordered offender. Therefore, the fitness for trial test under the jurisdiction of Thailand must be reformed.

The proposed fitness for trial test would appear as follows:

"*Criminal Procedure Code*

Section 14/1 The fitness for trial test During a preliminary hearing stage or a trial stage, if the matter comes to the court that the defendant is found unfit for trial, the court would issue the unfit for trial order and the trial would be suspended until he is recovered and found fit for trial.

For the purpose of this section, a defendant could be found to be unfit for trial if he is

(1) Suffering from a recognised medical condition and

(2) He lacks any of the following abilities

(2.1) an ability to understand the nature of the charge;

(2.2) an ability to understand the evidence presented as evidence in the alleged offence;

(2.3) an ability to understand the trial process and the consequences of being convicted;

(2.4) an ability to give instructions to a legal representative;

(2.5) an ability to make a decision about whether to plead guilty or not guilty;

(2.6) an ability to make a decision about whether to give evidence;

(2.7) an ability to make other decisions that might need to be made by the defendant in connection with the trial;

(2.8) an ability to follow the proceedings in court on the offence;

(2.9) an ability to give evidence;

(2.10) any other ability that appears to the court to be relevant in the particular case.

(3) For the purposes of sub-section (2.5) to (2.7), an ability to make a decision is to be regarded as consisting of:

(3.1) an ability to understand information relevant to the decision,

(3.2) an ability to retain that information,

(3.3) an ability to use and to weigh the information when making the decision, and

(3.4) an ability to communicate the decision

In order to determine fitness for trial, at least two distinct items of evidence from each of two registered medical practitioners must be submitted to indicate whether the defendant is suffering from a recognised medical condition which may affect his fitness for trial.

Section 14/2 The disposals in a case where the defendant is found to be unfit for trial If the defendant is found unfit for trial, the court shall either:

(1) make an order that the defendant be admitted to hospital according to Section 48 of the Criminal Code

(2) make a guardianship order, where the accused would be subject to the guardianship of a dedicated person.

(3) make a supervision and treatment order, where the accused would be under the supervision of a supervising officer and treated as an out-patient of a dedicated facility.

Section 14/3 The alternative hearing procedure in the case where the recovery is impossible. The alternative hearing procedure would be conducted if the defendant is found to be unfit for trial and the defendant's recovery is deemed to be impossible. The determination of the recovery would be based on at least two distinct items of medical evidence from two registered medical practitioners.

For the purpose of this section, the alternative hearing procedure is a process where the court determines whether it is satisfied that the prosecutor has proved the alleged matter against the defendant, in relation to the offence(s) which the defendant was to be, or was being, tried for. In this regard, the prosecutor and the defendant's legal representative are allowed to submit evidence to the court. If the court is satisfied that the alleged matter is proven, the court must determine so. But if the court is not satisfied, the court must acquit the defendant.

After the alternative hearing procedure is completed, the court must impose the disposals according to Section 14/2 or make an absolute discharge order if the medical evidence from at least two registered medical practitioners indicates that the defendant's condition is not a threat and does not require treatment."

In this regard, the issue of fitness for trial may be raised during a preliminary hearing stage and a trial stage, by any parties concerned with the case; the defendant himself, the prosecutor or the even the court. After the issue of fitness for trial has been raised, the defendant would be evaluated by at least two medical practitioners to consider whether he has a recognised medical condition and whether such condition affects his fitness for trial.

Noteworthy, the court would have the last called of the issue of fitness for trial, which will be decided, according to the fitness for trial test. In this respect, the medical evidence would act only as supporting evidence in the consideration of fitness for trial and a proper disposal. Additionally, the current Mental Health Act could still be invoked for the practical regulation regarding the evaluation of fitness for trial as well as procedure for the practitioners to evaluate and report fitness for trial and to resume the trial once the defendant is recovered. It should be noted that under this proposal, the decision regarding fitness for trial could be appeal.

Once the defendant is found unfit for trial, it must be considered whether recovery is possible. If it is possible then the court will impose proper disposals. If not, then the alternative hearing procedure would be staged. The objective of the alternative hearing procedure is not to determine the guilt of the defendant but only to provide closure in the matter of the alleged offence. Furthermore, if recovery is not possible, whether the court is satisfied that the defendant committed the alleged offence or not, the defendant would not be subjected to punishment as punishing him would not satisfy the objective of punishment.

5. Conclusion

After the comparative study and the critical analysis of the fitness for trial tests in the jurisdictions of Thailand, England and Wales and the Netherlands, as well as of the Law Commission' s proposal, this paper has made a proposal for a revised fitness for trial test for Thailand, which would be endorsed in the Criminal Procedure Code. If the main proposals set out in this research were adopted, they would help to solve the current practical problems surrounding fitness for trial and ensured that incapacitated defendants would not be trailed, thus, this would guarantee a fair trial. Further, it would greatly be improving the parts of the criminal justice system which relate to mentally disordered offenders.