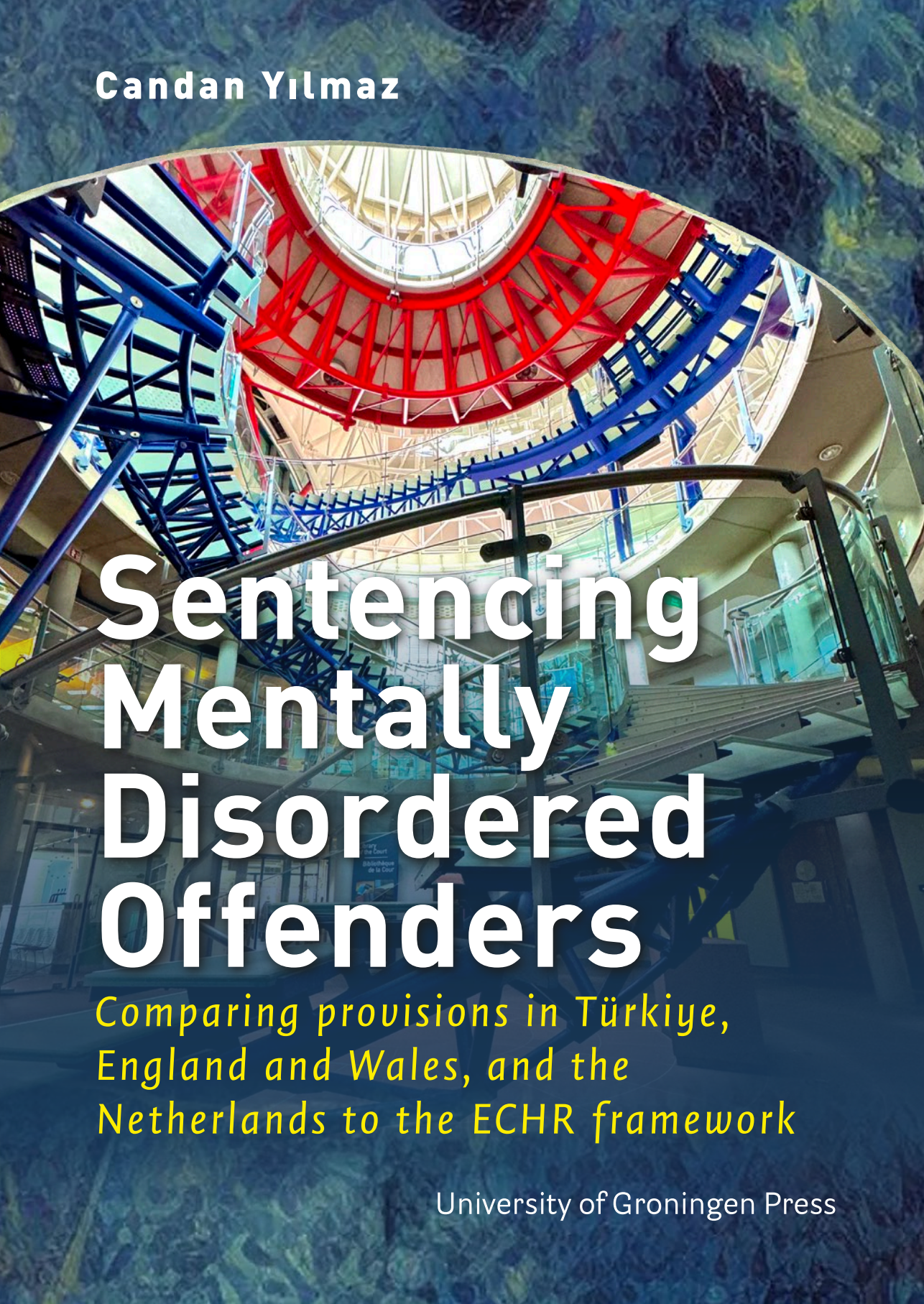
Candan Yılmaz



Sentencing Mentally Disordered Offenders

Comparing provisions in Türkiye, England and Wales, and the Netherlands to the ECHR framework

University of Groningen Press

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CHAPTER 1

INTRODUCTION

CHAPTER 1 **INTRODUCTION**

SECTION 1: BACKGROUND TO THE RESEARCH PROJECT

Each criminal justice system has its own distinctive regulations concerning the assessment of criminal responsibility in cases of mentally disordered offenders, as well as the corresponding possibilities for the imposition of an adequate punishment. That the presence of a mental disorder in a defendant affects the criminal process and/or adjudication may be considered a universality. The manner in which different jurisdictions have regulated the assessment of criminal responsibility of these offenders and the corresponding possibilities for adequate punishment are, in general, quite unique. However, while these regulations differ from country to country, there are also binding international human rights regulations, such as the European Convention on Human Rights ("ECHR"), that affect both the regulations and practices concerning mentally disordered offenders in High Contracting Parties. It is, therefore, of significance to provide not only a comparison of the relevant regulations in different criminal justice systems, but a comparison of these to the corresponding ECHR framework. This PhD research aims to do both, presenting a comparison of the relevant regulations and practices in Türkiye, England and Wales, and the Netherlands.

To summarize briefly, this comparative PhD dissertation examines the regulations in relation to the sentencing of mentally disordered offenders in Türkiye, England and Wales, and the Netherlands. Furthermore, the regulations of these jurisdictions are assessed in accordance with the relevant ECHR framework.

The starting point of this research was to examine the complicated sanctioning system of Türkiye in relation to mentally disordered offenders. Until 2019, there weren't any secured mental health institutions, even though that was required by the Turkish Criminal Code ("TCC"). According to the repealed and current regulations, no punishment shall be applied to persons who during the time of the offence suffer from a mental disorder leading to a lack of understanding of or control over the criminal actions.[1] Nevertheless, these persons are still subject to security measures. In the time that there were no secure mental health facilities in place, offenders were often released back into the public or detained in prisons, even though detention in prison was an infringement of the regulations in the TCC. In these years, courts claimed that this illegality could be justified on the basis of the importance of public security and safety. In 2018, the very first Yüksek Güvenlikli Adli Psikiyatri Hastanesi (Highly Secured Forensic Psychiatry Hospital) was opened in Türkiye and currently there are six of such facilities. As this finally seemed to bridge the gap between law and practice in this regard, unfortunately the Covid pandemic caused a further delay in solving the situation as these facilities were first used as locations for corona tests and vaccinations. As a result, it took approximately 20 years for the system to take shape as intended. Given this situation, the starting point of this

1 *See.* ANNEX 2 – Relevant Articles of the Turkish Criminal Code.

research was to examine the complex Turkish sanctioning system, more specific to analyse and underline its problems related to mentally disordered offenders.

With regards to academic relevance, this research project will be the first to examine these developments in Türkiye, either in Turkish or international literature. In light of the scarcity of publications in foreign languages on the Turkish criminal justice system, it is not particularly well-known in other countries. Consequently, an additional objective of the dissertation is to address this gap by providing information on Turkish criminal law and procedure in English, the academic lingua franca, and compare it to more well-known systems.

In order to provide an effective analysis of the Turkish criminal justice system in relation to sentencing mentally disordered offenders, a comparison will be made with two different criminal justice systems. For the purpose of this comparison the jurisdictions of the Netherlands and England and Wales were chosen. The former is an example from the continental European tradition, with its one-phase trial procedure in which the trial of fact and sentencing are combined. In contrast, the latter is from the common law tradition, in which the trial of fact and the sentencing trial are separated. Moreover, the chosen countries have markedly divergent views on criminal responsibility, and have established disparate sanctions in place for mentally disordered offenders. The Netherlands, for example, is renowned for its *terbeschikkingstelling* ("TBS")[2] system, which is distinctive in its legal framework and has garnered international recognition. Despite the existence of prior comparative studies between England and Wales and the Netherlands,[3] the necessity for a new comparison arises due to recent modifications to the Dutch system. The new Dutch Forensic Care Act ("Wfz", *Wet Forensische Zorg*), which fully came into force in 2020, for example represents a significant change in policy and legislation. In general, however, provisions related to sentencing are frequently changed in both England & Wales and the Netherlands as an important part of criminal policy. Furthermore, as all three criminal justice systems are subject to the ECHR and will be tested against its jurisprudential requirements, the essence of the comparative research is also to demonstrate how disparate systems of sentencing mentally disordered offenders may align with these standards, even though certain components may also infringe these requirements both de jure and de facto. As a consequence, the societal relevance of this

2 The term *terbeschikkingstelling* is Dutch for 'entrustment'. Consequently, the TBS-order is translated as the 'entrustment order'. In order to facilitate comprehension by the international academic community, it is important to clarify that the TBS-order is a hospital order for high-risk mentally disordered offenders in the Netherlands.

3 *See for example.* Bal, P., & Koenraadt, F. (2000). Criminal law and mentally ill offenders in comparative perspective. *Psychology, Crime & Law, 6*(4), 219–250; Senn, D., Bulten, E., Tomlin, J., & Völlm, B. (2020, November). A Comparison of English and Dutch Long-Stay Patients in Forensic Psychiatric Care. *Frontiers in psychiatry, 11*, 1-12; Brants, C., Jackson, A., & Koenraadt, F. (2016). Culpability compared: Mental capacity, criminal offences and the role of the expert in common law and civil law jurisdictions. *Journal of International and Comparative Law, 3*(2), 411-440.

research is given by advising these jurisdictions on how to align (better) with the human rights framework with regards to the issue of sentencing mentally disordered offenders.

In conclusion, this dissertation aims to compare the systems to each other by providing information from three criminal justice systems their academic literature, and their legal practices, and primarily, to assess the compatibility of three criminal justice systems with the requirements of the ECHR.

SECTION 2: MAIN RESEARCH QUESTION AND SUB-QUESTIONS

This dissertation addresses the following central research question:*'What are the legal and practical consequences of being a mentally disordered offender related to sentencing in Türkiye, England and Wales, and the Netherlands; and how do provisions and practices compare to each other and to the relevant ECHR framework?'*.

In this research question, the term *sentencing* is employed to encompass not only the criminal proceedings and arriving at a verdict, but also the imposition and execution of measures and penalties.

In order to respond to this complex research question, every chapter of this dissertation focuses on different sub-questions. Chapter 2 answers: "*How do the ECHR and ECtHR case law interpret the applicable legal boundaries related to the sentencing of mentally disordered offenders?*" to create an analytical assessment framework for the remainder of the dissertation. Eventually, the question "*In the light of the ECHR and ECtHR case law, how can a test for the sentencing of mentally disordered offenders be established?*" will be answered. Chapter 3 answers the comparative question of "*What are the legal and practical consequences of being a mentally disordered offender related to sentencing in Türkiye, England and Wales, and the Netherlands?*" and as a result of the comparison: "*What can be learned from the comparison of three criminal justice systems?*". Since the Turkish criminal justice system is, in comparison to the other two, internationally most unknown, one of the aims of Chapter 3 is to present the Turkish system in great (and, in comparison, more) detail. Therefore, the background information on England and Wales and the Netherlands will be more concise than that on Türkiye. Finally, Chapter 4 addresses the question "*To what extent do these three criminal justice systems comply with the ECHR test?*". It can be derived from the phrasing of the sub-questions that the test created in Chapter 2 is applied in Chapter 4 is limited to sentences specifically intended for mentally disordered offenders, whereas Chapter 3 takes the broader context of sentencing into account.

In terms of methodology, in answering this question the comparative design will be shaped by an analysis of the relevant provisions and case law related to the ECHR, with particular focus on Article 2, 3, 5/1(e) and (a), 6, 8 and 14, as a frame of reference.

SECTION 3: STRUCTURE, OUTLINE, AND METHODOLOGY OF THE DISSERTATION

3.1 Structure and Outline

This dissertation is divided into five chapters. This chapter (1) serves as an introduction to the dissertation and the research questions. It provides an overview of the structure, methodology, and limitations of the research.

Chapter 2 establishes the assessment framework for the dissertation by examining the regulations of the European Convention on Human Rights ("ECHR") and the case law of the European Court of Human Rights ("ECtHR") regarding the sentencing of mentally disordered offenders. After explaining the necessity of the framework, the chapter provides information on Articles 5, 2, 3, 8, 6, 14 of the ECHR respectively, and the key case law on these articles. Moreover, an analysis is provided after each article to reflect its value for mentally disordered offenders. Chapter 2 not only presents factual and general information on the rights of mentally disordered offenders governed by the ECHR and interpreted in the ECtHR case law to set the framework of the dissertation, but also analyses the impact of the ECHR and the ECtHR case law on the chosen criminal justice systems. At the end of this chapter, an ECHR test will be created to be used in Chapter 4 to analyse and assess the compatibility of the relevant provisions and practices in the three criminal justice systems.

The most significant aspect of the Chapter 3 is to lay a foundation by providing the necessary information for the assessment discussion in Chapter 4. Thus, information on criminal justice systems is intended to be concise and precise. Chapter 3 provides, analyses, and discusses information on the three criminal justice systems: Türkiye, England and Wales, and the Netherlands under 6 sections. The chapter begins by establishing overarching terminology that will be used throughout the dissertation, in Section 1. Section 2 provides an introduction to and history of three criminal justice systems. As a secondary aim of this dissertation is to provide knowledge on Turkish law, the explanation on Türkiye is more extensive compared to the Netherlands and England and Wales. Section 3 focuses on the substantive criminal law, Section 4 on criminal procedural law, and Section 5 on the execution of verdicts. Comparative outcomes and integral analysis will be presented at the end of the chapter, in Section 6. Tables will also be used to illustrate and highlight the main differences.

Chapter 4 examines the provisions and practices related to sentencing mentally disordered offenders in three criminal justice systems and evaluates their compliance with the ECHR framework. This chapter forms the core of the dissertation and will highlight the key findings of the compliance test.

Finally, in Chapter 5 conclusions will be drawn with subsequent recommendations after summarizing the key findings of the comparison and the compliance test.

3.2 Methodology

The objectives of this dissertation are to compare the criminal justice systems of chosen countries and assess their compliance with the ECHR with regards to the issue at hand. To achieve this, a comparative method is employed, complemented by legal analysis and doctrinal research.

Even though this dissertation does not include an empirical study, courts and forensics hospitals were visited throughout the PhD trajectory to provide direct observations of how laws and procedures are applied in practice, since offering such insights is not possible through doctrinal analysis alone. Criminal courts and forensic mental health services were visited during research stays in the three respective countries.[4] Relevant observations will occasionally be shared when necessary.

This methodology subsection outlines the steps and approaches used to conduct this comparative analysis, ensuring a comprehensive evaluation of each criminal justice system's adherence to ECHR standards.

3.2.1 Comparative Method

The comparative method is central to this research. The intention of comparing legal systems is to benefit national legal systems by suggesting future developments, foreseeing possible problems.[5] It involves systematically comparing the criminal justice systems of different countries to identify similarities, differences, and patterns. This method is particularly suitable for this study as it allows for a nuanced understanding of how various legal systems address common issues and challenges in the context of criminal justice and human rights.

The choice of the selected jurisdictions has already been addressed in Section 1 of this chapter. The mentioned situation in Türkiye was the starting point for this research, while the jurisdictions of England & Wales and the Netherlands were chosen for comparison as well-known systems from two different legal traditions. To aid the comparison, Chapter 3 offers a structured outline in which relevant contexts, provisions and practices of the three jurisdictions are presented in direct comparison to each other.

Assessing compliance with the ECHR involves evaluating whether the chosen criminal justice systems meet the standards set by the Convention. This evaluation is conducted through a structured and systematic approach, based on the assessment framework which will be created in Chapter 2. The compliance assessment concludes with a summary of

4 Courts in England, the Netherlands, and Türkiye. In Türkiye, the YGAP Hospital (Highly Secured Forensic Psychiatry Hospital) in Ankara was visited; and in the Netherlands, the Centre for Transcultural Psychiatry Veldzicht, the Forensisch Psychiatrisch Centrum Dr. S. van Mesdag, and the Forensisch Centrum Teylingereind.

5 Wilson, G. (2007). Comparative Legal Scholarship. In M. McConville, & W. H. Chui, *Research Methods for Law* (pp. 87-103). Edinburgh: Edinburgh University Press, p. 87.

the key findings and their implications for the criminal justice systems of the chosen jurisdictions.

3.2.2 Doctrinal Research

Doctrinal research, mainly aimed at *black-letter law*,[6] involves a detailed examination of statutory provisions, case law, and legal doctrines within each jurisdiction. Doctrinal research focuses on a) primary sources: legislation, judicial decisions, and official documents from each jurisdiction; b) secondary sources: scholarly articles, commentaries, and legal textbooks that provide context and interpretation of primary sources.[7]

Doctrinal research helps to understand if and how each criminal justice system aligns with or diverges from ECHR principles. These are formulated through a) identifying landmark cases: key decisions that have shaped the interpretation of ECHR principles; and b) assessing judicial reasoning: examining the rationale behind judicial decisions for a deeper understanding of the ECHR standards.

As a limitation, it shall be noted that doctrinal research may not fully capture the social, economic, and political contexts in which the law operates.

SECTION 4: LIMITATIONS OF THE RESEARCH

This PhD dissertation aims at contributing to the relevant body of knowledge for the legal scholar, practitioner or professional interested in human rights, criminal- and criminal procedural law, and comparative law. Additionally, it may provide insight for behavioural experts whose expertise is used in criminal proceedings, such as psychiatrists and psychologists, social workers. For that purpose, only when necessary, sometimes additional introductory legal information is provided.

The research is focused on an examination of the provisions and legal practices on the imposition and execution of sentences in three criminal justice systems, within the created ECHR framework. However, certain areas will not be examined in order to ensure limitation, precision and structure. The following areas have been excluded from this study: the provisions concerning minors, procedural provisions apart from those related to sentencing, provisions concerning diversion during prosecution – through problem-solving courts or non-legal practices for example-, behavioural scientific treatment options, criminological discussions, elaborative historical context (only relevant historical remarks). Additionally, general rights and regulations unrelated to mentally disordered offenders have been omitted. Moreover, this dissertation does not cover every single academic discussion, such as on concepts and terminologies.

Some overarching terminology will be outlined at the beginning of Chapter 3; however, it must be noted among the limitations that the term "mentally disordered offender" may

6 McConville, M., & Chui, W.H. (2007). *Research Methods for Law*. Edinburgh: Edinburgh University Press, p. 4.

7 McConville & Chui (2007), p. 4.

already have different interpretations. It may involve persons who have a mental disorder in the behavioural scientific sense, for whom a mental disorder or diminished responsibility is not established in the legal sense (and could even have developed after the crime). More often in this research, it will refer to persons who are found diminished or non-responsible for the committed offences or who are detained (also) on the basis of their "unsound mind" within the meaning of Article 5/1(e) of the European Convention on Human Rights.

It is acknowledged that there are potential limitations and challenges to comparative research, including access to information and language barriers. To aid the researcher, English translations were made of the relevant Turkish and Dutch provisions, and to aid the reader, they are provided in the annexes. They represent the terminology that is used throughout. As a disclaimer it shall be stated that both the translations of Turkish and Dutch provisions were made by the author, with the latter being checked by existing English language sources (and the supervisors). The last updates were made on 1 December 2024.

The last ECtHR case law update for this framework is made on 1 January 2024. Consequently, judgments issued after this date have not been incorporated.

In the dissertation, the pronouns "they/them" are employed as a gender-neutral expression, unless the ECtHR or the domestic courts refer otherwise.

CHAPTER 2

ECHR'S FRAMEWORK REGARDING SENTENCING MENTALLY DISORDERED OFFENDERS

CHAPTER 2 **ECHR'S FRAMEWORK REGARDING SENTENCING MENTALLY DISORDERED OFFENDERS**

SECTION 1: INTRODUCTION

1.1 Preface

> *"Human rights do not need to be earned or granted; they are the birthright of all human beings simply because they are human beings – no other qualification is required.".*[8]

This is an important aspect of human rights, as it guarantees the protection of all individuals, irrespective of their circumstances. Consequently, this quotation broadens the scope of human rights to encompass not only those who have committed offenses, but also individuals with mental disorders and those who have been diagnosed with mental disorders, without any form of discrimination.

The majority of the human rights are framed as *negative rights*, which serve to safeguard for individual freedom against an intrusive State.[9] The right to health, however, a positive right,[10] whereby a duty is placed on the state to provide certain recourses and opportunities to the public. This chapter will examine the rights and obligations set out in the European Convention on Human Rights ("ECHR") and interpreted by the European Court of Human Rights ("ECtHR") in relation to mentally disordered persons and offenders.[11] Following this examination, the human rights standards derived from the ECHR regulations and the ECtHR case law will establish the framework of the dissertation, which will be used to understand and assess the criminal justice systems in the following chapters. Therefore, this chapter responds to the sub-question of *"How do the ECHR and ECtHR case law interpret the sentencing of mentally disordered offenders?"*. The compliance of chosen criminal justice systems with the established ECHR test will be provided in Chapter 4.

1.2 Necessity of the Framework

In order to be able to compare the criminal justice systems of three criminal justice systems regarding the legal position of mentally disordered offenders, first, the applicable ECHR framework must be established. Without a well thought-out framework, the study

8 Kelly, B. (2016). *Mental Illness, Human Rights and the Law*. Glasgow: RCPsych Publications, p. 2.

9 For the definition, *See*. Fredman, S. (2008). *Human Rights Transformed: Positive Rights and Positive Duties*. New York: Oxford University Press, p. 1.

10 Ruger, J. (2006). Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements. *Yale Journal of Law & the Humanities, 18*(2), p. 22.

11 The last case law update for this framework is made on the 1st of January 2024. Judgments after this date, therefore, are not included.

of three divergent criminal justice systems would be too loose and complex to complete. The framework will help to define the boundary of the study and to conceptualise it, as well as to form a basis of the final comparison.

1.3 Importance of the ECHR and ECtHR Case Law

In accordance with the preamble of the European Convention on Human Rights, the High Contracting Parties *have primary responsibility to secure the rights and freedoms* set forth in the ECHR and its Protocols, and in doing so, they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by the ECHR.

According to Article 1 of the ECHR; *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."*. The criminal justice systems which will be examined in this dissertation are parties to the ECHR. Accordingly, Türkiye, England and Wales, and the Netherlands are bound by the ECHR to secure the rights and freedoms set out in the Convention. In other words, the countries concerned are under an obligation to comply with the rights, freedoms, and obligations. The Convention evolves with the interpretation of its provisions by the ECtHR, which means that it is a living mechanism, through the case law. While the Court does not change its interpretations so often, there remain some virgin areas for the ECtHR to interpret.

The ECHR and the case law of the ECtHR are cementing groundwork for this research study. The framework of human rights regulated in the ECHR on the mentally disordered offenders will be the blueprints and underpinnings of this dissertation. By monitoring the compliance with the ECHR and comparing countries' criminal justice systems, the dissertation will facilitate the understanding of concepts and variables as per the given definitions and build new knowledge.

Besides the legally binding nature of the ECHR, the final judgments of the ECtHR are also binding for the High Contracting Party concerned. The Party is obliged to execute them according to the Article 46 of the ECHR. Moreover, the Committee of Ministers of the Council of Europe inspects the execution of judgments, particularly to ensure payment of the sums awarded by the Court to the applicants in compensation for the damage they have sustained. While the judgments of the Court are officially binding on the concerned state, their impact extends far beyond.[12] The ECtHR's case law is closely followed by the courts of contracting states, and the opinions of other human rights bodies frequently refer to these cases.[13]

12 Hendriks, A. (2022). The Council of Europe. In B. Toebes, M. Hartlev, A. Hendrinks, K. Cathaoir, J. Rothmar Herrmann, & H. Sinding Aasen, *Health and Human Rights Global and European Perspectives* (pp. 119-162). Cambridge: Intersentia, p. 122.

13 Hendriks (2022), p. 122.

Although the international human rights framework could provide a broader scope and context for this study, focusing on the ECHR regulations and the ECtHR case law to the centre will allow for a more precise, authentic, and focused dissertation. Predominantly, in the international sphere, there are a number of agreements, principles and declarations that are not legally binding. Such instruments are often referred to as "soft law". Treaties that are to be regarded as soft law prior to entering into force are gradually transformed into hard law. This process commences with signature followed by ratification.[14] The ECHR is distinctive from other human rights declarations, such as the Universal Declaration of Human Rights, in that it establishes a binding mechanism for the enforcement of its rights. This mechanism is called the ECtHR.[15] As a result, the ECHR is more binding for ratifying states than other international agreements, making it a leading example in the field of international human rights. For these reasons, the ECHR is chosen as the foundation for the framework of human rights.

1.4 Related Rights and Obligations Regulated in the ECHR

The European Convention on Human Rights, formally the Convention for the Protection of Human Rights and Fundamental Freedoms[16], was opened for signature on 4 November 1950 and entered into force on 3 September 1953. State Parties that have ratified the Convention to safeguarding and ensuring the fundamental civil and political rights set out in the ECHR for all persons within their jurisdiction, regardless their nationalities. The rights and freedoms secured by the Convention include the right to life, the right to a fair hearing, the right to respect for private and family life, freedom of expression, freedom of thought, conscience and religion, and the protection of property. In particular, the Convention prohibits torture and inhuman or degrading treatment or punishment, forced labour, arbitrary and unlawful detention, and discrimination in the way one can enjoy the rights and freedoms secured by the Convention.

According to Article 1; *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."*. The criminal justice systems under examination in this dissertation are parties to the ECHR, and therefore it is legally binding for Türkiye, England and Wales, and the Netherlands to ensure the ECHR rights and freedoms are upheld.

It should be noted, however, that this chapter does not include an exhaustive list of all the rights and freedoms set out in the ECHR. This chapter will focus on the regulations relevant to sentencing mentally disordered offenders. It is possible for individuals with

14 Nußberger, A. (2018). Hard Law or Soft Law – Does it Matter?: Distinction Between Different Sources of International Law in the Jurisprudence of the ECtHR. In A. van Aaken, & I. Motoc, *The European Convention on Human Rights and General International Law* (pp. 41-58). Oxford: Oxford University Press, p. 44.

15 Kelly (2016), p. 15.

16 *See*. The preamble to the ECHR.

mental disorders to be convicted of criminal offences and thus to be sentenced. As this dissertation primarily concerns the sentencing of mentally disordered offenders within the criminal justice system, it is essential to ensure their liberty and security are protected. According to the ECtHR, together with Articles 2, 3 and 4; Article 5 is "*in the first rank of the fundamental rights that protect the physical security of the individual, and as such its importance is paramount*".[17] Article 5 is concerned with the liberty and security of the persons, and it protects persons from arbitrary or unjustified deprivation of liberty by governments. In light of the main research question, this dissertation considers the right to liberty and security to be of particular significance and importance. The detention of mentally disordered persons and offenders entails a deprivation of liberty, thereby underscoring the vital importance of safeguarding and upholding the legal position of such persons. It is therefore imperative to commence with Article 5 of the Convention. Given that criminal justice systems may divert such persons to hospitals in many shapes and forms, Article 5/1(e) would be relevant in such cases. It should be noted that an offender with a mental disorder may also receive a prison sentence. In these cases, Article 5/1(a) would be relevant. In light of the prioritisation of "mentally disordered" offenders over "offenders" with mental disorders, Article 5/1(e) will be explained prior to Article 5/1(a). It should be noted that, in certain criminal justice systems, hybrid options exist where both sub-paragraphs (e) and (a) are applicable.

Following an examination of Article 5, the framework of Articles 2 and 3 will be discussed. The first right guaranteed in the ECHR is the right to life (Article 2), and the second one is the prevention of torture, inhuman or degrading treatment or punishment (Article 3). It is the responsibility of the state to ensure the wellbeing of individuals in their custody. This is particularly relevant for those with mental disorders. Furthermore, the right to physical and mental health is also significant, as it is a fundamental human right that is essential for the exercise of other human rights. It is the right of every human being to enjoy the highest attainable standard of health, which is conducive to living a life in dignity. It is therefore evident that the right to health is recognised and mentioned in numerous international human rights documents. Even though the ECHR covers several rights that are immensely relevant from the health and human rights perspective,[18] neither the *right to health* nor the *right to mental health* is expressly regulated in the ECHR or in its Additional Protocols. For a Convention that almost exclusively regulates civil and political rights, it is surprising that health rights are not included to any extent.[19] The ECtHR established that, although the right to health is not explicitly guaranteed under the Convention or its Protocols, it is nevertheless a fundamental human right that must be respected and protected.[20] Consequently, the Court approaches the applications on the *right to health* and *right to mental health* within the context of Articles 2 and 3. Due to the relevance of the right

17 *Denis and Irvine v. Belgium,* App nos 62819/17, 63921/17), (ECtHR, 01 June 2021), §123.

18 Hendriks (2022), p. 123.

19 Same opinion, *see.* Hendriks (2022), p. 123.

20 *See. Vasileva v. Bulgaria,* App no 23796/10, (ECtHR, 17 March 2016) §63; *Lopes de Sousa Fernandes v. Portugal,* App no 56080/13, (ECtHR, 19 December 2017), §165.

to life, prohibition of torture, and the right to health for the mentally disordered offenders in criminal justice systems, these will be discussed at the second order.

Thirdly, the right to respect for private and family life will be discussed. Medical care and treatment without the patient's consent raise serious issues that fall within the framework of private life, regardless of the level of intervention. As this plays a significant role in sentencing mentally disordered offenders, the issue of the coerced treatment will be addressed, by examining the case law on Article 8 in comparison with Article 3.

It is evident that those involved in the criminal justice system, including those with mental disorders, are entitled to a fair trial. Consequently, the fourth order will focus on the specific rights associated with this, particularly the presumption of innocence, the right to legal aid, and the right to be informed and to participate effectively.

Finally, the right to equality and the prohibition of discrimination will be examined. Discrimination on the grounds of disability is prohibited with respect to persons with mental disorders. In this context, Article 14 of the ECHR and Article 1 of Protocol No. 12 to the Convention will be analysed.

Given that Article 5 regulates the right to liberty and security of the person, and that Article 5/1(e) specifically addresses the restriction of the right to liberty and security of persons of unsound mind, this article is of particular significance for the purposes of this study. In the absence of direct regulation of the right to (mental) health by the ECHR, it is Articles 2, 3, and 8 that provide the key to filling this gap. In light of the aforementioned relevance, a brief discussion of Articles 6 and 14 will also be presented. Given the significance attached to the research topic and the legal position of mentally disordered offenders, it is deemed appropriate to deviate from the order of the ECHR. From a bird's eye view, the explanations delineate the sequence of Articles 5, 2, 3, 8, 6, and 14 of the Convention. Moreover, only the paragraphs that are most pertinent to the research question will be presented in detail, while the others will be provided in summary.

SECTION 2: RIGHT TO LIBERTY AND SECURITY (ARTICLE 5)

As previously stated, the right to liberty has the most priority and importance for the mentally disordered offenders. In this section, an abstract examination of Article 5 will be undertaken initially. Secondly, the relevant grounds for detention will be discussed in the order of importance. Thirdly, the principles of the ECtHR on the lawfulness of detention will be examined. Finally, the distinction between the deprivation of liberty and the restriction of liberty will be discussed.

Article 5 of the Convention should, as far as possible, be interpreted in the light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the cruelty and inhumanity of armed conflict.[21]

21 *Hassan v. the United Kingdom*, App no 29750/09, (ECtHR, 16 September 2014), §102.

2.1 Lawfulness of the detention under Article 5/1

According to Article 5/1: "*Everyone has the right to liberty and security of person.*".[22] Article 5/1, however, also includes an exhaustive enumeration[23] of the circumstances in which deprivation of liberty is permissible. In this context, the notion of *liberty* is understood to encompass the physical liberty of the person.[24] According to the ECtHR, the right to liberty has supreme importance in a democratic society.[25] In order to ascertain whether a person has been deprived of their liberty within the meaning of Article 5/1, it is essential to consider their actual condition and to evaluate a range of criteria, including the type, duration, effects and manner of implementation of the measure in question.[26] The deprivation of liberty is only lawful if it falls under one of the permissible grounds listed in Article 5/1(a) to (f). These reasons are discussed in detail later, in subsection entitled 2.2 *Grounds for Detention*.

As ruled by the ECtHR, Article 5/1 has been identified as comprising three elements[27], all of which must be satisfied before a particular set of circumstances will be deemed a deprivation of liberty falling within the scope of Article 5. These elements are the objective element, the subjective element, and the state imputability, which will briefly be explained below.

The objective element

The ECtHR has established that a person may be regarded as having been "*detained*" even during a period when they were placed in an accessible hospital area with regular unsupervised movement across hospital premises and the possibility of unsupervised leave off the premises.[28] Furthermore, with respect to the placement of individuals with mental disorders in an institution, the ECtHR has established that the concept of deprivation of liberty encompasses not only the objective aspect of a person's confinement in a specific restricted area for a considerable duration, but also the subjective element of the individual's lack of valid consent to such confinement.[29]

22 Also regulated in the ICCPR Article 9/1 and the CRPD Article 14.

23 *Ireland v. the United Kingdom*, Series A no. 25, (ECtHR, 18 January 1978), §194.

24 *Engel and Others v. the Netherlands*, App nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 08/06/1976, (ECtHR, 8 June 1976), §58.

25 *Winterwerp v. the Netherlands*, App no 6301/73, (ECtHR, 24 October 1979, §37; *De Wilde, Ooms and Versyp v. Belgium*, App nos 2832/66, 2835/66, 2899/66, (ECtHR, 18 June 1971), §65, *Medvedyev and Others v. France*, App no 3394/03, (ECtHR, 29 March 2010), §76; *Ladent v. Poland*, App no 11036/03, (ECtHR, 18 March 2008), §45.

26 *Guzzardi v. Italy*, App no 7367/76, (ECtHR, 06 November1989), §92; *Engel and Others v. the Netherlands*, op. cit., §58-59; *Stanev v. Bulgari*a, App no 36760/06, (ECtHR, 17 January 2012), §115.

27 *Stanev v. Bulgari*a, op. cit., §117.

28 *Stanev v. Bulgari*a, op. cit., §116.

29 *Stanev v. Bulgaria*, op. cit., §117.

The subjective element

A person may be deprived of their liberty only if, as an additional subjective element, they have not validly consented to the detention in question. Consequently, even if a person is objectively confined, their situation will not fall within the scope of the article, if they give valid consent to the confinement. It is important to note that a person can only be considered to have valid consent if they possess the requisite mental capacity to do so.[30] Given that the majority of individuals with mental health issues are either receiving treatment of their own volition or are voluntarily admitted to facilities, this particular group is not subject to the provisions set forth in Article 5. The same is true of mentally disordered offenders who have been convicted to a conditional sentence or a security measure, provided that they have agreed to the conditions of treatment or commitment.

State Imputability

The final requirement is that the deprivation of liberty must be imputable to the State. In the case of *Storck v. Germany* case, three aspects are identified. Firstly, the deprivation of liberty could be imputable to the State because of the direct involvement of public authorities in the detention of the applicant. Secondly, the State could be held to have violated Article 5/1, on the grounds that the courts, in the compensation proceedings initiated by the applicant, failed to interpret the relevant civil law provisions pertaining to her claim in a manner consistent with the spirit of Article 5. Thirdly, the State could have breached its positive obligation to safeguard the applicant against interventions with her liberty by private persons.[31]

2.2 Grounds for Detention

The deprivation of liberty is only deemed lawful if it falls within one of the permissible grounds specified in sub-paragraphs (a) to (f) of Article 5/1.[32] Sub-paragraphs (a) to (f) of Article 5/1 contain an exhaustive list of permitted reasons on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds.[33] The applicability of one ground, however, does not necessarily

30 *"...the fact that the applicant was compliant and never attempted, or expressed the wish, to leave. The majority of the House of Lords specifically distinguished actual restraint of a person (which would amount to false imprisonment) and restraint which was conditional upon his seeking to leave (which would not constitute false imprisonment). The Court does not consider such a distinction to be of central importance under the Convention. Nor, for the same reason, can the Court accept as determinative the fact relied on by the Government that the regime applied to the applicant (as a compliant incapacitated patient) did not materially differ from that applied to a person who had the capacity to consent to hospital treatment, neither objecting to their admission to hospital."*, *H.L. v. the United Kingdom*, App no 45508/99, (ECtHR, 05 October 2014), §90.

31 *Storck v. Germany*, App no 61603/00, (ECtHR, 16 June 2005), §89.

32 *Khlaifia and Others v. Italy*, App no 16483/12, (ECtHR, 15 December 2016), §88.

33 *Creangă v. Romania*, op. cit., §84; *Khlaifia and Others v. Italy*, op. cit. §88.

preclude another; a detention may, depending on the circumstances, be justified under more than one sub-paragraph.[34]

Article 5/1 is explicit in stating that its guarantees are applicable to all persons. The sub-paragraphs of Article 5/1 will be examined in order of importance to the research question. Consequently, Article 5/1(e), which regulates the deprivation of liberty for the persons of unsound mind, will be considered first; then sub-paragraphs (a), (c), and (b) will be addressed respectively. Sub-paragraphs (b) and (f) are deliberately omitted on the grounds of irrelevance.

2.2.1 Detention for Medical or Social Reasons

The regulation of detention for medical or social reasons is outlined in Article 5/1(e). This ground establishes that *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants".*

According to this Article, the lawfulness of a detention is not satisfied solely by compliance with the relevant domestic law; the domestic law itself must also comply with the Convention, including the general principles expressed or implied therein, in particular the principle of the rule of law, which is specifically stated in the Preamble to the Convention. The requirement that a detention be "in accordance with a procedure prescribed by law" necessitates the existence in domestic law of adequate legal protections and "fair and proper procedures".[35]

In addition, the measure must not only be in conformity with domestic law, but also with the purposes of the restrictions laid down in Article 5/1. This result is derived also from Article 18 of the Convention. Thus, there should be a relation between the ground of deprivation of liberty and the place, environment, and conditions of detention. Consequently, the implementation of detention as outlined in sub-paragraph (e) is only permissible if carried out in a hospital, clinic or other appropriate institution.[36] Notably, the Court has stated that, in principle, Article 5/1(e) is not concerned with ensuring suitable treatment or conditions.[37]

In instances where there is a question regarding the relationship between the deprivation of liberty and the place of the detention, the Court has stated that it would be unrealistic to expect an appropriate clinic to be immediately available for the detainee, however a delay of six months due to lack of capacity is regarded as unacceptable.[38]

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34 *X v. the United Kingdom*, App no 7215/75, (ECtHR, 05 November 1981), §38-39.

35 *X v. Finland*, App no 34806/04, (ECtHR, 03 July 2012), §148; *Winterwerp v. the Netherlands*, op. cit., §45.

36 *De Donder and De Clippel v. Belgium*, App no 8595/06, (ECtHR, 06 December 2011), §105; *Ashingdane v. the United Kingdom*, App no 8225/78, (ECtHR, 28 May 1985), §44.

37 *Ashingdane v. the United Kingdom*, op. cit., §44.

38 *Brand v. the Netherlands*, App no 49902/99, (ECtHR, 11 May 2004), §64-66. For fifteen months of delay in the admission; *See. Morsink v. the Netherlands*, App no 48865/99, (ECtHR, 11 May 2004), §65-69.

Because the sub-paragraph (e) does not regulate any limitation in time, unlike the other sub-paragraphs of the same article, the important question is whether Article 5/4 only gives to the persons concerned the right to have the lawfulness of the deprivation of their liberty as such reviewed by a court, or also the right to have a periodic recourse to a court in the event of detention being prolonged.[39]

The Court differentiates between the detention procedures permitted under sub-paragraph (e) and those permitted under the other sub-paragraphs of Article 5/1, determining that a one-month period is not an unreasonable interval for the detention of individuals for other grounds of lawful detention.[40,41] However, when it comes to the detentions of persons of unsound mind, the Court has established that longer intervals for such detentions are permissible, and has determined that a period of nine months to be sufficient for the automatic periodic review of such detentions, in accordance with the requirements of Article 5/4.[42]

Before elaborating further, it should be noted that there is a distinction between the commitment ordered by a civil court and a criminal court. Involuntary civil commitment, which is also referred to as compulsory or coercive placement, is a legal process whereby an individual who is deemed by a qualified agent to have symptoms of a severe mental disorder is committed to treatment in a psychiatric hospital (inpatient) or in the community (outpatient). The criteria for the involuntary civil commitment vary across national laws, and in some criminal justice systems, it is possible for a criminal court to order civil commitment. However, for the ECtHR, it makes no difference whether the commitment is civil or criminal; both are considered under Article 5/1(e) for the reason that both restrict the freedom of "persons of unsound mind". The *Winterwerp v. the Netherlands* case, one of the most prominent cases on Article 5/1(e), deals with civil commitment and admission to psychiatric hospitals. This case law delineates the criteria that are applicable in both civil and criminal cases.

The ECtHR assesses two aspects of involuntary detention: firstly, whether the applicant is lawfully detained in accordance with Article 5;[43] and secondly, whether the person has a mental disorder that justifies involuntary confinement. Such confinement may be necessary, for instance, if a person needs treatment, or control and supervision in order to avoid harming themselves or others.[44] According to the ECtHR, involuntary civil commitment to a psychiatric hospital, indisputably, constitutes a deprivation of liberty,

39 Bleichrodt, E. (2018). Right to Liberty and Security (Article 5). In P. Van Dijk, F. Van Hoof, A. Van Rijn, & L. Zwaak, *Theory and Practice of the European Convention on Human Rights* (pp. 439-495). Cambridge: Intersentia, p. 464.

40 *Bezicheri v. Italy*, App no 11400/85, (ECtHR, 25 October 1989), §21.

41 Even a six-day period was found not too short. *See. De Jong, Baljet and Van den Brink v. the Netherlands*, App nos 8805/79, 8806/79, 9242/81, (ECtHR, 22 May 1984), §58-59.

42 *Herczegfalvy v. Austria*, App no 10533/83, (ECtHR, 24 September 1992), §77.

43 *See. H.M. v. Switzerland*, App no 39187/98, (ECtHR, 26 February 2002); *Storck v. Germany*, op. cit.; *H.L. v. the United Kingdom*, op. cit.; *D.D. v. Lithuania*, op. cit.

44 *Hutchison Reid v. the United Kingdom*, op. cit., §52.

and the Court sees no reason to hold otherwise.[45] Involuntary civil commitment includes not only involuntary placement, but also involuntary treatment, which affects two fundamental human rights: the right to freedom from torture, inhuman or degrading treatment or punishment, and the right to respect for private life. The coerced treatment and its relationship with the *Prohibition of Torture* as stated by Article 3 of the ECHR and the*"Right to Respect for Private and Family Life"*, as stated by Article 8 of the ECHR will be discussed in the *4.2 Coerced Treatment* subsection below.

In the ECHR, each term within Article 5/1(e) has its own autonomous Convention meaning.[46] Therefore, it is necessary to examine each term individually. Since this chapter is ordered by *priority*; the explanation and examination will begin with the concept of "*persons of unsound mind*".

2.2.1.1 Persons of unsound mind

2.2.1.1.1 The notion of "persons of unsound mind"

Given that each term in Article 5/1(e) has an autonomous Convention meaning,[47] and that the ECtHR cannot be bound by the domestic, national law definitions, it is necessary for the Court to provide its own autonomous definition through its case law.[48] In the sub-paragraph (e), the notion of *"of unsound mind"* is employed; however, the ECHR does not elucidate what is to be understood by it. According to an English dictionary, "of sound mind" is literally a synonym of "sane", and "of unsound mind" is of "mentally ill".[49] The ECtHR has stated in the case of *Winterwerp v. the Netherlands* that *"this term is not one that can be given a definitive interpretation… it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread."*.[50] This approach is appropriate since not only do psychiatry, psychology, and treatment options evolve, but also society changes its opinion of what constitutes a mental disorder. Thus, providing a definition could be limiting and requiring changes over time.

Later, in the *Rakevich v. Russia* case, the ECtHR reiterated that the term *"of unsound mind"* is not readily definable due to the dynamic nature of psychiatry as a field, continuously evolving both medically and socially.[51] Furthermore, according to the Court, the detention of a mentally disordered offender may be necessary in instances where the person needs control and supervision to prevent him, for instance, causing hurt to himself

45 *Plesó v. Hungary*, Application no. 41242/08, (ECtHR, 02 October 2012), §54.

46 Harris, D., O'Boyle, M., & Bates, E. (2018). *Law of the European Convention on Human Rights*. Oxford: Oxford University Press, p. 325.

47 Harris et al. (2018), p. 325.

48 *Petschulies v. Germany*, App no 6281/13, (ECtHR, 02 June 2016), §74-77.

49 *See*. Merriam-Webster Dictionary: <https://www.merriam-webster.com/> accessed: 10 June 2020.

50 *Winterwerp v. the Netherlands*, op. cit., §37.

51 *Rakevich v. Russia*, App no 58973/00, (ECtHR, 28 October 2003), §26; *see* also *Anatoliy Rudenko v. Ukraine*, App no 50264/08, (ECtHR, 17 April 2014), §102.

or others; and this is not limited to cases where the person requires therapy, medication or other treatment.[52]

Article 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties (VCLT) regulate the rules of interpretation for international treaties. As with any other international treaty, the ECHR must also *"be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"*. Yet, the notion of 'persons of unsound mind' has been criticised for being insufficiently precise[53]; and it was described as 'embarrassingly archaic'[54] and 'pejorative'[55]. Therefore, by following the interpretation rule regulated in Article 32 of the VCLT, the preparatory work of the treaty could be examined. However, unfortunately, the preparatory work (*travaux préparatoires)* is not helpful since the notion of persons of unsound mind was not discussed.[56] In the *Assanidze v. Georgia* judgment, the Court underlined that, in order to prevent arbitrariness, a narrow down interpretation of the exemptions must be the aim.[57] Thus, even though the notion is old fashioned and perhaps even sounds 'discriminatory'[58], only the interpretation of the notion matters.

According to the ECtHR case law, in order to be regarded as *of unsound mind*, the following three criteria must be met.[59] Firstly, the *mental disorder* of the person concerned must have been conclusively established. Secondly, the disorder must be of a character or of a degree that legitimises the detention. Thirdly, the detention cannot be validly prolonged without the persistence of the disorder. These three minimum criteria must be satisfied in order to have "the lawful detention of a person of unsound mind" within the meaning of ECHR Article 5/1(e). These criteria will be explained in detail in the subsection below.

2.2.1.1.2 Determination of the "unsound mind"

In accordance with Article 5(1)(e) of the Convention, the ECtHR has established that the detention of individuals with an "*unsound mind*" is permissible only when both the

52 *Ilnseher v. Germany*, App no 10211/12 and 27505/14, (ECtHR, 04 December 2018), §133; *Hutchison Reid v. the United Kingdom*, App no 50272/99, (ECtHR, 20 February 2003), § 52.

53 Szwed, M. (2020). The notion of 'a person of unsound mind' under Article 5 § 1(e) of the European Convention on Human Rights. *Netherlands Quarterly of Human Rights, XX*(X), p. 11.

54 Schabas, W. (2015). *The European Convention on Human Rights, A Commentary*. Oxford: Oxford University Press, p. 220.

55 Jiménez, A. (2015). Criminalizing Disability: The Urgent Need of a New Reading of the European Convention on Human Rights. *American University International Law Review, 30*(2), p. 220.

56 *See*. https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART5-DH(56)10-EN1674958.pdf

57 *Assanidze v. Georgia*, App no 71503/01, (ECtHR, 08 April 2004), §170.

58 Szwed (2020), p. 14.

59 For further information *see*. the subsection "*How to determine whether a person of unsound mind*" below.

substantive and procedural requirements for such detention are met.[60] Hence, an individual cannot be deprived of their liberty unless the abovementioned three minimum criteria are fulfilled.[61] These were set out in the *Winterwerp v. the Netherlands* judgement in 1979. [62]

1). The individual must be reliably shown to be of unsound mind, as having a true mental disorder, by objective medical expertise, unless emergency detention is required.
2). The mental disorder must be of a kind or degree warranting compulsory confinement.
3). The validity of continued confinement depends upon the persistence of such a disorder.

The *Winterwerp criteria* have been subject to modification over time. Given the importance of the topic for this dissertation, a chronological development of the *Winterwerp criteria* is presented in Table 1.

TABLE 1: Chronological Evolution of the *Winterwerp Criteria*

1979 *Winterwerp v. the Netherlands*	1. the individual must reliably be shown to be of unsound mind, as having a true mental disorder, by objective medical expertise, unless emergency detention is required; 2. the mental disorder must be of a kind or degree warranting compulsory confinement. 3. the validity of continued confinement depends upon the persistence of such a disorder.
2000 *Varbanov v. Bulgaria* [providing further explanations]	1. the individual must reliably be shown to be of unsound mind by objective medical expertise, and ***the medical assessment must be based on the actual state of mental health of the person concerned, and not solely on past events,*** unless emergency detention is required; 2. the mental disorder must be of a ***kind or degree*** warranting compulsory confinement. 3. the validity of continued confinement depends upon the persistence of such a disorder
2004 *H.L. v. the United Kingdom* [Turning back to the *Winterwerp criteria*]	1. the individual must reliably be shown to be of unsound mind; 2. the mental disorder must be of a kind or degree warranting compulsory confinement; and 3. the validity of continued confinement depends upon the persistence of such a disorder.

60 *Zagidulina v. Russia*, App no 11737/06, (ECtHR, 02 May 2013), §54; *Miklić v. Croatia*, App no 41023/19, (ECtHR, 07 April 2022), §61.

61 *Winterwerp v. the Netherlands*, op. cit., §39; *Ilnseher v. Germany*, op. cit., §127; *Varbanov v. Bulgaria*, App no 31365/96, (ECtHR, 05 October 2000), §50; *Hutchison Reid v. the United Kingdom*, op. cit., §48; *Varbanov v. Bulgaria*, App no 31365/96, (ECtHR, 05 October 2000), §114; *Kallweit v. Germany*, App no 17792/07, (ECtHR, 13 January 2011), §45; *Stanev v. Bulgaria*, op. cit., §145; *D.D. v. Lithuania*, App no 13469/06, (ECtHR, 14 February 2012), §156; *X v. Finland*, op. cit., §149; *Ümit Bilgiç v. Turkey*, App no 22398/05, (ECtHR, 03 September 2013), §106.

62 *Winterwerp v. the Netherlands*, op. cit., §39.

2012 *Stanev v. Bulgaria* [Repetition of Winterwerp criteria with extra explanation on the second criterion]	1. the individual must reliably be shown to be of unsound mind ***by a recent expert medical report*** ; 2. the mental disorder must be of a kind or degree warranting compulsory confinement ***-the detention of a mentally disordered person may be necessary not only where the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons-*** ; 3. the validity of continued confinement depends upon the persistence of such a disorder.
2013 *Zagidulina v. Russia* [introducing a completely different concept]	1. ***Substantive criteria*** (the ***Winterwerp criteria***) a. the individual should be suffering from a mental disorder b. the national authorities should reliably establish that the kind and degree of disorder warrant the individual's detention 2. ***Procedural criterion is the obligation to ensure a fair and proper detention which is not arbitrary.***
2018 *Ilnseher v. Germany* *Grand Chamber*	1. the individual must reliably be shown to be of unsound mind, ***a true mental disorder must be established before a competent authority on the basis of objective medical expertise, at the date of adoption of the measure depriving that person of his liberty , and the objectivity of the medical expertise entails a requirement that it was sufficiently recent*** ; 2. the mental disorder must be of a kind or degree warranting compulsory confinement. 3. the validity of continued confinement depends upon the persistence of such a disorder.
2021 *M.B. v. Poland*	1. whether the applicant has reliably been shown to be of unsound mind, ***in other words, that his mental disorder was of a kind or degree warranting compulsory confinement,*** 2. whether the medical assessment is based on the actual state of mental health of the person concerned and not solely on past events, 3. whether the existence of a mental disorder warranting compulsory confinement is reliably shown at the date of detention and throughout the detention.
2022 *Miklić v. Croatia* [turning back to *Zagidulina v. Russia judgment*]	1. ***substantive requirements*** a. the individual must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; b. the mental disorder must be of a kind or degree warranting compulsory confinement; c. the validity of continued confinement depends upon the persistence of such a disorder 2. ***procedural requirements*** a. ***the lawfulness criterion*** – ***in accordance with a procedure prescribed by law*** – ***issued from and executed by an appropriate authority*** – ***not arbitrary*** b. ***providing clearly effective guarantees against arbitrariness regarding the involuntary placement***

As is evident, the *Winterwerp criteria* has been updated in years by the ECtHR. Yet, the three minimum conditions are reiterated in every case concerning applications under Article 5/1(e).[63] In 2021, in the *M.B. v. Poland* case the Court stated that it will examine:

1). whether the individual has reliably been shown to be of unsound mind, in other words, that their mental disorder was of a kind or degree warranting compulsory confinement,[64]
2). whether the medical assessment is based on the actual state of mental health of the person concerned and not solely on past events (especially given the evident tendency of mental disorders to develop over time),[65]
3). whether the existence of a mental disorder warranting compulsory confinement is reliably shown at the date of detention and throughout the detention, especially given the marked tendency of mental disorders to develop over time.[66]

This judgement does not alter the *Winterwerp criteria,* yet it does provide a decent summary of the evaluation thereof. Consequently, when creating the ECHR test at the end of this chapter, the *M.B. v. Poland* case will be taken into account. As illustrated in Table 1, in 2022, the Court in the *Miklić v. Croatia* case stated that Article 5 § 1 (e) of the Convention permits the detention of persons of unsound mind *only when* both the *substantive requirements* and *procedural requirements* are satisfied.[67] The Court further elaborates that the *substantive requirements* are the three *Winterwerp criteria.*[68] The *procedural requirements* are as follows: firstly, the *lawfulness criterion,* which requires adherence to the prescribed procedure in domestic law, the issuance and the execution of the liberty-depriving measure by the appropriate authority, and the absence of *arbitraryness.* However, these criteria already exist for the Article 5/1 anyways and are applicable to the cases under Article 5/1(e) as a pre-test anyhow. Secondly, the procedural criteria include providing clearly effective guarantees against arbitrariness regarding the involuntary placement, given the vulnerability of individuals suffering from mental disorders. However, this is already a criterion gathered from Article,5 paragraphs 2, 3, 4, and 5. Therefore, it is not necessary to combine these procedural guarantees and present them as if they are specific to the detention of unsound mind. It is uncertain whether the Court will proceed with this new concept. Accordingly, the ECHR test, which is provided at the end of Chapter 2, will not include the *procedural requirements* as a separate criterion for Article 5/1(e), as they will be considered under Article 5 in any case.

Lastly, in this respect, it shall be noted that the criteria for Article 5/1(e) are also expanded by combining it with Article 3. The relevant information will be provided after Article 3 is explained under the subsection *3.7 Analysis and Historical Development of Holding Article 5/1(e) and Article 3 Together.*

63 For example *see.* Kolanis v. the United Kingdom, op. cit., §67.
64 *M.B. v. Poland,* op. cit., §60.
65 *M.B. v. Poland,* op. cit., §64.
66 *M.B. v. Poland,* op. cit., §63.
67 *Miklić v. Croatia*, op. cit., §61.
68 *Miklić v. Croatia*, op. cit., §62.

As previously stated, according to the ECtHR, a mental disorder must be so severe as to necessitate treatment in a hospital, a clinic or another appropriate institution to be considered as a "*true mental disorder*" within the meaning of Article 5/1(e).[69] Therefore, the Court has established that the mental condition must be of a certain gravity in order to be considered as a "true mental disorder".[70]

In the event that the liberty of a person considered to be of unsound mind is deprived without the consultation of a medical expert, it shall not be deemed in conformity with Article 5/1(e).[71] Any alternative approach would fail to meet the requisite protection against arbitrariness, inherent in Article 5.[72] The Court, additionally, emphasises the significance of an independent psychiatric evaluation as a protective measure against possible arbitrariness in decision-making process concerning the continuation of incarceration of persons in involuntary care.[73]

In relation to the "emergency detention" mentioned in the first condition, the Court acknowledges that the particular form and procedure may vary depending on the circumstances. In urgent cases or where a person is under arrest due to the violent behaviour, it may be acceptable that the objective medical expertise report be obtained immediately after the arrest. For the other cases, prior consultation is necessary. In cases where no other possibility exists, for instance, due to a rejection of the person concerned to appear for an examination, the court acknowledges that at least an assessment by a medical expert on the basis of the file must be requested; failure to do so precludes the court from determining that an individual is reliably found to be of unsound mind.[74] In addition, the medical evaluation must be grounded in the person's current state of mental health, rather than solely on past events.[75]

The national authorities must have a certain discretion when deciding whether a person should be detained as a "person of unsound mind", as it is in primarily for them to assess the evidence presented; it is the Court's task to review the decisions of these authorities under the Convention.[76] The competent domestic authority must subject the

69 *Bergmann v. Germany*, App no 23279/14, (ECtHR, 07 January 2016), §113; *Winterwerp v. the Netherlands*, op. cit., §39; *Glien v. Germany*, Application no. 7345/12, (ECtHR, 28 November 2013), §85.

70 *Glien v. Germany*, op. cit., §85.

71 *Ruiz Rivera v. Switzerland*, App no. 8300/06, (ECtHR, 18 February 2014), §59; *S.R. v. the Netherlands*, App no 13837/07, (ECtHR, 18 September 2012), §31.

72 *Varbanov v. Bulgaria*, op. cit., §47.

73 *X v. Finland*, op. cit., §169.

74 *Varbanov v. Bulgaria*, op. cit., §47; *Costancia v. the Netherlands*, App no 73560/12, (ECtHR, 03 March 2015), §26.

75 *M.B. v. Poland*, op. cit., §63; *Costancia v. the Netherlands*, op. cit., §26.

76 *Winterwerp v. the Netherlands*, op. cit., §40; *X v. the United Kingdom*, op. cit., §43; *Luberti v. Italy*, App no 9019/80, (ECtHR, 23 February 1984), §27; *Herczegfalvy v. Austria*, op. cit., §63; *Stanev v. Bulgaria*, op. cit., §155; *X v. Finland*, op. cit., §150, *Costancia v. the Netherlands*, op. cit., §27; *Ilnseher v. Germany*, op. cit., §128.

expert opinion to a strict scrutiny and decide itself on whether or not the person concerned suffers from a mental disorder.[77]

As previously mentioned, in order to prove an unsound mind, there must be a true disorder that is *of a kind or degree warranting compulsory confinement*, and this disorder must be reliably demonstrated by an objective medical expert.[78] In other words, the Court considers that the mental condition must be of a certain gravity in order to be considered as a *true* mental disorder.[79] In 1976, the Commission held that the term *unsound mind* is not limited to mental illness, and it must be understood in its broadest meaning, including abnormal personality traits which do not amount to mental illness.[80] Thus, it must be taken to include intellectual disabilities, psychotic illnesses, psychopathy, and probably neurotic conditions as well. In addition, the Court has stated that even if a mental disorder is not fully treatable, persons may still benefit from therapeutic activities or care.[81]

This criterion of being *of a kind or degree warranting compulsory confinement*, also includes the concept of 'dangerousness'. Even though the Court underlines that the dangerousness must be sufficiently proven,[82] the relationship between the dangerousness and a mental disorder and the degree of it stays questionable.[83] For instance, the Court doubts whether having a dissocial personality alone could be classified as a *true* mental disorder for the purposes of Article 5/1(e).[84]

For the requirements of Article 5/1(e), the *relevant time* at which a person must be reliably determined to be of unsound mind, is changed over time in case law. According to the case of *Varbanov v. Bulgaria*, the medical assessment must be based on the *actual state* of mental health of the person concerned and not solely on past events.[85] In the *Ilnseher v. Germany* judgment the Court further noted that a mental condition may change over time and thus, it is *only* necessary to assess whether a person is of unsound mind at the date

77 *Ilnseher v. Germany*, op. cit., §132.

78 *In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority – that is, a true mental disorder – calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder. Winterwerp v. the Netherlands*, op. cit., §39; *M.B. v. Poland,* App no 60157/15, (ECtHR, 14 October 2021), §63.

79 *Glien v. Germany*, op. cit., §85.

80 *X v. Federal Republic of Germany*, App no 7493/76, (ECoHR, 12 July 1976), p. 182.

81 *Rooman v. Belgium*, App no 18052/11, (ECtHR, 31 January 2019), §197; *Hutchison Reid v. the United Kingdom*, op. cit., §55.

82 *Trajče Stojanovski v. the former Yugoslav Republic of Macedonia,* App no 1431/03, (ECtHR, 22 October 2009), §35; *X v. Russia*, App no 3150/15, (ECtHR, 20 February 2018), §41-42.

83 *See*. Szwed (2020), p. 10.

84 *Glien v. Germany*, op. cit., §88; Petschulies v. Germany, op. cit., §77.

85 *Varbanov v. Bulgaria*, op. cit., §47.

of the adoption of the measure depriving that person of their liberty.[86] However, any changes in the mental health condition after the adoption of the detention order must also be taken into account.[87] Therefore, the medical expert reports on which the authorities rely must be adequately recent.[88]

When the medical evidence shows recovery, the authorities may need time to consider whether to end the confinement[89]; however the ECtHR has determined that if there is no medical reason for continued of the detention, the release should take place immediately; otherwise it would be incompatible with Article 5/1(e).[90] Furthermore, the Court holds that, within the meaning of Article 5/1(e), the detention of mentally disordered persons can be regarded as "lawful", only if it takes place in a hospital, clinic, or other appropriate institution authorised for the detention of such persons.[91] The appropriate treatment, therefore, must be provided in that appropriate institution.[92] The administration of suitable therapy is a requirement of the wider concept of the "*lawfulness*" of the deprivation of liberty. Any detention of mentally disordered persons must be for a therapeutic purpose, aimed at curing or alleviating their mental health condition, including, where appropriate, reducing or controlling their dangerousness.[93]

With respect to the aforementioned third condition, the Court accepts that, the wider interest of the community might be balanced against the individual's right to immediate and unconditional release.[94] In the *Luberti v. Italy* case, on the immediate release, it was held that even though there is a medical report which states that there is a recovery, the report itself does not necessitate a decision to release.[95]

The Court has recently decided that the welfare of a person with a mental disorder must also be considered in addition to the medical report. In assessing the necessity of placing a person in an institution, the *objective need* for accommodation and for social assistance should not *automatically* result in the deprivation of liberty.[96] The ECtHR has also underlined that protective measures should incorporate the wishes of those capable of expressing their own will, to the greatest extent possible. Failure to do so may lead to abuse and obstruct the exercise of the rights of vulnerable persons; thus as a general rule,

86 *Ilnseher v. Germany*, op. cit., §157.
87 *Ilnseher v. Germany*, op. cit., §134.
88 *Kadusic v. Switzerland*, App no 43977/13, (ECtHR, 09 January 2018), §53-55.
89 *Luberti v. Italy*, op. cit., §28.
90 *R.L. and M.-J.D. v. France*, App no 44568/98, (ECtHR, 19 May 2004), §124-128.
91 *Ashingdane v. the United Kingdom*, op. cit., §44; *O.H. v. Germany*, App no 4646/08, (ECtHR, 24 November 2011), §79; *L.B. v. Belgium*, App no 22831/08, (ECtHR, 02 October 2012), §93; *Hutchison Reid v. the United Kingdom*, op. cit., §49.
92 *Rooman v. Belgium*, op. cit., §203-205.
This criterion will be given and discussed under the subsection *3.7 Analysis and Historical Development of Holding Article 5/1(e) and Article 3 Together* below.
93 *Rooman v. Belgium*, op. cit., §208.
94 Harris et al. (2018), p. 330.
95 *Luberti v. Italy*, op. cit., §29.
96 *P.W. v. Austria*, App no 10425/19, (ECtHR, 21 June 2022), §56.

the measures taken without prior consultation of the person concerned should be carefully scrutinised.[97]

2.2.1.2 Infectious diseases, alcoholics, drug addicts or vagrants

As previously mentioned, Article 5/1(e) refers not only to the persons of unsound mind, but also to several categories of individuals, namely persons spreading infectious diseases, alcoholics, drug addicts, and vagrants. The autonomous meaning of each term will be explained below, in the same order. The link between these categories is that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds.[98]

a) Infectious diseases

With regard to the prevention of the spread of infectious diseases, the Court determines the essential criteria when assessing the "lawfulness" of the detention of a person. The criteria are as follows: (1) whether the spread of the infectious disease is dangerous to public health or safety; and (2) whether detention of the infected person is the last resort to prevent the spreading of the disease, since less severe measures have been considered and found to be insufficient to protect the public interest. When these criteria are no longer met, the basis for the deprivation of liberty ceases to exist.[99] The Court has stated that the HIV virus is indisputably dangerous to public health and safety.[100]

b) Alcoholics and drug addicts

The term "alcoholics", as used in Article 5/1(e), was not included the commentary on the preliminary draft Convention. Instead, it was mentioned as "*drunkenness*".[101] Accordingly, the Court has determined that the scope is not limited to persons who are in a clinical state of alcoholism, as nothing in the text of this provision prevents this measure from being applied by the State to a person committing alcohol abuse, in order to limit the harm caused by alcohol to themselves and to the public, or to prevent dangerous behaviour after consuming alcohol.[102] Consequently, persons who do not have a medical diagnosis of alcoholism, but whose behaviour while under the influence of alcohol puts the public order at risk or their own well-being, can be detained to protect of the public safety or their own interests, such as their health or personal safety, regardless of whether or not they are addicted to alcohol.[103] However, it is important to note that this does not

97 *P.W. v. Austria*, op. cit., §56.
98 *Enhorn v. Sweden*, App no 56529/00, (ECtHR, 25 January 2005), §43.
99 *Enhorn v. Sweden*, op. cit., §44.
100 *Enhorn v. Sweden*, op. cit., §44.
101 *Witold Litwa v. Poland*, op. cit., §63.
102 *Kharin v. Russia*, App no 37345/03, (ECtHR, 03 February 2011), §34; *Witold Litwa v. Poland*, op. cit., §60-61.
103 *Hilda Hafsteinsdóttir v. Iceland*, App no 40905/98, (ECtHR, 08 June 2004), §42; *Kharin v. Russia*, op. cit., §34.

mean that Article 5/1(e) allows a person to be detained solely based on the grounds of their alcohol consumption.[104]

It is noteworthy that the ECtHR has not yet addressed the question of the term 'drug addicts' in any of its case law, and this topic remains largely uncharted territory. It is therefore unclear whether the Court's approach to alcoholics, which does not require a medical diagnosis, will be extended to drug addicts.[105]

c) Vagrants

The existing case law on the subject of "*vagrants*" is insufficient due to a lack of detailed judgments that could elaborate on this terminology in greater detail. This legal concept is applicable to individuals who lack a fixed residence, means of income, and regular employment. These three criteria, inspired by the Belgian Criminal Code, are accepted by the ECtHR case law. These three criteria are cumulative, requiring simultaneous fulfilment in relation to the same person.[106]

As a summary of the subsection it can be stated that, in principle, the "detention" of a mentally disordered person will only be "lawful" within the meaning of Article 5/1(e) if it takes place in a hospital, clinic or other appropriate institution. There must be a link between the grounds for permitted deprivation of liberty relied on and the place and conditions of detention.[107] The *Aerts v. Belgium* case does not guarantee the right to a particularly high standard of treatment, however, it is possible to imply a slightly higher standard in Article 5 when the justification for deprivation of liberty under national law includes a requirement that the person has a treatable mental disability.[108]

2.2.2 Detention After Conviction

For the purposes of this dissertation, Article 5/1(a) is second in priority. According to Article 5/1(a), "*Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court.*".

The aim of this regulation is the execution of the imprisonment sentence imposed by a court decision. As with all terminology in respect to the ECHR, the word "*conviction*" also

104 *Petschulies v. Germany*, op. cit., §65; *Witold Litwa v. Poland*, op. cit., §61-62; *Kharin v. Russia*, op. cit., §34.

105 For the discussion regarding whether a person who has used drugs on a single occasion can be considered a drug addict, *see*. Barrett, D. (2018, September 03). *'Drug Addicts' and the ECHR*. Retrieved from Blog of the European Journal of International Law: https://www.ejiltalk.org/drug-addicts-and-the-echr/, (06/07/2020).

106 *De Wilde, Ooms and Versyp v. Belgium*, op. cit., §68-69.

107 *Ashingdane v. the United Kingdom*, op. cit., §44; ECtHR, *Aerts v. Belgium*, App no 61/1997/845/1051, (ECtHR, 30 July 1998), §46.

108 Bartlett, P., Lewis, O., & Thorold, O. (2007). *Mental Disability and The European Convention on Human Rights*. Leiden: Martinus Nijhoff Publishers, p. 114.

has an autonomous meaning for the ECtHR.[109] It applies to any conviction occasioning deprivation of liberty pronounced by a "court", whether the conviction is classified as criminal or disciplinary by the national law of the State concerned.[110]

As can be read from the regulation, the ECHR requires the involvement competent court for the lawfulness, and the detention must come after conviction. However, the Court reiterates that the word *after* in this context does not simply mean that the *detention* must follow the *conviction* in point of time.[111] Instead, this reference entails a *causative link* between the ongoing detention and the conviction for a specific offence.[112] This causative link constitutes an important safeguard.[113]

Within the meaning of Article 5/1(a), a defendant is deemed to be detained "after conviction by a competent court", when the judgment has been delivered at first instance, even if it is not yet enforceable and remains subject to appeal.[114] The term *"after conviction"* cannot be understood as being limited to the case of a final conviction, as this would exclude the arrest at the hearing of convicted persons who appeared for the trial while still at liberty, regardless of the remedies still open to them.[115] It should be noted that the detention will not retroactively be considered as unlawful. This means that if a conviction or a sentence decision is overturned by a higher court on appeal, it will not affect the validity of the detention or sentence, and will not make them unlawful from the beginning.[116]

2.2.3 Differences Between Article 5/1(a) and Article 5/1(e)

Article 5/1(a) covers the cases where persons of unsound mind are convicted of a crime and sentenced to prison. It also covers the detention of mentally disordered offenders in psychiatric facilities following their conviction.[117] However, it will not apply to such cases following an acquittal.[118]

In the *X v. the United Kingdom* judgment, the ECtHR stated that the deprivation of liberty may fall within the scope of both sub-paragraphs.[119] A conviction that finds the guilt by a competent court is considered as lawful detention under sub-paragraph (a); at the same time, being satisfied that the applicant is suffering from a mental disorder

109 *Engel and Others v. the Netherlands*, op. cit., §68.
110 *Engel and Others v. the Netherlands*, op. cit., §68.
111 *H.W. v. Germany*, App no 17167/11, (ECtHR, 19 September 2013), §102.
112 *H.W. v. Germany*, op. cit., §102.
113 Harris et al. (2018), p. 313.
114 *Ruslan Yakovenko v. Ukraine*, App no 5425/11, (ECtHR, 04 June 2015), §46.
115 *Ruslan Yakovenko v. Ukraine*, op. cit., §46; *Wemhoff v. Germany*, App no 2122/64, (ECtHR, 27 June 1968), p. 23, §9.
116 *Mooren v. Germany*, App no 11364/03, (ECtHR, 09 July 2009), §74.
117 *X v. The United Kingdom*, op. cit., §38-39; *Klinkenbuss v. Germany*, App no 53157/11, (ECtHR, 25 February 2016), §49; *Radu v. Germany*, App no 20084/07, (ECtHR, 16 May 2013), §97.
118 *Luberti v. Italy*, op. cit., §25; *X v. The United Kingdom*, op. cit., §38; *Sylvain Dhoest against Belgium*, App no 10448/83, (ECoHR, 14 May 1987), §135.
119 *X v. the United Kingdom*, op. cit., §38-39.

warranting the confinement in a mental facility for receiving treatment is considered as lawful detention under sub-paragraph (e).

In the recent years, the ECtHR has reiterated that a detention may be justified under more than one sub-paragraphs, as the applicability of one ground does not necessarily preclude another.[120] In particular, the Court has declared that both sub-paragraphs (a) and (e) apply to the TBS orders (*terbeschikkingstelling*) in the Netherlands.[121]

A distinction is made between sub-paragraphs (a) and (e) according to the ECtHR case law.[122] Firstly, while the deprivation of liberty under Article 5/1(a) is inherently punitive, detention under Article 5/1(e) is not. Secondly, even though neither category may be detained in inhuman or degrading conditions according to Article 3, persons detained under Article 5/1(e) must be detained in an appropriate therapeutic environment. Thirdly, Article 5/1(a) allows for a fixed period of detention, which is set by a sentence; no re-assessment is needed at the execution phase. However, the unsoundness of mind is an inconsistent condition that may vary over time. Thus, in combination with Article 5/1(e) and 5/4, the ECtHR provides a right to periodic hearings. Fourthly, in relation with the previous one, persons detained under Article 5/1(e) have a permanent ongoing right to be informed of the reasons for their detention, which is not the case for those detained under Article 5/1(a).[123]

These aforementioned points are mainly derived from the judgments *Aerts v. Belgium* and *Bizzotto v. Greece*[124]. In both cases, the applicants were drug addicts who had committed offences. In the *Bizzotto v. Greece* case, the applicant was convicted by the domestic court and sentenced to six years' imprisonment with medical facilities. The ECtHR determined that only Article 5/1(a) applies to this case. However, the lack of treatment opportunities in prison is not accepted as a violation of Article 5/1(a). In *Aerts v. Belgium*, however, the ECtHR considered that only Article 5/1(e) is applicable to this case, because by the domestic court, the applicant is accepted as a mentally disordered offender who was incapable of controlling their actions. As he was not criminally responsible, the applicant could not be convicted within the meaning of Article 5/1(a).[125] As the applicant was not detained in a hospital, clinic, or other appropriate institution, but in a prison; the detention of the applicant was not lawful and there has been a breach of Article 5/1(e).

The ECtHR's approach to these cases differed due to the domestic courts' final judgments. One applicant was found guilty, while the other was found not criminally responsible by their domestic courts. This distinction determines the ECtHR's approach towards to the case, including the question of whether a 'conviction' should be established. As a result, the Court has stated that when a "conviction" is established by a "competent

120 *Morsink v. the Netherlands,* op. cit., 61; *Constancia v. the Netherlands* (dec.), App no 73560/12, (ECtHR, 26 March 2015), §29.

121 *Morsink v. the Netherlands,* op. cit., §62; *Constancia v. the Netherlands* (dec.), op. cit., §31; *Brand v. the Netherlands,* op. cit., §59.

122 *See*. Bartlett et al. (2007), p. 39-40.

123 *See*. Bartlett et al. (2007), p. 39-40.

124 *Bizzotto v. Greece,* App no 22126/93, (ECtHR, 15 November 1996).

125 *Aerts v. Belgium*, op. cit., §45.

court", and following and dependent upon that conviction, a "lawful detention" is ordered by the same court, sub-paragraph (a) applies. If the detention is related to the detention of persons of unsound mind, sub-paragraph (e) also applies. However, as previously mentioned, the Court accepts that one sub-paragraph cannot preclude one other; both Article 5/1 (a) and (e) may be applicable at the same time.

2.2.4 Detention on Remand

According to Article 5/1(c): *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so"*.

A person may be detained for the purpose of being brought before the competent legal authority solely in the context of criminal proceedings, on the grounds of reasonable suspicion that they have committed an offence.[126] In circumstances where a person is arrested on the basis of reasonable suspicion that they have committed an criminal offence, or to prevent them from committing an offence, or to prevent them from fleeing after having done so, the conditions of the ECHR are only met only if the arrest or detention is truly intended to bring them before a competent judicial authority.[127] According to Article 5/3, the term *"legal authority"* means *"judge or other officer authorised by law to exercise judicial power"*.

The detention under Article 5/1(c) comes to an end when the person on remand is convicted by a first instance court; thereafter, the subsequent detention falls under Article 5/1(a). However, when a first instance court does not convict a person due to lack of mental capacity, the prolonged detention falls under Article 5/1(e).[128]

The Court implicitly accepted that the arrest of a suspect and their subsequent confinement in a psychiatric hospital raised *separate* issues of lawfulness under sub-paragraphs (c) and (e) of Article 5/1 of the Convention.[129] Consequently, Article 5/1(c) is excluded from the test, in this dissertation.

2.2.5 Detention for Non-Compliance with a Court Order or Legal Obligation

According to Article 5/1(b): *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure*

126 *Selahattin Demirtaş v. Turkey (no. 2) [GC]*, App no 14305/17, (ECtHR, 22 December 2020), §314; *Şahin Alpay v. Turkey*, App no 16538/17, (ECtHR, 20 March 2018), §103.

127 Bleichrodt (2018), p.457.

128 *Herczegfalvy v. Austria*, op. cit., §62-64.

129 *Ümit Bilgiç v. Turkey*, §91; *Gouloub Atanassov v. Bulgaria*, App no 73281/01, (ECtHR, 06 November 2008), §71, *R.L. and M.-J.D. v. France*, App no 44568/98, (ECtHR, 19 May 2004), §74-129.

prescribed by law: (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.". As it can be seen from the regulation, the first admissible form of deprivation of liberty cited under sub-paragraph (b) is the consequence of failure to comply with a lawful order of a court. The second form mentioned under sub-paragraph (b) is deprivation of liberty to ensure compliance with an obligation regulated by law and this one is seen as less clear than the first form.[130]

Non-compliance includes refusal to undergo a psychiatric[131] or medical[132] examination imposed by a court. However, there should be a balance between the importance of fulfilling the obligation in question and the importance of the right to liberty. The length of detention is one relevant factor in achieving such a balance.[133] In the *Nowicka v. Poland* case, the applicant was held in custody for several days prior to and following a psychiatric examination, which the Court deemed to be a violation of Article 5/1(b).[134]

The Court also provides other relevant factors, including the nature of the obligation arising from the relevant legislation including its underlying object and purpose, the person being detained, and the particular circumstances leading to the detention.[135] In the *Vasileva v. Denmark* case, the applicant was arrested for refusing to comply with the obligation to disclose her identity to the police, and she was released as soon as the obligation had been fulfilled.[136] The Court determined that the applicant's thirteen-and-a-half-hour detention failed to strike a fair balance between the need to ensure the fulfilment of the obligation and the right to liberty; thereby violating Article 5/1(b).[137]

2.3 Principles: Lawfulness of Detention

In addition to the aforementioned grounds for detention, there are also pertinent principles of ECtHR jurisprudence pertaining to the lawfulness of detention, which will be discussed in greater detail in the following subsections.

2.3.1 Compliance with National Law

In order to meet the requirement of lawfulness, detention must be *"in accordance with a procedure prescribed by law"*. The Convention essentially refers to national law and imposes an obligation to comply with its substantive and procedural regulations.[138] It is not only the domestic regulations, but also, the other applicable legal standards such as bilateral

130 Bleichrodt (2018), p. 454.
131 *X v. Federal Republic of Germany*, op. cit., p. 92-94.
132 *X. Austria*, App no 8278/78, (ECoHR, 13 December 1979), p. 154-159.
133 *Nowicka v. Poland*, App no 30218/96, (ECtHR, 03 December 2002), §61.
134 *Nowicka v. Poland*, op. cit., §65.
135 *Vasileva v. Denmark*, App no 52792/99, (ECtHR, 25 September 2003), §38.
136 *Vasileva v. Denmark*, op. cit., §38.
137 *Vasileva v. Denmark*, op. cit., §42-43.
138 *S., V. and A. v. Denmark*, App nos 35553/12, 36678/12, 36711/12, (ECtHR, 22 October 2018), § 74.

or international treaty, which form part of the domestic law order.[139] The detention order justifying continued detention must therefore be valid under domestic law for the entire period of detention.[140] It is therefore crucial to clearly define the conditions for deprivation of liberty under domestic law, and to make the law foreseeable, so that it meets the standard of *lawfulness* criterion of the Convention.[141]

According to the Court, Article 5/1 is also pertinent to the *"quality of the law"* and that it must be compatible with the rule of law and the overarching concept of the whole Convention. In this context, where a national law permits the deprivation of liberty, it must be sufficiently accessible, precise, and foreseeable in its application to avoid any risk of arbitrariness.[142]

2.3.2 No Arbitrariness

The fundamental purpose of Article 5 is to protect individuals from arbitrariness; therefore, any such detentions are incompatible with Article 5.[143] According to the ECtHR, compliance with national law is not sufficient enough in this regard. Article 5/1 obliges an addition that any deprivation of liberty must be consistent with the aim of protecting the person against arbitrariness.[144] Therefore, any deprivation of liberty should be consistent with the aim of protecting the individual from arbitrariness.[145] The concept of *arbitrariness* in Article 5/1 goes beyond lack of conformity with national law, so that a deprivation of liberty may be lawful within the meaning of domestic law, yet still arbitrary and cosequently contrary to the Convention.[146]

The concept of arbitrariness varies to a certain extent depending on the type of detention. The Court has not set out an exhaustive list, however it is possible to extract some key principles from the case law. The occurrence of arbitrariness may be substantiated in instances where: (1) there is an element of bad faith or deception on the part of the authorities, notwithstanding compliance with the letter of national law; (2) the issuance and the execution of the detention order do not genuinely conform to the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5/1; (3) there was no link between the ground for the permitted deprivation of liberty relied on and the

139 *Medvedyev and Others v. France*, op. cit., §79; *Toniolo v. San Marino and Italy*, App no 44853/10, (ECtHR, 26 June 2012), §46; *Paci v. Belgium*, App no 45597/09, (ECtHR, 17 April 2018), §64.

140 *Paci v. Belgium*, op. cit., §64.

141 *Khudoyorov v. Russia*, App no 6847/02, (ECtHR, 08 November 2005), §125, *Ječius v. Lithuania*, App no 34578/97, (ECtHR, 31 July 2000), §56.

142 *Toniolo v. San Marino and Italy*, op. cit. §46; *Khudoyorov v. Russia*, op. cit., §125; *Ječius v. Lithuania*, op. cit., §56; *Baranowski v. Poland*, App no 28358/95, (ECtHR, 28 March 2000), §50-52.

143 Schabas (2015), p. 232.

144 *S., V. and A. v. Denmark*, op. cit., § 74; *James, Wells and Lee v. the United Kingdom*, App nos 25119/09, 57715/09, 57877/09, (ECtHR, 18 September 2012), §191.

145 *Witold Litwa v. Poland*, App no 26629/95, (ECtHR, 04 April 2000), §78; *S., V. and A. v. Denmark*, op. cit., §74.

146 *Creangă v. Romania*, App no 292266/03, (ECtHR, 23 February 2012), §84; *A. and Others v. the United Kingdom*, App no 3455/05, (ECtHR, 19 February 2009), §164.

place and circumstances of detention; and (4) where there was no proportionality between the ground of detention relied on and the detention in question.[147]

a) Court Order

A period of detention is, in principle, "lawful", if it is based on a court order.[148] The detention may remain in accordance with "a procedure prescribed by law" even in instances where domestic courts have admitted that there had been flaws in the detention proceedings, such as the failure to comply with the time limit, but held the detention to be lawful.[149] Consequently, even where there are errors of fact or law in the detention order, it does not automatically render the underlying period of detention unlawful under Article 5/1.[150]

The ECtHR draws a distinction between acts of domestic courts that fall within their jurisdiction and those which are in excess of jurisdiction, by stating that the excess of jurisdiction is unlawful and individuals must be protected from arbitrariness.[151] Detention orders are considered ex facie invalid in cases where the person concerned has not been duly notified of the hearing[152], the domestic courts fail to conduct the means inquiry as required by the national legislation[153], or the lower courts fail to properly consider alternatives to imprisonment[154].

b) Reasoning of Decisions

The reasoning pertaining to the detention order is a relevant factor in determining whether the detention in question can be considered arbitrary. Although a period of detention is based on a valid court order, the absence or lack of reasoning constitutes one of the elements taken into account by the Court when assessing the lawfulness of detention under Article 5/1.[155] On the other hand, a pre-trial detention cannot be regarded as arbitrary, if the domestic court has provided certain reasons to justify the continuation of the detention, unless the reasons given are *extremely laconic* and do not give any reference to legal provision which would justify the detention.[156]

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147 *James, Wells and Lee v. the United Kingdom*, op. cit., §191-195; *Saadi v. the United Kingdom*, App no 13229/03, (ECtHR, 29 January 2008), §68-74.

148 *Yefimenko v. Russia*, App no 152/04, (ECtHR, 12 February 2013), §102.

149 *Erkalo v. the Netherlands*, App no 89/1997/873/1085, (ECtHR, 02 September 1998), §52-60.

150 *Yefimenko v. Russia*, op. cit., §102-108; *Ječius v. Lithuania*, op. cit., §68.

151 *Benham v. the United Kingdom*, App no 19380/92, (29 November 1994), §46-48.

152 *Khudoyorov v. Russia*, op. cit., § 129.

153 *Lloyd and Others v. the United Kingdom*, App nos 29798/96, 30395/96, 34327/96, 34341/96, 35445/97 36267/97, 36367/97, 37551/97, 37706/97, 38261/97, 39378/98, 41590/98, 41593/98, 42040/98, 42097/98, 45420/99, 45844/99, 46326/99, 47144/99, 53062/99, 53111/99, 54969/00, 54973/00, 54997/00, 55046/00, 55068/00, 55071/00, 56109/00, 56231/00, 56232/00, 56233/00, 56429/00, 56441/00, 2460/03, 2482/03, 2483/03, 2484/03 and 2490/03, (ECtHR, 01 March 2005), §108.

154 *Lloyd and Others v. the United Kingdom*, op. cit., §113.

155 *S., V. and A. v. Denmark*, op. cit., §92; ECtHR, *Stašaitis v. Lithuania*, App no 47679/99, (ECtHR, 21 March 2002), §67.

156 *Khudoyorov v. Russia*, op. cit., §157; *S., V. and A. v. Denmark*, op. cit., §92.

Nevertheless, in one judgment, the ECtHR has mentioned that the Court may consider the applicant's detention to be in compliance with the national legislation, even in the absence of explicit reasoning in the detention order, where the national court is satisfied that the decision is consistent with domestic case law. Consequently, the failure to state reasons for the detention order does not render the detention unlawful, nor does it necessitate the immediate release of the detainee.[157]

2.4 Definitions of and Differences Between 'Deprivation of Liberty' and 'Restriction upon Liberty'

Article 5 of the Convention, its importance, and the related case law have been delineated and deliberated above. After elucidating the legal position under Article 5, it is now essential to proceed with the distinction between the deprivation of liberty and restriction of liberty.

Arrest and detention are regarded as extreme forms of restriction upon freedom of movement. The classic example that first comes to mind first is when a person is kept in a secure closed prison. However, it should be noted that Article 5 is not limited to this situation, as it should be. According to the Court, deprivation of liberty may take numerous other forms, and this diversity is increased by the development of legal norms and attitudes.[158]

The Court rules that house arrest for 24 hours a day is indisputably a deprivation of liberty within the meaning of Article 5.[159] However, the Court stated that there is no deprivation of liberty in cases where a person is placed under special police supervision with an obligation to return home by 21.00 and not to leave before 07.00, unless there is a valid reason and this valid reason is communicated to the relevant authorities in advance.[160] In another judgment, the Court has also ruled that a curfew from 22.00 to 06.00 does not amount to house arrest.[161] In these cases, persons were permitted to leave their residences during the day, and were able to lead a social life and to maintain relations with the outside world.[162] It can, therefore, be deducted that the Court considers the restriction of social interactions out of the house as a criterion in its assessment of Article 5.

The Court also examines whether there is an *element of coercion*[163] that indicates a deprivation of liberty within the meaning of Article 5/1. Even if the duration is short, if

157 *Minjat v. Switzerland*, App no 38223/97, (ECtHR, 23 October 2003), §43.
158 *Guzzardi v. Italy*, op. cit., §95.
159 *N.C. v. Italy*, App no 24952/94, (ECtHR, 11 January 2001), §33; *Nikolova v. Bulgaria* (No. 2), App no 40896/98, (ECtHR, 30 September 2004), §60.
160 *Raimondo v. Italy*, App no 12954/87, (ECtHR, 22 February 1994), §13.
161 *De Tommaso v. Italy*, App no 43395/09, (ECtHR, 23 February 2017), §17, §46.
162 *De Tommaso v. Italy*, op. cit., §88.
163 *Gillan and Quinton v. the United Kingdom*, App no 4158/05, (ECtHR, 12 February 2010), §57.

the applicant was stopped, compelled to remain where they were and subjected to a search, this is considered a deprivation of their freedom of movement.[164]

It is imperative to underline that there is a legal difference between a restriction upon a person's liberty and a deprivation of their liberty.[165] According to the Court, the distinction is derived from the seriousness of the restriction. In cases where the restriction on movement is deemed serious enough, it falls within the realm of a *deprivation of liberty*; however, the mere restrictions of liberty are subject only to Article 2 of the Protocol No. 4.[166] Although the United Kingdom and Türkiye have not ratified Protocol 4 to the ECHR[167], the ECtHR has, in its decisions, made reference to this Protocol in order to underline the distinction between restriction and deprivation, alongside the points that: *"The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends."*.[168]

Alternatives to detention may shape in different forms, depending on the case, such as community service, supervision, electronic monitoring or house arrest. These alternatives may entail more or less restrictions on freedom of movement or restriction of liberty; therefore, they are not equal in this respect. While the use of modern technologies can be seen as good practice, other forms of electronic surveillance, such as the wrist or ankle bracelets, are often considered as harsh, and should be avoided wherever possible.[169]

A significant decision on the issue of preventive detention, which had been ongoing for more than 10 years, was given in 2009.[170] It was found that the applicant was still suffering from a serious mental disorder that could no longer be qualified as pathological and did not have to be treated medically, having regard to the reports of neurological and psychiatric experts. It was expected that the applicant would commit further spontaneous acts of violence and he was dangerous to the public, therefore, his preventive detention

164 *Foka v. Turkey*, App no 28940/95, (ECtHR, 24 June 2008), §75. Example of less than 30 minutes: *See. Gillan and Quinton v. the United Kingdom*, op. cit., §57.

165 *Stanev v. Bulgaria*, op. cit., §115. Example of 2 hours in police quarters of a child: *See. X v. Federal Republic of Germany*, App no 8819/79, (ECtHR, 19 March 1981), p.158.

166 *De Tommaso v. Italy*, op. cit., §80; *Engel and Others v. the Netherlands*, op. cit., §58; *Creangă v. Romania*, §91-92.

167 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Protocol No. 11, Strasbourg, 16/09/1963.

168 *Guzzardi v. Italy*, op. cit., §91; *Stanev v. Bulgaria*, op. cit., §115.

169 United Nations High Commissioner for Refugees. (2012). *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*. Retrieved from https://www.refworld.org/pdfid/503489533b8.pdf, (Accessed: 24/07/2020), §40.

170 *M. v. Germany*, App no 19359/04, (ECtHR, 17 December 2009).

was necessary.[171] However, the applicant's preventive detention was not based on the ground that the applicant was of unsound mind, therefore the applicant's detention could not be justified under Article 5/1(e) by the Court.[172] In addition, no causal link was found between the applicant's continued detention and their previous conviction. Consequently, the detention beyond 10-year period was not also justified under Article 5/1(a).[173] Due to the fact that this preventive detention beyond the 10-year period was not justified under any of the sub-paragraphs of Article 5/1, there has been a violation.

Following the ECtHR judgments, countries readily adopted other measures, including GPS satellite tracking for high-risk sex offenders. Electronic monitoring is a remote surveillance technology, which is used to locate and to track movements of offenders and suspects. Initially, radio-frequency technology was used to monitor; and then the second generation of electronic monitoring has arrived, which is the use of the American Global Positioning System (GPS).[174] In *Mautes v. Germany*[175], the Court ruled against the continued preventive imprisonment of sex offenders in Germany.

2.5 State's Obligations Derived from Article 5

As previously mentioned, Article 1 of the ECHR regulates that the High Contracting States are obliged to secure the rights and freedoms delineated in Section I of the Convention. Consequently, this obligation is binding for Türkiye, England and Wales, and the Netherlands. For instance, the first sentence of the Article 5/1 imposes a positive obligation on the States not only to refrain from active infringement of the rights in question, but also to take appropriate steps to provide protection against an unlawful interference with those rights to everyone within its jurisdiction.[176] According to the case law, States are therefore obliged to take measures providing effective protection for vulnerable persons. For instance, measures must be implemented to prevent the deprivation of liberty, of which the authorities have or ought to have knowledge. Therefore, private psychiatric institutions must not only be licensed, but also regularly

171 *M. v. Germany*, op. cit., §12.

172 *M. v. Germany*, op. cit., §103-105.

173 *M. v. Germany*, op. cit., §97-101.

174 Nellis, M. (2014). Understanding the electronic monitoring of offenders in Europe: expansion, regulation and prospects. *Crime, Law and Social Change*, 62, p. 489, 490.

175 *Mautes v. Germany*, App no 20008/07, (ECtHR, 13/01/2011).

176 *"The Macedonian authorities not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of Article 5 of the Convention, but they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer. The Court considers therefore that the responsibility of the respondent State is also engaged in respect of the applicant's detention between 23 January and 28 May 2004."*; ECtHR, El-Masri v. the former Yugoslav Republic of Macedonia, Application no. 39630/09, 13/12/2012, §239.

supervised and controlled to ensure that confinement and medical treatment are justified.[177]

Article 5 establishes four obligations, namely the obligation to inform promptly, the obligation to promptly provide the trial, the obligation to provide a remedy to challenge, and the obligation to provide compensation. These obligations will be examined in detail in the following sub-sections.

2.5.1 Obligation to Inform Promptly

Article 5/2 of the ECHR regulates that: *"Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest..."*. The Court has determined that, this obligation to inform, which applies to all categories of persons detained under Article 5/1, is a direct consequence of the right to challenge the lawfulness of the detention. The Court has reasoned that such a challenge would be impossible if the person was not aware of the grounds for their detention. Consequently, this obligation constitutes an essential role for the detained persons.

The ECtHR has established that Article 5/2 of the ECHR safeguards that any person arrested should know the reasons for their arrest. While this information should be provided promptly, it is not required to be done by the arresting officer at the very moment of the arrest.[178]

In summary, the aforementioned obligation can be sub-divided into three constituent elements. Firstly, the information should be given promptly; secondly, the reason for detention should be provided; and thirdly, the information should be comprehensible to the individual. With regard to the third component of comprehensibility, it is essential that the information is communicated in non-technical terms and in the language, or one of the languages, understood by the applicants if they are foreigners. There is therefore an obligation to provide a translation or an interpreter, depending on whether the information is conveyed in written or verbal form.

The language and interpreter elements are also regulated in Article 6. The information pertaining to the accusation must be in a language which the person who is charged can understand. In the case of mentally disordered persons, authorities are obliged to undertake additional steps to enable the person to be informed in detail of the nature and cause of the accusation brought against them.[179]

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177 ECtHR, Storck v. Germany, op. cit., §102-103.

178 *Fox, Campbell and Hartley v. the United Kingdom*, App nos 12244/86, 12245/86, 12383/86, (ECtHR, 30 August 1990), §40.

179 *"They could have ordered the applicant to attend the appointment with the psychiatrist and to appear at the hearing and, in the event of his failing to comply, arranged for him to be represented by his supervisor or a lawyer. That would have enabled the applicant to understand the proceedings and to be informed in detail of the nature and cause of the accusation against him within the meaning of Article 6 § 3 (a) of the Convention; it would also have enabled the Criminal Court to reach its decision entirely fairly.". See. Vaudelle v. France*, op. cit., §65.

2.5.2 Obligation to Promptly Provide the Trial

Article 5/3 establishes that, *"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."*.

The term "promptly" is employed in this paragraph of the ECHR, yet in the case law of the ECtHR, it is referred to as "reasonable time".[180] According to the Court, considering the unique features of each individual case, the question whether or not a period of detention is reasonable cannot be made in the abstract; rather, it must be evaluated on a case-by-case basis; therefore, there is no fixed time frame applicable to all cases.[181]

According to Article 5/3, primarily, the national judicial authorities are responsible for ensuring that the pre-trial detention of an accused does not exceed a reasonable time.[182] In accordance with the principle of the presumption of innocence, all the facts arguing for or against the existence of the above-mentioned public interest requirement, which justifies a derogation from the rule regulated in Article 5, must be examined, and documented in these decisions on the requests for release.[183]

2.5.3 Obligation to Provide Remedy to Challenge the Lawfulness of the Detention

Article 5/4 regulates that: *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."*. This obligation applies to all categories of persons detained under Article 5/1. Article 5/4 is the *habeas corpus* provision of the Convention which provides detainees with the right to actively obtain a judicial review of their detention.[184]

In Article 5/4, it is required that the decision should be taken "speedily". This is due to the fact that when the liberty of the individual is at stake, States must guarantee that the proceedings are conducted as quickly as possible.[185] As previously mentioned, Article 5/3 employs the term "promptly", ECtHR case law utilises "reasonable time", and in Article 5/4 refers to the term "speedily". To clarify this ambiguity, the Court states that the notion of "speedily" indicates a lesser urgency then that of "promptly".[186] The Court further clarigies

180 *Buzadji v. the Republic of Moldova*, App no 23755/07, (ECtHR, 05 July 2016), §89-91; *Kudła v. Poland*, App no 30210/96, (ECtHR, 26 October 2000), §110; *Labita v. Italy*, App no 26772/95, (ECtHR, 06 April 2000), §152.

181 *McKay v. the United Kingdom*, App no 543/03, (ECtHR, 03 October 2006), §45.

182 *Labita v. Italy*, op. cit., §152; *McKay v. the United Kingdom*, op. cit., §41-45.

183 *Buzadji v. the Republic of Moldova*, op. cit., §91; *Kudła v. Poland*, op. cit., §110; *McKay v. the United Kingdom*, op. cit., §43; *Muller v. France*, App no 21802/93, (ECtHR, 17 March 1997), §35.

184 *Baranowski v. Poland*, op. cit., §68; *Jabłoński v. Poland*, App no 33492/96, (ECtHR, 21 December 2000), §91; *Mooren v. Germany*, op. cit., §106.

185 *Khlaifia and Others v. Italy*, App no 16483/12, (ECtHR, 15 December 2016), §131.

186 *Brogan and Others v. the United Kingdom*, App nos 11209/84, 11234/84, 11266/84, 11386/85, (ECtHR, 29 November 1988), §59; *E. v. Norway*, App no 11701/85, (ECtHR, 29 August 1990), §64.

that the term "speedily" cannot be defined in the abstract meaning; rather, it should be determined in the light of the particular circumstances of each case.[187] These circumstances include the complexity of the procedure, their conduct by the domestic authorities and by the applicant, what was at stake for the latter, and any specificities of the domestic procedure.[188]

The term "court" as mentioned in this article does not necessarily have to be a court of law of the classic kind that is integrated within the standard judicial system of the country, according to the ECtHR. The term "court" refers to bodies that exhibit not only common fundamental characteristics, of which the most important is independence of the executive and of the parties to the case, but also guarantees appropriate to the kind of deprivation of liberty in question of a judicial proceeding, the forms of which may vary from one domain to another.[189]

According to the principles derived from the case law pertaining to mentally disordered persons and Article 5/4, the following provisions apply:[190]

(a) The initial detention period may be granted by an administrative authority as an emergency measure provided that it is of short duration and the person concerned is able to bring judicial proceedings "speedily" to challenge the lawfulness of any such detention including, where appropriate, its lawful justification as an emergency measure.[191]

(b) Persons of unsound mind who are compulsorily confined in a psychiatric institution for an indefinite time or long period are also entitled to initiate judicial proceedings at reasonable intervals before a court to challange the lawfulness of their detention.[192]

(c) The procedure followed have a judicial character and provide the person concerned with adequate safeguards for the type of deprivation of liberty at issue. In order to determine whether a procedure provides adequate safeguards, the particular nature of the circumstances in which such proceedings take place must be taken into account.[193]

(d) The judicial proceedings do not always have to be accompanied by the same guarantees as those required under Article 6/1. However, it is essential that the person concerned should have access to a court and the opportunity to be heard in person or through some form of representation.[194] Special procedural safeguards may be needed to protect the interests of persons who are not fully capable of advocating for themselves

187 *R.M.D. v. Switzerland*, App no 19800/92, (ECtHR, 28 September 1997), §42.
188 *Mehmet Hasan Altan v. Turkey*, App no 13237/17, (ECtHR, 20 March 2018), §162-163.
189 *Weeks v. the United Kingdom*, App no 9787/82, (ECtHR, 02 March 1987), §61.
190 Summarized in *M.H. v. the United Kingdom*, App no 11577/06, (ECtHR, 22 October 2013), §77.
191 *Winterwerp v. the Netherlands*, op. cit., §57-61.
192 *Musial v. Poland*, App no 24557/94, (ECtHR, 25 March 1999), §43; *Luberti v. Italy*, op. cit., §31; *Megyeri v. Germany*, App no 13770/88, (ECtHR, 12 May 1992), §22.
193 *Wassink v. the Netherlands*, App no 12535/86, (ECtHR, 27 September 1990), §30; *Megyeri v. Germany*, op. cit., §22.
194 *Winterwerp v. the Netherlands*, op. cit., §60; *Megyeri v. Germany*, op. cit., §22.

because of their mental disabilities.[195] Consequently, Article 5/4 does not require that mentally disordered offenders should take the initiative to obtain legal representation.[196]

As a consequence of the aforementioned it can be concluded that when persons confined in a psychiatric institution on the ground of committing acts that are deemed criminal offences, yet for which they cannot be held responsible because of a mental disorder, should, in the absence of exceptional circumstances, receive legal assistance in following proceedings regarding the continuance, suspension or termination of their detention.[197]

The procedure set out in Article 5/4 does not necessarily lead to freedom; instead, it may also lead to another form of detention. In instances where the detention of a person falls under both sub-paragraphs (a) and (e) of Article 5/1, it would be contrary to the aim and purpose of Article 5 to interpret paragraph 4 of that provision in such a way that the lawfulness of the detention in a psychiatric institution cannot be reviewed just because the initial decision ordering detention was taken by a court under Article 5/1(a). The reason for ensuring a review under Article 5/4 is equally important for detained persons in a psychiatric institution whether or not they are serving a term of imprisonment at the same time.[198]

2.5.4 Obligation to Provide Compensation

Article 5/5 of the Convention reads as follows: "*Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation*".

The right to compensation for unlawful detention of a person is regulated in Article 5/5, and this right is a direct and enforceable right before the national courts.[199] In order to comply with Article 5/5, it is necessary for there to be the possibility of submitting an application for compensation in respect of a deprivation of liberty carried out in contravention of paragraphs 1, 2, 3 or 4 is possible.[200]

According to the Court, there can be no question of compensation where there is no pecuniary or non-pecuniary damage on account of the violation of another of the paragraphs of the Article, due to the word choice of "victim".[201] The States' obligation to provide compensation relates primarily to financial compensation and it does not confer the detained person's release.[202] Moreover, Article 5/5 does not entitle the applicant to a

195 *M.H. v. the United Kingdom*, §77; *Winterwerp v. the Netherlands*, op. cit., §66.
196 *Megyeri v. Germany*, op. cit., §22.
197 *Megyeri v. Germany*, op. cit., §23.
198 In *Kuttner v. Austria*, the applicant's request to lift the measure of detention in a mental institution could lead only to his transfer to an ordinary prison. *See. Kuttner v. Austria*, App no 7997/08, (ECtHR, 16 July 2015), §31.
199 *A. and Others v. the United Kingdom*, op. cit., §229.
200 *Michalák v. Slovakia*, App no 30157/03, (ECtHR, 08 February 2011), §204.
201 *Wassink v. The Netherlands*, op. cit., §30.
202 *Bozano v. France*, App no 9990/82, (ECoHR, 15 May 1984), p. 144.

particular amount of compensation.[203] In determining whether there has been a violation of Article 5/5, the Court takes account of its own practices under Article 41 of the Convention in similar cases, as well as to the factual elements of the case, such as the duration of the applicant's detention.[204]

2.6 Analysis of Article 5

As previously stated, Article 5 is of great value for this research topic, as it regulates obligations to the Contracting Parties. There are four obligations regulated in Article 5: the obligation to inform the person promptly, the obligation to promptly provide the trial, the obligation to provide a remedy to challenge, and if the deprivation of liberty is found unlawful, then the obligation to provide compensation. It is important to note that these obligations are not provided solely for mentally disordered offenders; however, they are applicable to assess the lawfulness of any detention. It can be even claimed that these obligations carry more importance for the mentally disordered offenders to create safeguards for this vulnerable group, who may have limited understanding of the criminal process. The obligation to inform promptly, which regulates that the information must be in a language the person understand, should therefore be interpreted to include explanations to persons with mental disorders in a way that they can understand.

The right to liberty is especially important in relation to the research question of this dissertation, as it is regarding deprivation of liberty. It is, therefore, essential to note that any deprivation of liberty can be deemed unlawful, unless it falls within one of the permissible grounds specified in sub-paragraphs. The sub-paragraph (a) regulates the lawful detention of a person after conviction by a competent court, and sub-paragraph (e) regulates the detention for medical or social reasons, and it includes the detention of *persons of unsound mind*. Therefore, Article 5/1(a) and Article 5/1(e) of the ECHR both pertain to the deprivation of liberty in different contexts. In the context of sentencing mentally disordered offenders, sub-paragraphs can be relevant, but they serve different purposes. The ECtHR has ruled that the deprivation of liberty may fall within the scope of both sub-paragraphs (a) and (e)[205] for mentally disordered offenders, thus the applicability of one ground does not necessarily preclude another.[206] Consequently, a conviction that finds the guilt of an accused by a competent court is considered as lawful detention under sub-paragraph (a); at the same time, being satisfied that the applicant is suffering from a mental disorder warranting the confinement in a mental facility for receiving treatment is considered as lawful detention under sub-paragraph (e).

However, the Court implicitly stated that the arrest of a suspect and their confinement in a psychiatric hospital raised *separate* issues of lawfulness under sub-paragraphs (c) and

203 *Şahin Çağdaş v. Turkey*, App no 28137/02, (ECtHR, 11 April 2006), §34.
204 *Vasilevskiy and Bogdanov v. Russia*, App nos 52241/14, 74222/14, (ECtHR, 10 July 2018), §23.
205 *X v. the United Kingdom*, op. cit., §38-39.
206 *Morsink v. the Netherlands*, op. cit., 61; *Constancia v. the Netherlands* (dec.), op. cit., §29.

(e) of Article 5/1 of the Convention.[207] In this dissertation, therefore, sub-paragraph (c) is separated from the ECHR test.

The concept of "*persons of unsound mind*", and its autonomous meaning were elaborately examined under the subsection *2.2.1.1 Persons of unsound mind*. Even though the chosen notion was rightly criticised as being insufficiently precise,[208] old-fashioned and even 'discriminatory',[209] 'embarrassingly archaic',[210] and 'pejorative',[211] it is important that the ECtHR accepts that there is no definitive interpretation of this term, and that its meaning is continuously evolving.[212] It is true that this terminology is problematic and does not fit well within the current legal understanding, however international covenants on human rights do not get amendments after it is signed, therefore the original terminology remains unaltered.

The *Winterwerp criteria* play a significant role in determining the *unsound mind*. As demonstrated in *TABLE 1: Chronological Evolution of the Winterwerp Criteria*, the *Winterwerp criteria* have been updated in years by the ECtHR. However, these three minimum conditions are kept being repeated in every case concerning applications under Article 5/1(e). According to the *Winterwerp criteria,* the Court will examine: 1. whether the applicant has reliably been shown to be of unsound mind, in other words, that their mental disorder was of a kind or degree warranting compulsory confinement,[213] 2. whether the medical assessment is based on the actual state of mental health of the person concerned and not solely on past events (especially given the evident tendency of mental disorders to develop over time),[214] 3. whether the existence of a mental disorder warranting compulsory confinement is reliably shown at the date of detention and throughout the detention, especially given the marked tendency of mental disorders to develop over time.[215] It is also important to involve the person as much as possible in protective measures, by seeking their opinion and will.[216] The welfare of the person with mental disorder must also be taken into account, however, the *objective need* for accommodation and for social assistance should not *automatically* lead to the deprivation of liberty.[217]

In order to summarize the case law regarding Article 5/1(e), it can be stated that a lawful detention shall be based on a medical report that is written by objective medical expertise, that demonstrates a true mental disorder which is of a kind or degree warranting

207 *Ümit Bilgiç v. Turkey*, §91; *Gouloub Atanassov v. Bulgaria,* op. cit., §71, *R.L. and M.-J.D. v. France*, op. cit., §74-129.
208 Szwed (2020), p. 11.
209 Szwed (2020), p. 14.
210 Schabas (2015), p. 220.
211 Jiménez (2015), p. 220.
212 *Winterwerp v. the Netherlands*, op. cit., §37.
213 *M.B. v. Poland,* op. cit., §60.
214 *Ibid,* §64.
215 *Ibid,* §63.
216 *P.W. v. Austria*, op. cit., §56.
217 *P.W. v. Austria*, op. cit., §56.

compulsory confinement, that is adequately recent and not solely based on past events by including the actual mental state, and that also reflects on the person's opinion and will[218]. The welfare of the person with a mental disorder must be also taken into account, however, the *objective need* for accommodation and for social assistance should not *automatically* lead to deprivation of liberty.[219] When the medical evidence shows recovery, and therefore, there is no medical reason for the continuance of the detention, the release should take place immediately; otherwise, it would be incompatible with Article 5/1(e).[220] However what shall be understood from *recovery* is not specified. It is acknowledged that certain mental disorders may be incurable, yet when the risk of dangerousness is significantly reduced, this should be regarded as a compelling justification for the termination of detention.

The significance of Articles 5 and 5/1(e) lies in its provision of legal safeguards for persons with mental disorders who may be detained for their own safety or that of others. In this regard, Article 5 ensures that individuals with mental disorders are not unlawfully deprived of their liberty. It requires that such detention of mentally disordered individuals must be in accordance with legal procedures and that they be promptly brought before a competent legal authority. By preventing arbitrary detention, Article 5 ensures that persons with mental disorders receive appropriate legal protections. Furthermore, Article 5/1(e) allows for their detention for the purpose of receiving necessary medical or psychiatric attention, ensuring that their mental health needs are addressed during the period of detention. Lastly, detention under Article 5 requires periodic review to assess the continued necessity of the detention and the person's mental condition. With these periodic reviews, Article 5 ensures that the detention remains lawful. In summary, Article 5 provides: 1) legal safeguards, 2) protection of rights, 3) access to treatment, and 4) periodic review.

Article 5 is applicable not only to the cases involving prison, but also to a wide rage of situations, including the placements in the psychiatric institutions.[221] The Court also holds that the detention of mentally disordered persons can only be regarded as "lawful" within the meaning of Article 5/1(e) if it takes place in a hospital, clinic, or other appropriate institution authorised for the detention of such persons.[222] In practice, mentally disordered offenders can be taken to prison psychiatric wards or wings. It should also be considered under the "other appropriate institution" category, since the therapeutic purpose that is aimed at curing, improving their mental-health condition, or bringing about a reduction in or control over their dangerousness, can be achieved.[223] The Court establishes that in an

218 *P.W. v. Austria*, op. cit., §56.
219 *P.W. v. Austria*, op. cit., §56.
220 *R.L. and M.-J.D. v. France*, op. cit., §124-128.
221 *Stanev v. Bulgaria*, op. cit.
222 *Ashingdane v. the United Kingdom*, op. cit., §44; *O.H. v. Germany*, op. cit., §79; *L.B. v. Belgium*, op. cit., §93; *Hutchison Reid v. the United Kingdom*, op. cit., §49.
223 These criteria are mentioned in *Rooman v. Belgium*, op. cit., §208.

appropriate institution, appropriate treatment must be provided.[224] Even though, the Court initially stated that Article 5/1(e) *is not in principle concerned with suitable treatment or conditions* in 1985,[225] it gradually *expanded the scope of Article 5/1(e)* through its case law.[226] What constitutes *suitable* will be explained under the subsection *3.7 Analysis and Historical Development of Holding Article 5/1(e) and Article 3 Together* below, and *Table 2* will demonstrate the chronological evolution. The commutation, remission, termination and the conditional release of the patient are also related to Article 3, and these will be elaborated below.

The concept of *alcoholics* should also be discussed, as Article 5/1(e) does not only regulate the lawful detention for persons of unsound mind, but also alcoholics. According to the Court, the scope of it is not limited to persons who are in a clinical state of alcoholism.[227] Consequently, persons who have not been medically diagnosed as "alcoholics", but whose behaviour under the influence of alcohol puts the public order at risk or themselves, can be detained to protect of the public or their own interests, such as their health or personal safety, regardless of whether or not they are addicted to alcohol.[228] Therefore, alcohol consumption itself does not automatically constitute a sufficient reason to legally detain a person.[229]

To address the foundation of addiction, two models have been proposed: the brain disease model[230] and the choice model[231]. As their names suggest, they are directly opposing each other. Even though in some cases, addiction, severe intoxication, or drug-induced psychosis may alter the sense of reality, addiction has been shown to have no direct impact on cognitive capacity for rationality.[232]

In some criminal justice systems – for instance in Türkiye, alcohol and substance use disorders are recognised as mental disorders. Given that alcohol and substance use disorders are mentioned in international diagnostic books[233], alcohol and substance

224 *Rooman v. Belgium*, op. cit., §203-205.

225 Emphasis added *Ashingdane v. the United Kingdom*, op. cit., §44.

226 Emphasis added *Rooman v. Belgium*, op. cit., §207.

227 *Kharin v. Russia*, op. cit., §34; *Witold Litwa v. Poland*, op. cit., §60-61.

228 *Hilda Hafsteinsdóttir v. Iceland*, op. cit., §42; *Kharin v. Russia*, op. cit., §34.

229 *Petschulies v. Germany*, op. cit., §65; *Witold Litwa v. Poland*, op. cit., §61-62; *Kharin v. Russia*, op. cit., §34.

230 *"Scientific advances over the past 20 years have shown that drug addiction is a chronic, relapsing desease that results from the prolonged effects of drugs on the brain." See.* Leshner, A. (1997). Addiction is a Brain Disease, and it Matters. *Science, 278*(5335), 45-47, p. 45.

231 *"Addiction is a disorder of choice."*, Heyman, G. (2010). *Addiction: A Disorder of Choice*. Cambridge, MA and London, England: Harvard University Press, p. 173.

232 Goldberg, A., & Roef, D. (2019). Addiction, Capacities and Criminal Responsibility – a Comparative Analysis. In *Addiction, capacities and criminal responsibility. A comparative analysis* (pp. 209-236). (Maastricht Law Series; Vol. 14). Eleven International Publishing, p. 4.

233 International Classification of Diseases (ICD-11) has the section *"Disorders due to Substance Use and Addictive Behaviours", See.* <https://icd.who.int/browse/2024-01/mms/en#1602669465> accessed 24 February 2024.

addicts can, within the concept of ECHR, fall under the category of *persons of unsound mind.* In any case, the persons who are persons of unsound mind, alcoholics, and drug addicts may be lawfully detained according to Article 5/1(e).

Overall, obligations regulated under Article 5 are particularly important for mentally disordered offenders, who may have limited understanding of the legal process and require additional safeguards to protect their rights. Article 5 and Article 5/1(e) of the ECHR play a critical role in the safeguarding of the rights of mentally disordered offenders, ensuring that any deprivation of liberty is lawful, justified, and respectful of the dignity and well-being of the person. Article 5 recognizes the need to consider the individual circumstances of mentally disordered offenders, including their mental state, opinion, and welfare, thereby ensuring that any deprivation of liberty is justified by genuine medical necessity and respects the dignity and rights of the individual.

In this subsection, general information was provided on relevant paragraphs of Article 5 and the ECtHR case law thereon. The integral analysis of Article 5 in conjunction with other articles will be provided under *Section 7*. Below, Article 2 and 3, the right to life and the prohibition of torture, inhuman or degrading treatment or punishment will be examined.

SECTION 3: RIGHT TO LIFE AND PROHIBITION OF TORTURE, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (ARTICLES 2 AND 3)

3.1 Introduction to Right to Health

The right to physical and mental health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. As mentioned above, the right to health is recognised and mentioned in numerous international human rights documents. Article 25 of the Universal Declaration of Human Rights affirms that *"Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services"*. The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to health in international human rights law. In accordance with Article 12/1 of the Covenant, States parties recognise *"the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"*, while Article 12/2 enumerates, by way of illustration, a number of *"steps to be taken by the States parties...*

Diagnostic and Statistical Manual of Mental Disorders (DSM-5-TR) has the section *"Substance-Related and Addictive Disorders", See.* <https://www.psychdb.com/addictions/home> accessed 24 February 2024.

to achieve the full realization of this right". Additionally, the right to health is recognised in Article 5/e(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in Article 11/1(f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and in Article 24 of the Convention on the Rights of the Child of 1989. Several regional human rights instruments also recognise the right to health, such as the European Social Charter of 1961 as revised (Article 11), the African Charter on Human and Peoples' Rights of 1981 (Article 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (Article 10). Similarly, the right to health has been proclaimed by the Commission on Human Rights, as well as in the Vienna Declaration and Programme of Action of 1993; the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (resolution 46/119) adopted by the United Nations General Assembly in 1991, and the Committee's General Comment No. 5 on Persons with Disabilities apply to persons with mental illness. While drafting Article 12 of the Covenant, the Third Committee of the United Nations General Assembly did not adopt the definition of health contained in the preamble to the Constitution of the World Health Organization, which conceptualizes health as *"a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"*. However, the reference in Article 12/1 of the Covenant to "*the highest attainable standard of physical and mental health*" is not limited to the right to healthcare. General Comment No. 14 sets out the following *interrelated and essential* elements for the right to health: availability, accessibility, acceptability, and quality.[234] In addition to these elements, two more principles are also accepted for the right to health: accountability and participation.[235]

It is remarkable that the *right to health* and the *right to mental health* are not regulated in the ECHR or in its Additional Protocols. The ECtHR addresses these rights through other articles, such as the Articles 2 and 3. The Court finds that withholding of *necessary care* may constitute a violation of Article 3 and/or Article 2. It also reiterates that Article 2 ranks as one of the most fundamental provisions in the Convention, in conjunction with Article 3, it enshrines one of the core values of the democratic societies that constitute the Council of Europe.[236] Therefore, these two articles are examined together in this dissertation, at the second priority order.

234 *See.* <https://www.refworld.org/pdfid/4538838d0.pdf>, accessed 22 November 2023.

235 For further information *see.* Hesselman, M., Hallo de Wolf, A., & Toebes, B. (2017) International guideposts for essential public services provision and socio-economic human rights. In M. Hesselman, A. Hallo de Wolf, & B. Toebes, *Socio-Economic Human Rights in Essential Public Services Provision* (pp. 299-327). Oxon: Routledge, p. 314.

236 *Giuliani and Gaggio v. Italy*, App no 23458/02, (ECtHR, 24 March 2011), §174.

3.2 Right to Life, Article 2

The first right guaranteed in the ECHR is the right to life, and according to Article 2; *"Everyone's right to life shall be protected by law"*.[237] It is a prerequisite for the enjoyment of human rights that a person is alive.[238]

The Convention comprises an exhaustive list of exemptions, for example, the death penalty[239] (Article 2/1), and three situations of lethal force legitimately used by state agents (Article 2/2). These are: *(a) in defence of any person from unlawful violence, (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, (c) in action lawfully taken for the purpose of quelling a riot or insurrection*.

According to Article 2, the States have positive and negative obligations. The positive obligations will be listed subsequently in the following subsection below. As a negative obligation, the States should refrain from acts that would deprive individuals of their lives.

3.3 States' Obligation to Protect the Right to Life by Law

The Court states that the first sentence of Article 2 requires the High Contracting Parties not only to refrain from deliberately and unlawfully causing death, but also to take the necessary measures to protect the lives of persons within its jurisdiction.[240] Hence, fundamentally, the High Contracting Parties have a negative obligation to refrain from taking life, and as a positive obligation, to take reasonable measures to safeguard the lives of those within its jurisdiction, to establish a functioning legal framework which properly protects life.[241] In fulfilling this positive obligation, the Parties are obliged to guarantee the right to life by adopting effective criminal law regulations to deter the commission of offences against persons, supported by law-enforcement mechanisms to prevent, combat and punish breaches of such offences.[242] According to the Court, the High Contracting Parties have three obligations under Article 2: the obligation to protect the right to life by law, the obligation to protect the life of individuals in a vulnerable position (e.g., prisoners, military conscripts), and the life of vulnerable individuals (e.g., mentally disordered), and the obligation to investigate deaths effectively. The Court emphasises

237 Right to life is also regulated in ICCPR Article 6, UDHR Article 3, and CRPD Article 10. Therefore, every human being has the inherent right to life and this right shall be protected by law. No one shall be arbitrarily deprived of his life.

238 Gerards, J. (2018). Right to Life (Article 2). In P. Van Dijk, F. Van Hoof, A. Van Rijn, & L. Zwaak, *Theory and Practive of the European Convention on Human Rights* (pp. 353-380). Cambridge: Insertia, p. 353.

239 For the process of the acceptance *See.* Gerards (2018), p. 353.

240 *Jeanty v. Belgium*, App no 82284/17, (ECtHR, 31 March 2020), §70.

241 *Osman v. the United Kingdom*, App no 87/1997/871/1083, (ECtHR, 28 October 1998), §115.

242 *Makaratzis v. Greece*, App no 50385/99, (ECtHR, 20 December 2004), §57.

that persons in custody are in a vulnerable position and therefore the authorities are under a duty to protect them. [243]

The responsibility of the States to protect the life of persons in vulnerable positions includes the obligation to provide adequate medical care to prisoners. According to the Court, when a person remains in custody, this means that this they are therefore under the full supervision of the authorities which are obliged to account for their health and provide them with adequate medical care.[244] Yet, this obligation does not go so far as to oblige the States force-feed them if they go on hunger strike,[245] even though the right to life may require active measures by the State to save lives, especially in the case of persons detained by the state.[246] However, it might fall under the concept of Article 3. In addition, the issue of suicidal tendencies needs specific attention when dealing with mentally disordered prisoners. Article 2 may, in certain well-defined circumstances, impose a positive obligation on the authorities to take preventive operational measures to protect one individual from another and/or from themselves.[247] The ECtHR also ruled that a delay in the provision of medical assistance that contributes in a decisive manner to the death of a prisoner or detainee constitutes a violation of Article 2.[248]

The case of *Centre of Legal Resources on behalf of Valentin Câmpeanu v. Romania* concerned a person suffering from severe mental disabilities and HIV infection who had spent his entire life in state care where no facilities existed to treat HIV. The Grand Chamber held that there has been a violation of Article 2 of the Convention on the grounds that the authorities unreasonably endangered his life in danger by placing him in the hospital, notwithstanding his heightened state of vulnerability while the medical staff had failed to provide appropriate care and treatment.[249]

In another case where a 16-year-old committed suicide in prison, the Court held that there had been a violation of Article 2 as the authorities had showed indifference to the juvenile's grave psychological problems and previous suicide attempts.[250] Similarly, the Court found a violation, in a case concerning a mentally fragile person who committed suicide while serving a prison sentence by stealing medicine.[251] The Court considered that the obligation to provide appropriate medical care to a detainee would be rendered meaningless if it were limited to prescribing appropriate treatment, without ensuring

243 *Paul and Audrey Edwards v. the United Kingdom*, App no 46477/99, (ECtHR, 14 March 2002), §56.

244 *Salakhov and Islyamova v. Ukraine*, App no 28005/08, (ECtHR, 14 March 2013), §143.

245 *"For these reasons, the Court … holds unanimously that there has been a violation of Article 3 of the Convention in respect of the force-feeding of the applicant, which amounted to torture"*, *Nevmerzhitsky v. Ukraine*, op. cit.

246 Jacobs, P. (2012). *Force-feeding of prisoners and detainees on hunger strike: Right to self-determination versus right to intervention*. Cambridge: Intersentia, p. 197.

247 *Keenan v. the United Kingdom*, App no 27229/95, (ECtHR, 03 April 2001).

248 *Anguelova v. Bulgaria*, App no 38361/97, (ECtHR, 13 June 2002), §125-131.

249 *Centre of Legal Resources on behalf of Valentin Câmpeanu v. Romania*, App no 47848/08, (ECtHR, 17 July 2014), §89-91.

250 *Çoşelav v. Turkey*, App no 1413/07, (ECtHR, 09 October 2012), §69-70.

251 *Jasińska v. Poland*, App no 28326/05, (ECtHR, 1 June 2010), §79.

that it was properly administered and monitored; and this responsibility is all the more important in the case of prisoners with mental disorders.[252]

The Court reiterates that the first sentence of Article 2 established an obligation for the States to take the appropriate steps to protect the lives of persons within their jurisdiction. Consequently, the States have also a specific duty of care, which is a protection against third parties.[253]

Moreover, the Court has defined a number of procedural positive obligations under Article 2. It has imposed an obligation on the States to conduct effective investigations of the cases in which a death has occurred, as well as to provide for appropriate procedures to bring the responsible parties to justice. According to the Court, these positive obligations, which are named as *procedural obligations*, have become so essential that the Article 2 has evolved into a separate and autonomous duty.[254]

3.4 Prohibition of Torture, Inhuman or Degrading Treatment or Punishment, Article 3

3.4.1 In General

The prohibition of torture and other prohibited ill-treatments, as outlined in Article 3, in conjunction with the right to life regulated as set out in Article 2, shows that the Council of Europe prioritizes these fundamental values. In order to explain the relationship between Article 3 and mentally disordered offenders, it is first necessary to provide a general information about the article and case law regarding.

According to the ECHR Article 3, "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*".[255] Accordingly, the Convention prohibits five types of treatment: torture, inhuman treatment, inhuman punishment, degrading treatment, and degrading punishment. In order to facilitate a detailed examination, the definitions of these terms should be provided.

The Court examines the term torture[256] for the first time in *Ireland v. the United Kingdom*, in 1978. In order to determine whether any particular form of ill-treatment is torture, it is

252 *Jasińska v. Poland*, op. cit., §78.

253 *See. Choreftakis and Choreftaki v. Greece*, App no 46846/98, (ECtHR, 17 February 2012).

254 *Šilih v. Slovenia*, App no 71463/01, (ECtHR, 09 April 2009), §159.

255 Also regulated in the UDHR Article 5 and UNCAT Article 1-2-6-11.

256 The term *torture* is defined in a broad manner in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Article 1 regulates that *"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."*. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is a Council of Europe (COE) entity,

ruled that the distinction is the special stigma of the torture is a deliberate inhuman treatment which causes very serious and cruel suffering.[257] In addition, in all cases where the Court finds that the ill-treatment amounts to torture, it is carried out by the State.[258] According to the Court, the rape of a detainee by a State official must be regarded as an *"especially grave and abhorrent form of ill-treatment"* given the ease with which the offender can abuse the vulnerability and weakened resistance of his victim.[259]

In summary, the assessment of the level of severity inherent in the concept of torture, as outlined in the *Ireland v. the United Kingdom* decision. The "severity test" utilised by the Court entails the evaluation of the duration, physical and mental effects of the treatment, and occasionally the age, sex and health conditions of the applicant, and so on.[260] While qualifying the treatment as torture, mental suffering and lasting effect may be also a relevant or even decisive factors.[261] In addition, the Court also examines the intent aspect; in the *Krastanov v. Bulgaria* case, the treatment was held as inhuman, not qualified as torture, due to its brief duration, therefore the intention factor could not be proven.[262]

The ill-treatment must reach a *minimum level of severity* in order to fall within the scope of application of Article 3. The determination of the level depends on all the circumstances of the individual case, such as the nature and the context of the treatment, the manner and method of execution, its duration, and its effects, in some cases, the victim's gender, age, and health state.[263]

The Court also sets out that even in the fight against terrorism and organised crime, which are the extremely tough circumstances for a State, the Convention still *"prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the*

established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) in 1987. According to Article 1 of the ECPT, the CPT shall, *by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.* However, this establishment is entirely separate from the ECtHR.

257 *"According to the Court's well-established case-law the distinction between the notion of torture and that of inhuman and degrading treatment would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering."; See*. Ireland v. the United Kingdom, op. cit., §167; *Aydın v. Turkey*, App no 23178/94, (ECtHR, 25 September 1997), §82.

258 For example, in *Aydın v. Turkey*, the rape was committed by a state official which is accepted as torture, whereas in *M.C. v. Bulgaria* case, the rape is only qualified as ill-treatment, not as torture, because the rape came from a private individual. *See. Aydın v. Turkey*, op. cit., 83-86; *M.C. v. Bulgaria*, App no 39272/98, (ECtHR, 04 December 2003), §149.

259 *Aydın v. Turkey*, op. cit., §83.

260 *Ireland v. the United Kingdom*, op. cit., §162.

261 In *Akkoç v. Turkey*, the Court determines that, in addition to the psychical treatment, the long-term symptoms of psychological pressure due to threats concerning the ill-treatment of her children equals very serious and cruel suffering which may be characterized as torture. *See Akkoç v. Turkey, App nos 22947/93 and 22948/93, (ECtHR, 10 October 2000)*, §116-117.

262 *Krastanov v. Bulgaria*, App no 50222/99, (ECtHR, 30/09/2004), §53.

263 *Gäfgen v. Germany*, App no 22978/05, (ECtHR, 01 June 2010), rectified on 03/06/2010, §88, *Kudła v. Poland*, op. cit., §91; *Bouyid v. Belgium*, App no 23380/09, (ECtHR, 28 September 2015), §86.

conduct of the person concerned".[264] In many cases where the Court finds a violation of Article 3 it indicates whether the treatment in question was degrading or inhuman or whether it amounted to torture.[265]

However, the Court considers that certain acts that in the past were qualified as "*inhuman and degrading treatment*" and not as "*torture*" could be classified differently in future. The Court believes that the increasing demands for the protection of human rights and fundamental freedoms require greater determination while assessing violations of the fundamental values of democratic societies.[266] According to the Court, it appears that it was the intention that the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment', should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.[267] While assessing whether a punishment or treatment is 'degrading' within the meaning of Article 3, the ECtHR shall also take into account whether it is intended to humiliate and degrade the person concerned and whether, in terms of its consequences, it adversely affects their personality in a manner that is incompatible with Article 3.[268]

The Court has determined that persons in custody are in a vulnerable position and the authorities are under a duty to protect them.[269] The main significance of Article 3 for this dissertation, thus, stems from the treatments. Article 3 is also referred as the "*right to care*",[270] and it obliges the States to provide appropriate medical services for prisoners,[271] including psychiatric treatment.[272] The obligations under Article 3 can extend to requiring States to transfer prisoners to suitable facilities required by the person's condition to receive appropriate treatment, particularly for those who are vulnerable.[273] Furthermore, the State must guarantee that persons are detained in conditions compatible with respect for their human dignity, that the manner and method of the execution of the measure do not expose the detainees to 'distress' or 'hardship' of an intensity beyond the foreseeable

264 *Gäfgen v. Germany*, op. cit., §87.
265 *Gäfgen v. Germany*, op. cit., §101-108.
266 *Selmouni v. France*, App no 25803/94, (ECtHR, 28 July 1999), §101.
267 *Ireland v. the United Kingdom*, App no 5310/71, (ECtHR, 20 March 2018), §15: the report of the ECoHR on 25 January 1976, §167.
268 *Keenan v. the United Kingdom*, op. cit., §110.
269 *Bouyid v. Belgium*, op. cit., §83.
270 Hendriks (2022), p. 136.
271 "*In these circumstances, the Court considers that there has been a violation of Article 3 of the Convention as regards the lack of adequate medical treatment and assistance provided to the applicant while he was detained, amounting to degrading treatment.*"; *Nevmerzhitsky v. Ukraine*, App no 54825/00, (ECtHR, 05 April 2005), §106. "*The lack of appropriate medical care may amount to treatment contrary to Article 3*"; *Keenan v the United Kingdom*, op. cit., §111; *Rooman v. Belgium*, op. cit., §146.
272 "*As regards the treatment of prisoners with mental-health problems, the Court has consistently held that Article 3 of the Convention requires States to ensure that the health and well-being of prisoners are adequately secured by, among other things, providing them with the requisite medical assistance.*", *Murray v. the Netherlands*, op. cit., §105.
273 *See. Raffray Taddei v. France*, App no 36435/07, (ECtHR, 21 December 2010), §63.

amount of suffering inherent in detention, and that, having regard to the practical of imprisonment, their health and well-being are adequately safeguarded by, among other things, providing them with the necessary medical assistance.[274] The coerced treatment and its relationship with Article 3 and Article 8 will be discussed under the 4.2 *Coerced Treatment* subsection below. T avoid repetition, it will not be addressed here.

Even though Article 3 of the Convention cannot be interpreted as a general obligation for releasing detainees on health grounds, it nevertheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance.[275] In *Dybeku v. Albania* the applicant was suffering from a chronic mental disorder, however he was placed in a prison cell which he shared with other inmates who were in good health. The applicant's vulnerable psychological condition worsened with pain, anguish, and fear. The ECtHR determined that the nature, duration, and severity of the ill-treatment to which the applicant was subjected and the cumulative negative outcomes on his health are enough to be qualified as inhuman and degrading; and therefore, there has been a violation of Article 3.[276] In the case of *Kucheruk v. Ukraine*, the Court also held that there had been a violation of Article 3, since mentally disordered applicant was handcuffed for seven days. The ECtHR considered this to be inhuman and degrading treatment because he had been handcuffed without any psychiatric justification or without medical treatment for the injuries sustained during his forced restraint and self-inflicted while confined in the disciplinary cell.[277] Similarly, in *Strazimiri v. Albania*, the Court determined that the cumulative effect of worsened living conditions in the Prison Hospital and insufficient psychiatric care amounts to inhuman and degrading treatment.[278] Moreover, in this judgment, the ECtHR cited the CPT's report on a periodic visit to Albania's Prison Hospital and employed the Committee's choice of words, *'therapeutic abandonment'*, to define the situation there.

The Court renders that there are two types of remedies possible regarding the complaints under Article 3: the improvement in the conditions and the compensation.[279] A remedy for a person detained in such circumstances is, therefore, of the utmost value and even indispensable for a person detained in such circumstances to be able to quickly put an end to the ongoing violation, given the particular importance attached to the right under Article 3. Once the challenged situation has ended, however, as this person has been released or placed in circumstances that meet the requirements of Article 3, they should have at least an enforceable right to compensation for any violations that have already

274 *Kudła v. Poland*, op. cit., §94.

275 *Dybeku v. Albania*, App no 41153/06, (ECtHR, 18 December 2007), §41.

276 *Dybeku v. Albania*, op. cit., §44-52.

277 *Kucheruk v. Ukraine*, App no 2570/04, (ECtHR, 6 September 2007), §140-146.

278 *Strazimiri v. Albania*, App no 34602/16, (ECtHR, 21 January 2020), §111.

279 *İleride and Others v. Türkiye*, App nos 35614/19, 5885/20, 6489/20, 7540/20, 10977/20, 11422/20, 14798/20, 16554/20, 16577/20, 18001/20 and 40294/20, (ECtHR, 05 December 2023), §151.

occurred. [280] To put it differently, preventive and compensatory measures must complement each other to be considered *effective*.[281]

As previously outlined, Article 3 is important for the condition of the detention. Within the concept of Article 3, the discussion of life sentences and their consequences must be made first. Afterwards, detention conditions will be analysed by taking Article 3 and Article 5/1(e) together.

3.4.2 Life Imprisonment

Article 3 guarantees one of the most fundamental values of the democratic society and prohibits in absolute terms torture or inhuman or degrading treatment and punishment, regardless of the circumstances and the behaviour of the victim.[282] The Court consistently emphasises that in any case, the suffering and humiliation in question must go beyond the unavoidable element of suffering or humiliation, in connection with a particular form of lawful treatment or punishment. Methods and measures employed in the context of deprivation of liberty may often include this element. In accordance with Article 3, the States must ensure that persons are detained under conditions compatible with respect for their human dignity and that the manner and method of the execution of the measure do not subject them to "*distress*" or "*hardship*" beyond the predictable amount of suffering acceptable and normal in detention.[283]

The prisoners serving life imprisonment, unfortunately, do not have a guaranteed day of release, nor do they have an absolute right to be released from prison.[284] The imposition of a life sentence imprisonment on an adult offender is not prohibited by the regulations in the ECHR nor incompatible with Article 3. Nevertheless, the Court determines that the imposition of an "*irreducible life sentence*" on an adult *might* raise an issue under Article 3.[285] The reason for this is that the emphasis on rehabilitation and reintegration has become a mandatory factor to be taken into account by the States when designing their penal policies.[286] It follows that the necessary evaluation must take account of the progress made by the prisoner in terms of rehabilitation, assessing whether this progress has been so important that continued detention can no longer be justified on legitimate

280 *İleride and Others v. Türkiye*, op. cit., §151.

281 *İleride and Others v. Türkiye*, op. cit., §151.

282 *Kafkaris v. Cyprus*, App no 21906/04, (ECtHR, 12 February 2008), §95; *Rooman v. Belgium*, op. cit., §141.

283 *Kafkaris v. Cyprus*, op. cit., §96; *Kudła v. Poland*, op. cit., §92-94.

284 Appleton, C., & Van Zyl Smit, D. (2016). The Paradox of Reform: Life Imprisonment in England and Wales. In D. Van Zyl Smit, & C. Appleton, *Life Imprisonment and Human Rights* (pp. 217-240). Portland: Hart Publishing, p. 217.

285 *Kafkaris v. Cyprus*, op. cit., §97; *Murray v. the Netherlands*, App no 10511/10, (ECtHR, 21 April 2016), §99; *Khamtokhu and Aksenchik v. Russia*, App nos 60367/08, 961/11, (ECtHR, 24 January 2017), §72; *Sanchez-Sanchez v. the United Kingdom*, App no 22854/20, (ECtHR, 03 November 2022), §79.

286 *Khoroshenko v. Russia*, App no 41418/04, (ECtHR, 30 June 2015), §121.

penological grounds.[287] Hence, the Court assesses the essential question of whether a life prisoner could be said to have any *prospect of release*.[288]

According to the Court, it is necessary to distinguish between three types of life sentence:

"(a) a life sentence with eligibility for release after a minimum period had been served;

(b) a discretionary sentence of life imprisonment without the possibility of parole (that is, a sentence which is provided for in law, but which requires a judicial decision before it can be imposed); and

(c) a mandatory sentence of life imprisonment without the possibility of parole (that is, a sentence which is set down in law for a particular offence and which leaves a judge no discretion as to whether to impose it or not)".[289]

As the first type of sentence is clearly reducible, according to the Court no issue can arise under Article 3, except of course when another ground for violation of this Article occurs. The second type is imposed for the offenders who commit utmost severity offences, such as murder or manslaughter, therefore, in any legal system, they will serve a significant number of years in prison and they do not have any realistic hope of release, even though they are given a determinate sentence, not a life sentence. Thus, a discretionary life sentence cannot, in itself, give rise to an issue under Article 3. With regard to the third type of sentence, namely a mandatory sentence of life imprisonment without parole, although greater scrutiny is required as to whether it is grossly disproportionate, it is not *per se* incompatible with the Convention. An issue may only arise under Article 3 in the same way as for a discretionary sentence of life imprisonment without parole.[290]

The commitment to both the rehabilitation of life sentence prisoners and to the prospect of their eventual release is later reflected in the practice of the States. It is shown that a large majority of member States do not impose life sentences at all, and when they do, they provide a dedicated mechanism, integrated within the sentencing legislation, guaranteeing a review of those life sentences after a set period; mostly after twenty-five years of imprisonment.[291]

In the context of a life sentence, the Court considers that Article 3 must be interpreted as requiring reducibility of the sentence, for the abovementioned reasons, in the sense of a review which allows the domestic authorities to ascertain whether any changes to the life sentence are so significant, and such progress in rehabilitation has been made in the course of the sentence, to such an extent that continued detention can no longer be justified on legitimate penological grounds.[292]

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287 *Hutchinson v. the United Kingdom*, App no 57592/08, (ECtHR, 17 January 2017), §43.

288 *Sanchez-Sanchez v. the United Kingdom*, op. cit., §79.

289 *Vinter and Others v. the United Kingdom*, App nos 66069/09, 130/10, 3896/10, (ECtHR, 09 July 2013), §84.

290 *Vinter and Others v. the United Kingdom*, op. cit., §85-88.

291 *Vinter and Others v. the United Kingdom*, op. cit., §117; *Hutchinson v. the United Kingdom*, op. cit., §44.

292 *Vinter and Others v. the United Kingdom*, op. cit., §119.

However, the Court underlines that, in criminal justice and sentencing matters, the States must be granted a border of discretion. It is not the Court's task to advise an executive or judicial form in which a review should take. For the same reason, it is not for the Court to determine when such review should take place.[293] However, in instances where the domestic law does not provide for the possibility of such a review, a whole life sentence will not meet the standards set out in Article 3.[294] The right to a review of a prisoner contains a factual assessment of the relevant information, and the review must also be surrounded by sufficient procedural guarantees.[295]

In summary, in determining whether a life sentence in a given case can be regarded as *irreducible* within the concept of Article 3, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release.[296] Where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3.[297] Conversely, where detention is subject to review for the purposes of parole after the expiry of the minimum period for serving the life sentence, it cannot be said that the life sentence in question has no hope of release.[298] The reason for this is that, where the sentence is irreducible under domestic law, it would be capricious to expect the prisoner to follow the rehabilitation rules and work for it without knowing whether on one day the system might be changed and make them eligible for release. Consequently, in cases where there is no mechanism or possibility for the review of a whole life sentence in domestic law, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.[299] Although the required review is a prospective event necessarily follows the sentence, lifetime prisoners should not be obliged to wait and serve an indefinite number of years before they can make a complaint that the legal conditions of their sentence fail to comply with the requirements of Article 3, because such an obligation would be contrary not only to legal certainty but also to the general principles on victim status within the meaning of Article 34 of the Convention.[300]

The Court shifted the emphasis from *reducibility* criteria to the *existence of a review mechanism focused on the rehabilitation* of the detainee.[301] The notion of the "*rehabilitation*" is also drawn by the ECtHR. The *reintegration into society* of the convicted persons is the

293 *Vinter and Others v. the United Kingdom*, op. cit., §120.
294 *Vinter and Others v. the United Kingdom*, op. cit., §121.
295 *Murray v. the Netherlands*, op. cit., §100.
296 *Sanchez-Sanchez v. the United Kingdom*, op. cit., §79.
297 *Kafkaris v. Cyprus*, op. cit., §98.
298 *See Stanford, v. the United Kingdom, App no 73299/01, (ECtHR, 12 December 2002), Admissibility Decision; Hill v. the United Kingdom*, App no 19365/02, (ECtHR, 18 March 2003); *Wynne v. the United Kingdom*, App no 67385/01, (ECtHR, 22 May 2000).
299 *Vinter and Others v. the United Kingdom*, op. cit., §122; *Murray v. the Netherlands*, op. cit., §99-100.
300 *Vinter and Others v. the United Kingdom*, op. cit., §122.
301 *Sanchez-Sanchez v. the United Kingdom*, op. cit., §81.

main principle of the rehabilitation.[302] The fundamental function of a prison sentence is the protection of society, for example by preventing a criminal from reoffending and thereby causing further harm, and another legitimate aim is a progressive social reintegration.[303] In other words, rehabilitation aims at preventing recidivism and thereby to safeguard the protection of society.[304] For the given reasons, periodically reviewing prisoners will encourage them to develop a responsible and crime-free life. Thus, life prisoners should also be provided with an opportunity to rehabilitate themselves. Because the Convention is intended to safeguard rights that are not theoretical or illusory, but rather practical and effective; offering a possibility of rehabilitation to life prisoners should be seen as a positive obligation and an absolute duty, also making progress towards their rehabilitation should be enabled.[305]

For the prisoners who have mental disorders, the Court has repeatedly stated that Article 3 requires States to ensure that the health and well-being of prisoners are adequately safeguarded by providing them with the necessary medical assistance.[306] Obligations under Article 3 can go so far as to oblige the States to transfer prisoners, including mentally disordered ones, to special facilities to receive suitable treatment.[307] It is imperative to note that merely examining and diagnosing of such prisoners are not enough; instead, the proper treatment for the diagnosed problem is essential.[308]

Life prisoners, who are not considered to be *persons of unsound* mind, and therefore have been found criminally responsible for the offences of which they are guilty may have certain mental health problems which may impact on the risk of their recidivism; for instance, these individuals may have behavioural or social problems or suffer from different types of personality disorders. In order to comply with the obligations under Article 3, States are firstly required to assess the prisoners' needs regarding the treatment, as well as to facilitate their rehabilitation and to reduce the risk of recidivism. Due to their mental health situation, life prisoners may not be able to understand their need for treatment, therefore the assessment should be carried out regardless of the prisoners' request. [309] In instances where the assessment concludes that a type of treatment or therapy may help life prisoners to rehabilitate themselves, they should be allowed to get that treatment to the possible extent within the prison environment. This aspect is

302 *Murray v. the Netherlands*, op. cit., §101.

303 *Mastromatteo v. Italy*, App no 37703/97, (ECtHR, 24 October 2022), §72.

304 *Murray v. the Netherlands*, op. cit., §102; *Matiošaitis and Others v. Lithuania*, App nos 22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13,72824/13, (ECtHR, 23 May 2017), §175.

305 *Murray v. the Netherlands*, op. cit., §103-104; *Hutchinson v. the United Kingdom*, op. cit., §43; *Matiošaitis and Others v. Lithuania*, op. cit., §177; *Petukhov v. Ukraine* (No. 2), App no 41216/13, (ECtHR, 12 March 2019), §181.

306 *Rooman v. Belgium*, op. cit., §146; *Murray v. the Netherlands*, op. cit., §105.

307 *See. Raffray Taddei v. France*, op. cit., §63.

308 *Raffray Taddei v. France*, op. cit., §59; *Murray v. the Netherlands*, op. cit., §106; *Rooman v. Belgium*, op. cit., §146.

309 *Murray v. the Netherlands*, op. cit., §107-108.

specifically vital for the life prisoners, as the treatment constitutes a precondition for a possible release in future, thereby constituting a crucial aspect of the reducibility of the life imprisonment.[310]

To reiterate, an "*irreducible life sentence*" on an adult *might* raise an issue under Article 3.[311] This issue may arise in cases where there is no prospect of release, no possibility for review, an no established periodic-review mechanism for such sentences.[312] Furthermore, the court rules that a convicted person cannot be detained, unless there are legitimate penological reasons for detention, including the objective of rehabilitation.[313] Hence, this rule is applicable to treatment orders, hospital orders, and security measures for mentally disordered offenders. Consequently, the review requires to enable domestic authorities to assess whether, during the term of the life sentence, such changes in rehabilitation have occurred such that continuance of the detention can no longer be justified.[314]

In the well-known *Murray v. the Netherlands* judgement, the ECtHR recognised that certain mental health problems are either not treatable or difficult to treat.[315] However, as the Judge Paulo Pinto de Albuquerque stated in his partly concurring opinion, *"however heinous the crime committed, no prisoner deserves to be treated like forgotten 'human waste'"*.[316] These words echoed the partly dissenting opinion of the Court's former President Jean-Paul Costa in the *Leger* judgement.[317] He rightfully asked, *"but would transforming prisoners into wild beasts or human waste not mean creating further victims and substituting vengeance for justice?"* Hence, from Article 3 of the ECHR point of view, it is quite important to provide rehabilitation and treatment opportunity to the mentally disordered offenders to reduce their risk of reoffending to provide them with any prospect of release. In order to evaluate whether the rehabilitation works, there should be a possibility of review, including for hospital orders.

In addition to Article 3, long detentions may also pose an issue under Article 5. As stated in *Section 1*, according to the ECtHR case law under Article 5/4, in principle, mentally disordered offenders who are detained for an indefinite or for a longer period of time have the right to initiate proceedings before a court *at reasonable intervals* to challenge the lawfulness of their detention, in cases where there is no automatic periodic review of a

310 *Murray v. the Netherlands*, op. cit., §108.

311 *Kafkaris v. Cyprus*, op. cit., §97; *Murray v. the Netherlands*, op. cit., §99; *Khamtokhu and Aksenchik v. Russia*, op. cit., §72; *Sanchez-Sanchez v. the United Kingdom*, op. cit., §79.

312 *Murray v. the Netherlands*, op. cit., §92, 99; *Vinter and Others v. the United Kingdom*, op. cit., §119-122.

313 *Murray v. the Netherlands*, op. cit., §100.

314 *Murray v. the Netherlands*, op. cit., §100-101.

315 *Murray v. the Netherlands*, op. cit., §108.

316 *See*. Partly Concurring Opinion of Judge Pinto de Albuquerque, *Murray v. the Netherlands*, op. cit., p. 69, §21.

317 *See*. President Costa's separate opinion in *Leger v. France (dec.)*, App no. 19324/02, (ECtHR, 11 April 2006).

judicial character.[318] Consequently, "*the refusal to order a fresh psychiatric assessment*"[319] amounts to a violation of Article 5/4, as Article 5/4 provides detained persons with the right to actively seek a judicial review of their detention.

As a conclusion, it is crucial to acknowledge that not only life prisoners, but also those convicted of lifelong hospital orders, should be given a realistic opportunity for rehabilitation in order to have a hope of release.

3.4.3 Detention Conditions – Analysing Article 3 and Article 5/1(e) Together

In the early decisions, the ECtHR exclusively focused on issue of the detention, and examined whether it is lawful according to Article 5/1(e) or Article 5/1(a). In subsequent decisions, however, the Court began to examine the conditions of the detention for mentally disordered offenders. The ECtHR set a threshold for the conditions for the institution, medical care and treatment. Under this subsection, the judgments on these matters will be provided.

The case law has established that Article 3 requires States to ensure that the health and well-being of persons deprived of their liberty are sufficiently safeguarded by, inter alia, providing them with the necessary medical assistance. The absence of such requisite medical care may, therefore, amount to treatment contrary to Article 3.[320]

The Court recognises that mentally disordered detainees are particularly vulnerable within the context of detention.[321] When considering Article 3 and 5/1(e) in conjunction, one can reach the criteria set by the ECtHR for the mentally disordered detainees. First, there must be an "adequate medical assistance" and secondly, the adequate medical assistance must be provided in an "appropriate institution".[322]

a) Adequate Medical Assistance

It is accepted by the Court that the absence of appropriate medical care may amount to treatment contrary to Article 3.[323] Consequently, the most difficult element to determine is the "adequacy" of medical assistance.[324] The Court states that in cases involving mentally disordered prisoners, the vulnerability of those persons, their incapacity to rationally complain, or the inability to state the effects of particular treatment should be taken into consideration in determining the adequacy of medical assistance.[325] Therefore, to provide

318 *Stanev v. Bulgaria*, op. cit., §171.

319 *Ruiz Riviera v. Switzerland*, op. cit., §66.

320 *See. Blokhin v. Russia*, op. cit., §136; *Raffray Taddei v. France*, op. cit., §51; *Rivière v. France*, App no 33834/03, (ECtHR, 11 July 2006), §74.

321 *Bamouhammad v. Belgium*, App no 47687/13, (ECtHR, 17 November 2015), §121.

322 *See. Blokhin v. Russia*, op. cit., §137; *Bamouhammad v. Belgium*, op. cit., §120-123; *Aleksanyan v. Russia*, App no 46468/06, (ECtHR, 22 December 2008), §137-140.

323 *Keenan v. the United Kingdom*, op. cit., §111; *İlhan v. Turkey*, App no 22277/93, (ECtHR, 27 June 2000), §87.

324 *Blokhin v. Russia*, op. cit., §137.

325 *Keenan v. the United Kingdom*, op. cit., §111.

the "adequate medical assistance", it is not enough to only examine and make a diagnose; it is also essential to provide proper treatment and suitable medical supervision by qualified staff.[326] The ECtHR mentions that the supervision should include a comprehensive therapeutic strategy aimed at treatment or prevention of aggravation.[327] The Court notes that the appropriate treatment is also important to be provided as effectively as possible, for the reintegration of the mentally disordered offenders into society.[328] Even though the ECHR does not explicitly guarantee the *right to rehabilitation*,[329] the ECtHR explicitly states that the High Contracting Parties must consider the rehabilitation and reintegration of offenders when formulating their penal policies.[330]

Nevertheless, the Court also underlines that the Article 3 cannot be interpreted as providing each detained person with the same level of medical assistance as *"in the best civilian clinics"*.[331] In addition, the ECtHR goes further and states that it was willing to accept that, in principle, the resources of medical facilities within the penitentiary system are limited in comparison to the civilian clinics.[332]

In the early cases, the Commission established that the right to medical treatment appropriate to the patient's condition does not derive from Article 5/1(e). It is admitted that the psychiatric hospital should meet *therapeutic* and *social* functions; the Convention; however, deals with only the social function of protection by allowing the deprivation of liberty of a mentally disordered person under certain conditions.[333] This approach is endorsed by the Court in the same case by repeating the same statement.[334] In a subsequent case, in *Ashingdane v. the United Kingdom*, the Court underlined that in principle, Article 5/1(e) is not concerned with suitable treatment or conditions, but the deprivation of liberty of the mentally disordered persons.[335]

In the Commission decision of Ashingdane, three members dissented by giving the reasoning that the specific purpose of Article 5/1(e) should be understood two-fold: *"(a) the protection of society and the person of unsound mind; and (b) the rehabilitation of the patient for life in society"*. It is also underlined that *"the substantive lawfulness of the detention of a person of unsound mind is inseparable from the conditions of his treatment. Therefore the appropriate treatment, in which the appropriate hospital, together with the medical justification clearly play a major role, seems to be an important element legitimising further detention, at*

326 *Bamouhammad v. Belgium*, op. cit., §122.

327 *Blokhin v. Russia*, op. cit., §137.

328 *W.D. v. Belgium*, App no 73548/13, (ECtHR, 06 September 2016), §113.

329 Meijer, S. (2017). Rehabilitation as a Positive Obligation. *European Journal of Crime, Criminal Law, and Criminal Justice, 25*, 145-162, p. 147.

330 *Khoroshenko v. Russia*, op. cit., §121. *See also. Murray v. the Netherlands*, op. cit., §104.

331 *Aleksanyan v. Russia*, op. cit., §139; *Mirilashivili v. Russia* (dec.), App no 6293/04, (ECtHR, 10 July 2007).

332 *Grishin v. Russia*, App no 30983/02, (ECtHR, 15 November 2007), §76.

333 *Winterwerp v. the Netherlands*, op. cit., §84.

334 *Winterwerp v. the Netherlands*, op. cit. §51.

335 *Ashingdane v. the United Kingdom*, op. cit., §44; *See also Dhoest v. Belgium*, App no 10448/83, (ECoHR, 14 May 1987), §145.

least in the same hospital".[336] In addition, in three cases the Court ruled that the prolonged lack of appropriate medical care constitutes a breach of Article 3, with Article 5.[337] However, no violation of Article 3 does not rule out a breach of Article 5.[338]

In conclusion, the Court initially stated that the therapeutic function is irrelevant to Article 5. However, it changed its case law and later stated that the adequate medical treatment is a fundamental condition for the broader notion of lawfulness. Thus, any detention of a mentally disordered offender must have a therapeutic purpose, designed to heal or alleviate their condition, and to decrease the risk they may pose to themselves or to society.

It is, also, important to mention the *Dhoest v. Belgium* case, in which the Commission discussed the use of an official language in the context of treatment in a mental institution.[339] The Flemish-speaking applicant had been replaced in a mental institution in the French-speaking region of Belgium and his application was based on his inability to communicate with doctors, which rendered his treatment useless. The Commission acknowledged that proper psychiatric treatment is difficult if it takes place in a foreign language, however the Commission ultimately concluded that the linguistic element seemed not to have been decisive for the availability of proper psychiatric treatment, since the applicant did not cooperate.[340]

In 2019, ECtHR delivered a ruling on a similar case.[341] The applicant, who is German-speaking, has been placed in an institution in the French-speaking region of Belgium. The ECtHR has determined that it is the court's obligation to examine whether the necessary and reasonable measures have been taken to ensure communication that facilitates the effective implementation of appropriate treatment. By mentioning the *Dhoest v. Belgium* decision, the Court underlined that *"In the area of psychiatric treatment in relation to Article 3, the purely linguistic element could prove to be decisive as to the availability or the administration of appropriate treatment, but only where other factors do not make it possible to offset the lack of communication and, in particular, subject to cooperation by the individual concerned."*[342]. It is stated that all the evidence in the case file indicates a lack of therapeutic treatment, since it was impossible for the medical staff and the applicant to communicate. Furthermore, no information was found in the case file to indicate that psychiatric treatment or individualised care was provided between 2004 and 2017. Consequently, it seems that, throughout this period, the authorities responsible for the applicant were satisfied with the excuse that there was no German-speaking specialist to

336 Dissenting Opinion of Mr Sampaio joined by MM Melchior and Weitzel; *See. Ashingdane v. the United Kingdom*, App no 8225/78, (ECoHR, 12 May 1983), p. 25.

337 *W.D. v. Belgium*, op. cit.; *Claes v. Belgium*, op. cit., §120; *Lankester v. Belgium*, App no 22283/10, (ECtHR, 09 January 2014).

338 *Aerts v. Belgium*, op. cit., §61-67.

339 *Dhoest v. Belgium*, op. cit.

340 *Dhoest v. Belgium*, op. cit., §124.

341 *Rooman v. Belgium*, op. cit., §13.

342 *Rooman v. Belgium*, op. cit., §151.

justify the lack of treatment for the applicant. Thus, the national authorities' failure to provide treatment caused him a level of distress that exceeded the unavoidable level of suffering inherent in detention. [343] The Court is unwilling to accept any excuses or justifications put forward by a State relating to a lack of resources, provided that the lack of medical care exceeds the threshold of severity under Article 3.[344] In conclusion, the ECtHR holds that there has been a violation of Article 3 of the Convention, due to the linguistic element.

b) Appropriate Institution

Within the context of Article 5/1(e), the purpose of the detention of mentally disordered persons refers to the need to provide therapy, medication, or other clinical treatment aimed at the alleviation or cure of their conditions; or when necessary to ensure their control and supervision to prevent self-harm or harm to others.[345] Lawful detention is thus only implemented in a hospital, clinic, or other appropriate institution, even in cases where the mental disorder is not treatable.[346] Even though the psychiatric hospitals are, by definition, appropriate institutions for detention, the Court still underlines the need for efficient and consistent treatment within these facilities.[347] As previously mentioned, it is crucial that the appropriate treatment be provided as effectively as possible, for the reintegration of the mentally disordered offenders into society.[348] Consequently, the institution should be capable of providing the special therapy needed in order to prepare them for release.[349]

The Court found a violation for the very first time due to the conditions of the detention of a mentally disordered detainee in the *Aerts v. Belgium* case. The applicant was detained in a psychiatric wing of an ordinary prison because there was no place available in the mental health clinic of the social protection centre. Even though the Court found no breach of Article 3, it held that the psychiatric wing cannot be regarded as an appropriate mental health institution, as the applicant could not receive either regular medical attention or a therapeutic environment, thus the lack of treatment made the detention of the applicant unlawful under Article 5. As a result, according to the Court; the proper relationship between the main purpose of the detention and the state in which it took place was consequently deficient.[350] In the subsequent ruling in *Hutchison Reid v. the United Kingdom*, the ECtHR ruled that generally under Article 5; *"it would be prima facie*

343 *Rooman v. Belgium*, op. cit., §153-157.

344 Language barrier: *see. Rooman v. Belgium*, op. cit., §158; financial or logistic difficulties: *see. Poghosyan v. Georgia*, App no 9870/07, (ECtHR, 24 February 2009), §48; maintenance works: *see. Mamedova v. Russia*, App no 7064/05, (ECtHR, 1 June 2006), §63; shortage of places in suitable facilities: *see. Claes v. Belgium*, App no 43418/09, (ECtHR, 10 January 2013), §99.

345 *Hutchison Reid v. the United Kingdom*, op. cit., §52; *Stanev v. Bulgaria*, op. cit., §146.

346 *Hutchison Reid v. the United Kingdom*, op. cit., §55.

347 *Frank v. Germany* (dec.), App no 32705/06, (ECtHR, 28 September 2010).

348 *W.D. v. Belgium*, App no 73548/13, (ECtHR, 06 September 2016), §113.

349 *Lorenz v. Austria*, App no 11537/11, (ECtHR, 20 July 2017), §61.

350 *Aerts v. Belgium*, op. cit., §49.

unacceptable not to detain a mentally ill person in a suitable therapeutic environment".[351] Despite the fact that the applicant's condition was not deemed curable or amenable to treatment, he was still profiting from the hospital environment, as his symptoms became worse outside its support structure.

In 2011, the ECtHR ruled that the psychiatric annex of a prison is not an appropriate institution for the detention of mental health patients on the basis of the findings of the CPT.[352] Similarly, the Court also found that separate prison wings, which are designed for persons in preventive detention, are not appropriate places for the detention of mentally disordered offenders; since these places are not health care institutions, they lacked the necessary medical and therapeutic environment.[353] Consequently, it is imperative that long-term detainees suffering from mental disorders have to be provided with a therapeutic environment appropriate for their mental conditions within an institution suitable for the detention of mental health patients.[354] Moreover, it is stated that because of cutting off the link between the purpose of the detention and the conditions in which it took place, keeping mentally disordered detainees in a psychiatric wing for a significant period of time is recognized as being unsuitable for their needs.[355]

Furthermore, the Court established in a series of cases that the psychiatric wings of prisons in Belgium, were not appropriate places for the lengthy detention of mentally disordered persons. This was in accordance with Article 5/1(e), on the grounds that the detainees did not receive appropriate care and treatment, and were therefore, deprived of any realistic prospect of rehabilitation. The violations resulted from a structural problem, essentially from a shortage of places in external psychiatric facilities or the rejection of *undesirable* individuals.[356]

However, the Court emphasises that not all facilities associated with prisons are automatically unsuitable institutions for the detainees with mental disorders; even an ordinary prison can be considered an appropriate institution, because the title of the institution does not matter for the purposes of Article 5, only the possibility of treatment

351 *Hutchison Reid v. the United Kingdom*, op. cit., §55.

352 *Hadžić and Suljić v. Bosnia and Herzegovina*, App nos 39446/06 and 33849/08, (ECtHR, 07 June 2011), §41.

353 *O.H. v. Germany*, op. cit., §88-91; *B. v. Germany*, App no 61272/09, (ECtHR, 19 April 2012), §82-84; *S. v. Germany*, App no 3300/10, (ECtHR, 28 June 2012), §97-99; *Glien v. Germany*, Application no. 7345/12, (ECtHR, 28 November 2013), §93-96.

354 *O.H. v. Germany*, op. cit., §90-91.

355 *W.D. v. Belgium*, op. cit., §132.

356 *See* the pilot judgment *W.D. v. Belgium*, op. cit.; *See* also: *L.B. v. Belgium*, op. cit.; *Claes v. Belgium*, op. cit.; *Dufoort v. Belgium*, App no 43653/09, (ECtHR, 10 January 2013); *Swennen v. Belgium*, App no 53448/10, (ECtHR, 10 January 2013); *Van Meroye v. Belgium*, App no 330/09, (ECtHR, 09 January 2014); *Oukili v. Belgium*, App no 43663/09, (ECtHR, 09 January 2014); *Caryn v. Belgium*, App no 43687/09, (ECtHR, 09 January 2014); *Moreels v. Belgium*, App no 43717/09, (ECtHR, 09 January 2014); *Gelaude v. Belgium*, App no 43733/09, (ECtHR, 09 January 2014); *Saadouni v. Belgium*, App no 50658/09, (ECtHR, 09 January 2014); *Plaisier v. Belgium*, Application no. 28785/11, (ECtHR, 09 January 2014); *Lankester v. Belgium*, op. cit.

does.[357] The ECtHR also ruled that a preventive detention care, newly constructed on the premises of a prison, is an appropriate and suitable institution for the detention.[358] In order to assess the suitability of the centre located within the prison, the Court examined the staffing situation and decided that it has similar employment conditions to a psychiatric hospital run in the same Land.[359]

In the case of admission, the Court rules that it would be unrealistic to expect the authorities to ensure an available place immediately, therefore a certain delay is acceptable. However, if a significant delay occurs in admission and this affects the treatment; it entails a breach of Article 5.[360] In the *Brand v. the Netherlands* case, the Court ruled that six months of delay is not acceptable.[361] Subsequently, in the *Pankiewicz v. Poland* case, a delay of two months and twenty-five days was considered excessive.[362]

In conclusion, the institution for detaining the mentally disordered offenders must be appropriate within the meaning of Article 5/1(e), which means that the institution must be suitable to provide adequate care. Furthermore, a lack of resources is never an acceptable excuse for failure to provide appropriate medical care under Article 3. Resources may be taken into account under Article 5 if the provision of therapy is delayed, but the delay cannot be significant.

3.5 States' Obligations Derived from Article 3

Article 3 of the ECHR enshrines one of the most fundamental values of a democratic society, as it prohibits torture and inhuman or degrading treatment or punishment. It is indeed a civilisation value closely linked to respect for human dignity.[363] As previously outlined, Article 3 makes no exceptions, and no derogation form it is permissible.[364]

Article 3 regulates two obligations for the States. The first one is the obligation to protect individuals from proscribed ill-treatment or punishment, and the second is the obligation to investigate and enforce the law. The following subsections will examine these obligations.

3.5.1 Obligation to Protect Individuals from Proscribed Ill-Treatment or Punishment

As previously stated, Article 3 regulates the prohibition of torture, inhuman or degrading treatment or punishment. Consequently, it constitutes a positive obligation for the States to protect individuals from proscribed ill-treatment or punishment. Moreover, the States

357 *Papillo v. Switzerland*, App no 43368/08, (ECtHR, 27 January 2015), §48.
358 *Bergmann v. Germany*, op. cit., §124-128.
359 *Bergmann v. Germany*, op. cit., §125.
360 *Morsink v. the Netherlands*, op. cit., §67-69.
361 *Brand v. the Netherlands*, op. cit., §66.
362 *Pankiewicz v. Poland*, App no 34151/04, (ECtHR, 12 February 2008), §45.
363 *Bouyid v. Belgium*, op. cit., §81.
364 *Bouyid v. Belgium*, op. cit., §81.

should have a legal framework, which is effectively enforced and provides adequate protection against ill-treatment by state agents or private persons.

The Court considers that the obligation on the States under Article 1 to guarantee to persons within their jurisdiction the rights and freedoms set forth in the Convention, in conjunction with Article 3, obliges the States to take measures in order to ensure that persons within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.[365]

The scope of ill-treatment by private individuals has been extended by the *Opuz v. Turkey* judgment to protect individuals from domestic violence. According to the ECtHR, a violation of Article 3 occurs when state authorities has not taken reasonable protective measures to prevent further serious physical violence by (former) husbands against their wives.[366]

3.5.2 Obligation to Investigate and to Enforce the Law

The second positive obligation for the States, derived from Article 3, is to investigate and to enforce the law in a thorough and effective manner.[367] The Court has recognised that this obligation has the same meaning and aim *mutatis mutandis* as the obligations regulated in Article 2.[368] Therefore, the procedural obligation regulated in Article 3, as in Article 2, requires an official investigation with the capacity to identify and punish those responsible.[369]

When such accusations are not properly or consistently investigated, law enforcements run the risk of sowing the seeds for a cycle of impunity for the perpetrators of inhuman treatment. Where such impunity exists, one could say that there is an administrative practice or a policy of tolerance for violations of Article 3.

This subsection provided a general overview of the relevant paragraphs of Articles 2 and 3, along with the relevant ECtHR case law. A more in-depth analysis including other Articles will be provided below.

3.6 Analysis of Article 2 and Article 3

The right to physical and mental health is a fundamental human right indispensable for the exercise of other human rights. According to numerous human rights documents -that are mentioned under *3.1 Introduction to Right to Health* subsection – every human being is entitled to the enjoyment of the highest attainable standard of health conducive

365 *A. v. the United Kingdom*, App no 25599/94, (ECtHR, 23 September 1998), §22.
366 *Opuz v. Turkey*, App no 33401/02, (ECtHR, 09 July 2009), §158-176.
367 *Gäfgen v. Germany*, op. cit., §117.
368 *Assenov and Others v. Bulgaria*, App no 24760/94, (ECtHR, 28 October 1998), §102.
369 *Gäfgen v. Germany*, op. cit., §117.

to living a life in dignity. As mentioned previously, however, there is no direct right to health regulation in the ECHR or in its Additional Protocols. Consequently, the ECtHR approaches these rights through other articles, such as Articles 2 and 3, since the Court finds that withholding *necessary care* may constitute a violation of Article 3 and/or Article 2.

The prohibition of torture, inhuman or degrading treatment or punishment is regulated under Article 3. Even in the most difficult circumstances, in absolute terms, torture and inhuman or degrading treatment is prohibited regardless of the behaviour of the person concerned. The main significance of Article 3 for this dissertation stems from the treatment, as it obliges the States to provide appropriate medical services for prisoners[370], including psychiatric treatment.[371] It is thus of great importance for the protection of mentally disordered persons within criminal justice systems.

Violation of Article 3 ECHR occurs, for example, in the situation where the detainee has no contact with other detainees, receives no news from outside, has no right to contact their lawyer, stays in an unheated cell with no natural light or ventilation, nor receives visits from their family on a regular basis.[372] The ECtHR then inspects the nature, duration, and severity of the ill-treatment to which the applicant was subjected and the cumulative negative outcomes on their health are enough to be qualified as inhuman and degrading.[373] In a case, for example the Court held that there had been a violation of Article 3, because a mentally disordered applicant was handcuffed for seven days.[374] In accordance with Article 3, the States must ensure that persons are detained under conditions that are compatible with respect for their human dignity and that the manner and method of the execution of the measure do not subject them to "*distress*" or "*hardship*" beyond the predictable amount of suffering acceptable and normal in detention.[375]

The imposition of a life sentence imprisonment on an adult offender is not prohibited by the regulations in the ECHR nor incompatible with Article 3, nevertheless, the Court determines that the imposition of an "*irreducible life sentence*" on an adult may raise an issue under Article 3.[376] An issue may only arise under Article 3 in the same way as for a

370 *"In these circumstances, the Court considers that there has been a violation of Article 3 of the Convention as regards the lack of adequate medical treatment and assistance provided to the applicant while he was detained, amounting to degrading treatment."; Nevmerzhitsky v. Ukraine*, App no 54825/00, (ECtHR, 05 April 2005), §106. *"The lack of appropriate medical care may amount to treatment contrary to Article 3"; Keenan v the United Kingdom*, op. cit., §111; *Rooman v. Belgium*, op. cit., §146.

371 *"As regards the treatment of prisoners with mental-health problems, the Court has consistently held that Article 3 of the Convention requires States to ensure that the health and well-being of prisoners are adequately secured by, among other things, providing them with the requisite medical assistance."*, *Murray v. the Netherlands*, op. cit., §105.

372 *Ilaşcu and Others v. Moldova and Russia*, App no 48787/99, (ECtHR, 08 July 2004), §438.

373 *Dybeku v. Albania*, op. cit., §44-52.

374 *Kucheruk v. Ukraine*, op. cit., §140-146.

375 *Kafkaris v. Cyprus*, op. cit., §96; *Kudła v. Poland*, op. cit., §92-94.

376 *Kafkaris v. Cyprus*, op. cit., §97; *Murray v. the Netherlands*, op. cit., §99; *Khamtokhu and Aksenchik v. Russia*, op. cit., §72.

discretionary sentence of life imprisonment without parole.[377] The main principles of the "*rehabilitation*" is also drawn by the Court, namely the reintegration into society of the convicted persons, preventing recidivism, and thereby safeguarding the protection of society.[378] The emphasis on rehabilitation and reintegration should, therefore, become a mandatory factor to be taken into account by the States when designing their penal policies by States. As previously pointed out in subsection 2.5.4.2 *Life Imprisonment*, it constitutes a violation where prisoners serving a life sentence have neither a guaranteed day of release nor an absolute right to be released from prison.[379] In accordance with Article 3 of the ECHR and the ECtHR case law, when domestic law does not provide for the possibility of a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention.[380] Even though security measures specifically regulated for the mentally disordered offenders -including hospital order- do not classify as an imprisonment sentence, However, in this particular context, these measures should be accepted as if a life sentence. When there is no time limit for the security measures applicable to the persons who have no criminal liability, the foreseeability for them would be restricted, as well. Hence, High Contracting Parties shall introduce amendments to provide for the possibility of review of this unknown period for a view to its commutation, remission, termination or the conditional release of the patient to sufficient to satisfy Article 3, as is the case for prisoners.[381]

In summary, mentally disordered offenders should be detained in an appropriate institution, under appropriate conditions, with appropriate medical assistance. Furthermore, life-sentenced prisoners with mental disorders shall be given a realistic opportunity and hope of release in order to rehabilitate themselves. The failure to provide such opportunities may render the life sentence irreducible,[382] thereby violating Article 3.

The issue of coerced treatment will be explained in subsection 4.2 *Coerced Treatment*. The discussion will involve Article 3 in conjunction with Article 8. To conclude this current section on Article 3, the subsequent subsection will examine the relationship between Article 3and the aforementioned Article 5/1(e).

3.7 Analysis and Historical Development of Holding Article 5/1(e) and Article 3 Together

Elaborating further on the analysis provided in the 2.2.1.1 *Persons of unsound mind* subsection and *Table 1*, it is important to highlight the developments regarding how the Court has expanded the concept of Article 5/1(e) by combining it with Article 3. As

377 *Vinter and Others v. the United Kingdom*, op. cit., §85-88.
378 *Murray v. the Netherlands*, op. cit., §102; *Matiošaitis and Others v. Lithuania*, op. cit., §175.
379 Appleton & Van Zyl Smit (2016), p. 217.
380 *Vinter and Others v. the United Kingdom*, op. cit., §119-122.
381 Criteria can be found in *Kafkaris v. Cyprus*, op. cit., §98.
382 *Murray v. the Netherlands*, op. cit., §112.

explained in the aforementioned subsection, within the concept of Article 5/1(e), the Court was only focusing on the decision-making process of the detention, rather than the implementation of the detention.

Even though the Court does not mention Article 3, in the *Ashingdane* case of 1985, it is noteworthy that the Court looked at the conditions of the detention and held that, despite the fact that the cause of the delay in the transfer of the applicant had to do with employment relations rather than *therapeutic* aspects, it was clear that the delay was not been motivated by deliberate disregard for the applicant's mental wellbeing and that the authorities had made efforts to find a resolution at the earliest opportunity.[383]

In the subsequent *Aerts* judgment of 1998, the Court developed its approach for interpreting Article 5/1(e) significantly. A violation of Article 5/1 was found by the Court on the basis that the psychiatric wing of the prison where the applicant was detained could not provide *regular medical attention* or *a therapeutic environment*.[384] The Court held that there was therefore no proper relationship between the purpose of detention and the circumstances in which it took place, in particular as a result of the lack of treatment required by the condition that had led to the applicant's compulsory confinement.[385]

In 2003, the Court in the *Hutchison Reid* case clearly stated that the confinement under Article 5/1(e) is possible not only when a *person needs therapy, medication or other clinical treatment to cure or alleviate their condition*, but also when a *person needs control and supervision* to prevent them from injuring themselves or others.[386] It is crucial to underline that the Court, rightfully, stated that the regulation on the fact that the mental disorder cannot be treated clinically does not mean that release is mandatory where a danger to public order persists.[387] This important decision will be discussed in Chapter 4, while criticising regulation in England and Wales. The person with mental disorder could derive benefit from the hospital environment, as their symptoms could deteriorate outside this supportive structure.[388]

The *Morsink* judgement of 2004 accepted that the mere fact that an individual was not placed in an appropriate facility did not automatically render their detention unlawful under Article 5/1 of the Convention. [389] As immediate placement to an available clinic would be *unrealistic and too rigid*, a certain delay in admission to a clinic or hospital is acceptable.[390] In the mentioned case, however, the Court determined that a delay of fifteen months in the admission of a person to a custodial clinic cannot be regarded as acceptable, and therefore found a violation of Article 5/1 of the Convention.[391]

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383 *Ashingdane v. the United Kingdom*, op. cit., §47-48.
384 Emphasis added. *Aerts v. Belgium*, op. cit., §49.
385 *Aerts v. Belgium*, op. cit., §49.
386 *Hutchison Reid v. the United Kingdom*, op. cit., §52.
387 *Hutchison Reid v. the United Kingdom*, op. cit., §54.
388 *Hutchison Reid v. the United Kingdom*, op. cit., §55.
389 *See. Morsink v. the Netherlands*, op. cit., §66-69.
390 Emphasis added. *Morsink v. the Netherlands*, op. cit., §67.
391 *Morsink v. the Netherlands*, op. cit., §69-70.

Moreover, in the 2010 *Frank* case, it was held that in order to prevent persons admitted to a psychiatric hospital from being deprived of the *prospect of release*, national authorities must ensure that such placement is accompanied by *effective and consistent therapy measures*.[392] Consequently, the Court has stressed the necessity of the prospect of release, in this case.[393]

Obligation to work towards the goal of preparing the person for their release is mentioned also in 2017, by the Court in *Lorenz* case.[394] The Court has also provided examples of how to reach the goal, by providing incentives for further therapy, by transferring to an institution where the necessary treatment can be provided, or by the granting of certain privileges.[395]

In the 2019 ruling in the *Rooman v. Belgium* case, the Court introduced a whole new concept to the Article 5/1(e), by combining it with Article 3. The Grand Chamber determined that "*the failure to provide treatment commensurate to the applicant's mental condition amounted to negligence. It had added that the mere fact of having been detained for an indeterminate period without appropriate treatment amounted to a violation of Articles 3 and 5 § 1 of the Convention*".[396] Thus, the focus, which was solely on the decision making for the detention of the mentally disordered person, finally has got broadened. The Court has outlined that the criteria as the *appropriate facility, appropriate institution,* no *significant delay, appropriate care and treatment, appropriate and individualised therapy, realistic prospect of rehabilitation*, to render a detention lawful or unlawful.[397] Through its case law, therefore, the Court has gradually expanded the scope of Article 5/1(e).[398] It is important to mention that a finding that there has been no violation of Article 3 does not automatically lead to a finding that there has been no violation of Article 5/1, although a finding of a violation of Article 3 on account of a lack of appropriate treatment may also result in a finding of violation of Article 5/1 on the same grounds.

In summary, it can be concluded from these judgments that the place of the detention for mentally disordered offenders must be appropriate within the meaning of Article 5/1(e). In other words, the facility must be suitable to provide adequate care. Furthermore, the lack of resources is never an acceptable excuse for the failure to provide appropriate

392 *Frank v. Germany*, op. cit., under *"b. Lawfulness of the applicant's detention"*.

393 Given the importance of the prospect of regaining liberty, the prisoners are entitled to access opportunities for rehabilitation. This is referred to as the "*right to rehabilitation*" in academic literature. *See.* Rotman, E. (1987). Do Criminal Offenders Have a Constitutional Right to Rehabilitation. *Journal of Criminal Law and Criminology, 77*(4), 1023-1068; Van Zyl Smit, D., Weatherby, P., & Creighton, S. (2014). Whole life sentences and the tide of European human rights jurisprudence: What is to be done?, *Human Rights Law Review*, *14*(1), 59–84; O'Loughlin, A. (2024). *Law and Personality Disorder: Human Rights, Human Risks, and Rehabilitation*. Oxford: Oxford University Press, p. 132-138.

394 *Lorenz v. Austria,* op. cit., §61.

395 *Lorenz v. Austria,* op. cit., §61.

396 *Rooman v. Belgium*, op. cit., §130.

397 *Rooman v. Belgium*, op. cit., §198-205.

398 *Rooman v. Belgium*, op. cit., §207.

medical care under Article 3. Resources may be taken into account under Article 5 if the provision of therapy is delayed, but the delay should not be significant.

The chronological evolution of holding Article 5/1(e) and Article 3 together will be demonstrated in *Table 2*, below.

TABLE 2: Chronological Evolution of Holding Article 5/1(e) and Article 3 Together

1985 *Ashingdane v. the United Kingdom*	• There shall be no delay in the transfer
1998 *Aerts v. Belgium*	• Regular medical attention should be provided in a therapeutic environment • The purpose of detention and the circumstances should be properly matching.
2003 *Hutchison Reid v. the United Kingdom*	• Detention under Article 5/1(e) is justifiable when – a person needs therapy, medication or other clinical treatment to cure or alleviate their condition, or – a person needs control and supervision to prevent them from injuring themselves or others. • The mental disorder which cannot be treated clinically does not mean that release is mandatory where a danger to public order persists.
2004 *Morsink v. the Netherlands*	• There should be no significant delay in the placement into an appropriate facility.
2010 *Frank v. Germany*	• There should be a prospect of release. • Effective and consistent therapy must be ensured.
2017 *Lorenz v. Austria*	• There is an obligation to work towards the goal of preparing the person for their release.
2019 *Rooman v. Belgium*	• The failure to provide treatment commensurate to the applicant's mental condition amounts to negligence. • Having been detained for an indeterminate period without appropriate treatment amounts to a violation of Articles 3 and 5 § 1 of the Convention. • *appropriate facility, appropriate institutions* , no *significant delay, appropriate care and treatment, appropriate and individualised therapy, realistic prospect of rehabilitation*

SECTION 4: RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE (ARTICLE 8)

Article 8 of the Convention regulates the right to respect for private and family life. According to this article: "*1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*"

As with numerous other Convention terminology, each of these interests have an autonomous meaning, and the Court is not bound by the findings of the domestic

courts.[399] In the aforementioned article, four interests are protected: 1. private life, 2. family life, 3. home, 4. correspondence. While the lack of an adequate conceptual framework for the Court's approach to the definition of private life has been criticised, the problem seems to be not so much the inadequacy of the framework as its broad scope.[400]

It is a purely negative obligation of the States not to interfere arbitrarily with the rights guaranteed in Article 8. However, not every interference leads to a violation. The States has the power to interfere if three cumulative conditions mentioned in Article 8/2 are met: 1. lawfulness, 2. legitimate aim, and 3. necessity. A failure to meet one condition results in a violation of Article 8.

As a positive obligation, the Court clarifies that States has to adopt measures to ensure the respect for private life, even in relations between persons.[401] As regards these positive obligations, the concept of "*respect*" is not clear. Given the diversity of practices and situations in the States, the requirements for this concept will vary considerably from case to case.[402]

The ECtHR has established that the States have another positive obligation under Article 8 to provide protection for mentally disordered persons' right to private and family life. The States shall ensure that mentally disordered persons can participate effectively in proceedings concerning the placement of their children.[403]

Regarding persons in need of psychiatric treatment in particular, the Court notes that the State is obliged to protect the right of its citizens their right to physical integrity under Article 8 of the Convention. When there are hospitals run by the State, as well as private hospitals; the State cannot fully evade its responsibility by delegating its obligations in this area to private bodies or persons. Consequently, according to the Court, the States remain under an obligation to supervise and control private psychiatric institutions. Such institutions, in particular those where persons are held without a court order, require not only a licence, but also competent supervision on a regular basis to verify the legitimacy of confinement and medical treatment.[404]

The following subsections will firstly elucidate the concept of mental integrity as outlined in Article 8. Thereafter, the issue of coerced treatment will be discussed, before finally addressing the matter of the revocation of the residence permit of those migrants.

399 Harris et al. (2018), p. 501.

400 Harris et al. (2018), p. 509.

401 *"Germany had also violated its positive obligation to protect her from these interferences with her right to respect for private life."*, *See. Storck v. Germany*, op. cit., §139.

402 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, App nos 9214/80, 9473/81, 9474/81, (ECtHR, 28 May 1985), §67.

403 *B. v. Romania (no. 2)*, App no 1285/03, (ECtHR, 19 February 2013), §117-120.

404 *Storck v. Germany*, op. cit., §103.

4.1 Mental Integrity

The Court rules that *the concept of private life includes a person's physical and psychological integrity*.[405] Consequently, the Contracting Parties have a *duty to protect physical and moral integrity of an individual* from others under Article 8 of the ECHR.[406] Safeguarding mental stability is, in this respect, an unavoidable precondition for the effective enjoyment of the right to respect for private life.[407]

The *right to mental integrity* is a qualified right that permits certain interventions in a person's mental state and capacities.[408] The ECtHR, however, does not further define psychological integrity or moral integrity, which are used interchangeably.[409] As previously mentioned, interferences with a person's physical and psychological integrity fall within the scope of private life, as outlined in Article 8, and in some cases, it may fall under Article 3. The rapidly developing field of neurotechnology may cause issues in the close future on mental integrity, such as the monitoring or controlling the human brain through neurointerventions.

Under the concept of mental integrity, the aspects of mental privacy and freedom of thought should also be discussed. Article 9 of the ECHR regulates the right to freedom of thought, and Article 10 regulates the right to freedom of expression;[410] and by implication, Article 10 also guarantees, the right *not to be compelled to express oneself*,[411] to some extent.[412] Coercive treatment, such as coercive medicine and therapy may limit the right to freedom of thought and the right to freedom of expression, since these types of interventions often aim at *changing thoughts*, *thought patterns*, or *beliefs*.[413] For more than a decade, therefore, the potential promises and dangers of neurotechnology in criminal justice have been

405 The Court indicated that for the first time in *X and Y v. the Netherlands*, App no 8978/80, (ECoHR, 25 March 1985), §22. *See. also Eremia v. The Republic of Moldova,* App no 3564/11, (ECtHR 28 May 2013, §73.

406 *Sandra Janković v. Croatia,* App no 38478/05, (ECtHR 05 March 2009), §45.

407 *Bensaid v. the United Kingdom*, App no 44599/98, 06 February 2001, §47; *Savran v. Denmark*, App no 57467/15, (ECtHR, 07 December 2021), §172.

408 Ligthart, S., Bublitz, C., Douglas, T., Forsberg, L., & Meynen, G. (2022). Rethinking the Right to Freedom of Thought: A Multidisciplinary Analysis. *Human Rights Law Review, 22*, 1-14, p. 7.

409 De Vries, K. (2018). Right to Respect for Private and Family Life (Article 58). In P. Van Dijk, F. Van Hoof, A. Van Rijn, & L. Zwaak, *Theory and Practice of the European Convention on Human Rights* (pp. 667-733). Cambridge: Intersentia, p. 690.

410 It shall be noted that while freedom of thought is an *absolute right,* and the freedom of expression is a *qualified right* that can be restricted in some circumstances to protect the rights of another or the wider public interest. *See.* Bublitz, J. (2021). Freedom of Thought as an International Human Right: Elements of a Theory of a Living Right. In J. Bublitz, & M. Blitz, *The Law and Ethics of Freedom of Thought* (Vol. 1: Neuroscience, Autonomy, and Individual Rights, pp. 49-102). Cham: Palgrave Macmillan, p. 94. *See also.* <https://www.cps.gov.uk/legal-guidance/human-rights-and-criminal-prosecutions-general-principles> accessed 26 September 2023.

411 *Strohal v. Austria,* App no 20871/92, (ECoHR, 07 April 1994), §2, *Gillberg v. Sweden*, App no 41723/06, (ECtHR, 03 April 2012), §85.

412 Harris et al. (2018), p. 595.

413 Bublitz (2021), p. 72–73.

debated by philosophers, legal scholars, and criminologists.[414] Consequently, due to the rapidly developing technology, freedom of thought and freedom of expression should be protected from brain-reading, manipulation of thoughts or brainwashing, while sentencing mentally disordered offenders.[415,416]

Furthermore, concerns pertaining to mental and physical integrity encompass the issue of forced treatment and compulsory medical procedures, which will be elaborated upon in the following subsection.

4.2 Coerced Treatment

As previously stated, the obligation to provide adequate care is considered within the framework of Article 3, and the manner and conditions under which care is provided fall under Article 8, since the concept of private life includes the right to physical and mental integrity.[417]

Medical care and treatment without the patient's consent raise serious issues that fall within the framework of private life, no matter how minor the intervention. In *Peters v. the Netherlands*, the applicant was ordered to undergo a urine test as a disciplinary sanction that he refused to comply with, and the Court determined that, even if the interference is of minor importance, it must be considered as an interference with the right to respect for private life.[418]

In *Herczegfalvy v. Austria* case, when the applicant went on a hunger strike, he was force fed, even though he refused to have medical examination or treatment, he was given sedatives against his will. He was also attached to a security bed, handcuffed, and a belt

414 Ryberg, J. (2020). *Neurointerventions, Crime, and Punishment*. New York: Oxford University Press, p. 1.

415 Ligthart, S., & van de Pol, N. (2024). Freedom of thought: Absolute protection of mental privacy and mental integrity? Considering the case of neurotechnology in criminal justice. In Patrick O'Callaghan & Bethany Shiner, *The Cambridge Handbook of Freedom of Thought* (pp. 1-15). Cambridge: Cambridge University Press, p. 6-7.

416 Collecting personal information about mental states of persons, without their consent, is likely to interfere with the privacy of persons. Lie detectors, which have been used since 19th century, could establish a good example for the intervention on mental privacy and mental integrity during the criminal proceedings. Cesare Lombroso, for instance, was already using a hydrosphygmograph during forensic interrogations back in 1895. Later on, the combination of cardiac, vascular, respiratory, and electrodermal measurement techniques were used to detect deception. Currently, fMRI and EEG technologies have been shown that it is possible to measure brain activity to make assumptions on concealed knowledge on what a person remembers, thinks, or feels. *See*. Rosenfeld, J. (2018). *Detecting Concealed Information and Deception*. London: Academic Press, p. 5-16.

417 *Eremia v. The Republic of Moldova,* op. cit., para. 73.

418 *Peters v. the Netherlands*, App no 21132/93, (ECtHR, 06 April 1994), p. 4; *Storck v. Germany*, op. cit., §43.

was placed around his ankles.[419] Ultimately, the Court determined that there had been no violation of Article 5/1.[420]

While examining the Article 3, the Court makes a distinction between the concepts of "*appropriate treatment*" and the "*therapeutically necessary treatment*". According to the ECtHR, as a rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading, however the Court should satisfy itself that the medical need has been convincingly demonstrated.[421] In *Herczegfalvy v. Austria* case, the applicant also complained of his forcibly administered food and neuroleptics, in addition to his situation of being tied to bed with handcuffs. The Court determined that even though the usage of handcuffs and a security bed appeared worrying, according to the generally accepted psychiatric principles, medical necessity justified the treatment in issue, therefore no violation of Article 3 had been found.[422]

In addition to the reference to Article 3, the applicant further claimed that the hospital authorities had violated Article 8 by the use of force feeding and treatment. The Court states that the hospital has the authority to regard the applicant's psychiatric illness as an absolute incapacity to make decisions for themselves. Thus, no violation of Article 8 has been shown.[423] It is claimed that, for a long time the compulsory treatment of detained psychiatric patients was left mainly to the discretion of the responsible clinician; therefore, the ECtHR jurisprudence in this area is underdeveloped and unsatisfactory.[424]

The Court mentions the Commission's previous case law and reiterates that the forced-feeding of a person contains degrading elements, which, under certain circumstances, may be regarded as prohibited by Article 3 of the Convention, if the applicant's allegations of ill-treatment during the hunger strike were backed up by evidence.[425] In assessing whether the treatment or punishment in question is incompatible with the standards set out in Article 3, particular account should be taken in the case of mentally disordered persons, which are to take into consideration their vulnerability and

419 *Herczegfalvy v. Austria*, op. cit., §25-28.

420 *Herczegfalvy v. Austria*, op. cit., §69.

421 *Juhnke v. Turkey*, App no 52515/99, (ECtHR, 13 May 2008), §71; *Nevmerzhitsky v. Ukraine*, op. cit., §94. The ECtHR establishes that while the *medical authorities* have the authority to determine the appropriate therapeutic methods based on the established standards of medical science, *if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3, whose requirements permit of no derogation*". *Herczegfalvy v. Austria*, op. cit., §82

422 *Herczegfalvy v. Austria*, op. cit., §82-84.

423 *Herczegfalvy v. Austria*, op. cit., §86.

424 Bartlett, P. (2011, Autumn). 'The Necessity Must Be Convincingly Shown to Exist': Standards For Compulsory Treatment for Mental Disorder Under the Mental Health Act 1983. *Medical Law Review, 19*, 514-547.

425 *See. Nevmerzhitsky v. Ukraine*, op. cit., §93.

their inability, and in some cases to complain coherently or at all about how they are being affected by any particular treatment.[426]

Following the *Herczegfalvy v. Austria* judgment, in principle, the Court reiterates that a measure which is necessary from a therapeutic point of view in the light of established principles of medicine cannot be regarded as inhuman and degrading. The same can be applied to the use of coercive food intended to save the life of a particular prisoner who consciously refuses to take food.[427]

In *Storck v. Germany*, the applicant also claimed that there was a violation of Article 3 and Article 8 of the Convention with regard to the medical treatment she had received against her will. The Court considered that the applicant's complaints fell under Article 8, alone, due to her right to respect for her private life. As a result, due to the fact that the treatment with medicine constituted an interference with her physical integrity, and that it was carried out against her will, the Court held that there had been a violation of Article 8.[428]

Article 3, which provides for the right to be free from inhuman or degrading treatment or punishment, has not yet been found to have been violated by psychiatric treatment. However, in theory at least, mental health treatment may engage Article 3.[429]

As a result, it can be stated that, according to the ECtHR case law, the use of coercion to detain and to treat the persons with mental disorders is permissible. Consequently, the detention can be also applied to the persons who are unaware of their detention according to the Article 5/1(e).

In relation to coerced treatment, the ECHR sets a high threshold of severity before it will consider such treatment to be unlawful and relies heavily on medical advice through the notion of medical necessity. It has been claimed that the presence of a capable refusal has little weight and thus, it is concluded that the ECHR currently fails to capture much of the coercion experienced by patients in practice. According to this point of view, it is unavoidable that when some coercion is allowed by human rights law, the point at which patients consider themselves as coerced and the point at which that coercion is considered unlawful will not coincide. Accordingly, the threshold for determining the unlawfulness of conduct, as established by the ECtHR, is deemed as excessively high due to the prevalence of coercive measures.[430]

4.3 Revocation of Residence Permit of Settled Migrants

The ECtHR considers cases on revocation of residence permit of and the imposition of entry bans within the framework of Article 8. Thus, regardless of the existence of a family

426 *Keenan v the United Kingdom*, op. cit., §111.
427 *Nevmerzhitsky v. Ukraine*, op. cit., §94.
428 *Storck v. Germany*, op. cit., §137, §144.
429 Bartlett et al. (2007), p. 116.
430 Richardson, G. (2008, June). Coercion and human rights: A European perspective. *Journal of Mental Health, 17*(3), 245-354, p. 252.

life, the expulsion of a settled migrant constitutes an interference with their right to respect for private life.[431]

The Grand Chamber assessed the permanent exclusion order issued against a long-established immigrant suffering from paranoid schizophrenia who had committed violent offences in the *Savran* case.[432] In accordance with the *Maslov criteria*[433], the Court must look for the existence of "*very serious reasons*" capable of justifying the applicant's expulsion.[434] In the case of a settled immigrant who has lawfully spent most of his childhood and youth in the host country, very strong reasons must be put forward to justify expulsion.[435] The long-term mental disorder from which he suffered, and his low intellectual capacity made him particularly vulnerable; and failure of the authorities to take into account and balance the various interests at stake and the relevant factors. The re-entry ban imposed on him therefore leaves him with no realistic prospect of re-entering Danish territory, let alone re-settling there.[436] However, the regional court did not take the applicant's personal situation into account when assessing the risk of re-offending in the light of the context, such as his mental state at the time of the offences, the positive effects of his treatment, nor the fact that he had stronger links with Denmark over Türkiye.[437] Consequently, the Grand Chamber decided that there had been a violation of Article 8 of the Convention.

Similarly, in the *Azzaqui* case,[438] the Netherlands imposed a ten-year entry ban and revoked the residence permit of a long-term settled migrant with a mental disorder who was convicted of rape, sentenced, and imposed a custodial confinement in a secure clinic. During the appeal process, the person stated that revoking the residence permit had not been in compliance with Article 8 of the ECHR, due to the fact that he developed ties amounting to private life in his long stay in the Netherlands; including the time he spent in the clinic.[439] According to the probation report, the person's situation deteriorated after he was informed of the revocation of his residence permit; he could not cope with this complex situation and he was lacking the skills to deal with it.[440] His country of origin was unlikely to have him back due to his criminal and psychiatric background, and therefore it was predicted that he might end up on the streets.[441] The Court underlined that even though his convictions for crimes of a violent and sexual nature constitutes a *very serious reason* to justify the expulsion, the revocation proceedings had given scant

431 *Maslov v. Austria*, App no 1638/03, 23 June 2008, §63.
432 *Savran v. Denmark*, op. cit.
433 Created in *Maslov v. Austria*, op. cit.
434 *Maslov v. Austria*, op. cit., §75; *Savran v. Denmark*, op. cit., §194.
435 *Savran v. Denmark*, op. cit., §193-194.
436 *Savran v. Denmark*, op. cit., §200.
437 *Savran v. Denmark*, op. cit., §201.
438 *Azzaqui v. the Netherlands*, App no 8757/20, (ECtHR, 30 May 2023).
439 *Azzaqui v. the Netherlands*, op. cit., §19.
440 *Azzaqui v. the Netherlands*, op. cit., §21.
441 *Azzaqui v. the Netherlands*, op. cit., §21.

attention to the personal circumstances of the person concerned.[442] In this context, his treatment was aimed at reintegration into Dutch society up to that time, and thus no steps had been taken to prepare him to return to Morocco. In such particular conditions, the authorities were required to properly fulfil their duty to coordinate the various procedures concerning the applicant's right to respect for his private life and to assess in a timely and thorough manner the practical feasibility of his expulsion to Morocco, in order to properly respect the interests protected by Article 8.[443] Due to his mental vulnerability, and the difficulties that the person might face in Morocco; the Court found that the domestic authorities did not properly consider and wight the interests at stake, judging that there was a violation of Article 8.[444]

Hence, according to the ECtHR case law, when assessing the justifications provided outlined in Article 8 paragraph 2, particular importance shall be given to the personal circumstances of the persons with mental disorders, regardless of whether they have committed the crimes before, or are dangerous to the society. The *very serious reason* to justify the expulsion, thus, would not be sufficient to justify the interference to the right to respect for private and family life.

In this subsection, general information was provided on the relevant concepts of Article 8 and the ECtHR case law thereon. Specified to the research topic, these concepts will be analysed more in-depth below.

4.4 Analysis of Article 8

The ECtHR states that the States have also another positive obligation under Article 8 to provide protection for everyone's – therefore also for mentally disordered persons' – right to private and family life; States shall ensure that mentally disordered persons can participate effectively in proceedings concerning the placement of their children.[445]

In addition, as previously stated, the obligation to provide adequate care is considered within the scope of Article 3, and the manner and conditions under which care is provided – especially the coerced care – fall under Article 8, since the concept of private life includes the right to physical and mental integrity.[446] In a case where the applicant claimed that there was a violation of Article 3 and Article 8 of the Convention with regard to the medical treatment she had received against her will, the Court considered that the applicant's complaints fell *solely* under Article 8; as the coerced treatment with medicine is an interference with her physical integrity, the Court found a violation of Article 8.[447]

442 *Azzaqui v. the Netherlands*, op. cit., §55-59.
443 *Azzaqui v. the Netherlands*, op. cit., §60.
444 *Azzaqui v. the Netherlands*, op. cit., §61-63.
445 *B. v. Romania (no. 2)*, op. cit., §117-120.
446 *Eremia v. The Republic of Moldova*, op. cit., para. 73.
447 *Storck v. Germany*, op. cit., §137, §144.

However, the ECtHR sets a high threshold of severity in relation to coerced treatment, before considering such treatment to be unlawful, and relies heavily on medical advice through the notion of medical necessity.

Furthermore, the ECtHR considers cases on revocation of residence permit of and the imposition of entry bans within the framework of Article 8.[448] In the *Azzaqui* case[449], the Court found a violation of Article 8, due to the fact that the Netherlands imposed a ten-year entry ban and revoked the residence permit of a long-term settled migrant who is a mentally disordered offender placed in a secure clinic. The Court ruled that even though his convictions for crimes of violent and sexual nature constitutes a *very serious reason* to justify the expulsion, the revocation proceedings had given scant attention to the personal circumstances of the person concerned.[450] His treatment was aimed at reintegration into Dutch society up to that time, and thus no steps had been taken to prepare him for his return to Morocco. As his country of origin was unlikely to have him back due to his criminal and psychiatric background and therefore it was predicted that he might end up on the streets.[451] Due to scarcity of decisions in this area where Article 5/1(e) and Article 8 intersect, what constitutes a *very serious reason* to justify the expulsion is yet obscure.

SECTION 5: RIGHT TO A FAIR TRIAL (ARTICLE 6)

According to Article 6/1 of the Convention, "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*".

The general requirements of fairness regulated in Article 6 apply to all criminal proceedings, irrespective of the type of offence at issue.[452] As with every terminology used in the ECHR, the concept of a "*criminal charge*" has also an autonomous meaning, independent of the categorisations employed by the national legal systems of the Contracting Parties.[453] According to the Court, even though the legislation of the State concerned is certainly relevant, it provides no more than a starting point in determining whether, at any time,

448 *Maslov v. Austria*, op. cit., §63.
449 *Azzaqui v. the Netherlands*, op. cit.
450 *Azzaqui v. the Netherlands*, op. cit., §55-59.
451 *Azzaqui v. the Netherlands*, op. cit., §21.
452 *Ibrahim and Others v. the United Kingdom*, App nos 50541/08, 50571/08, 50573/08, 40351/09, (ECtHR, 13 September 2016), §252.
453 *Adolf v. Austria*, App no 82/78, (ECoHR, 26 March 1982), §30; *Blokhin v. Russia*, op. cit., §179.

there was a criminal charge against the person or whether the person was charged with a criminal offence.[454]

The primary purpose of Article 6, as far as criminal matters are concerned, is to guarantee a fair trial by a "*tribunal*" competent to determine "any criminal charge"; however, as previously mentioned, the safeguards outlined in Article 6 apply from the moment a criminal charge within the meaning of the case law and may, thus, be relevant during the pre-trial procedure if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.[455]

In order to assess the applicability of Article 6, there should be the existence of a charge, and that charge must be of a criminal nature. The assessment of the applicability of the criminal aspect of Article 6 of the Convention is based on the criteria outlined in *Engel and Others v. the Netherlands*, namely, the classification in domestic law, the very nature of the offence, and the severity of the penalty that the person concerned risks incurring.[456]

Article 6/1 regulates that everyone has the right to access to a court, to that end, it requires a tribunal falling within the scope to be "impartial", and normally, impartiality indicates the lack of prejudice or bias, and its existence or otherwise can be tested in different ways.[457] This right includes general guarantees such as the fairness, public hearing and reasonable time. The concept of fairness encompasses the effective participation in the proceedings[458], equality of arms, adversarial proceedings[459], reasoning of judicial decisions[460], the right to remain silent, not to incriminate oneself[461], administration of evidence[462], the principle of immediacy[463], and the legal certainty[464]. The public hearing guarantee includes the principle of publicity, the right to an oral hearing[465], and presence at the hearing[466].

Article 6/2 represents the presumption of innocence. It requires, inter alia, that (1) the members of a court in the performance of their duties should not begin with the

454 *Adolf v. Austria*, op. cit., §30.

455 *Ibrahim and Others v. the United Kingdom*, op. cit., §253.

456 *Engel and Others v. the Netherlands*, op. cit., §82-83; *Blokhin v. Russia*, op. cit., §179.

457 *Kyprianou v. Cyprus*, App no 73797/01, (ECtHR, 15 December 2005), §118; *Micallef v. Malta*, App no 17056/06, (ECtHR, 15 October 2009), §93.

458 *Murtazaliyeva v. Russia*, App no 36658/05, (ECtHR, 18 December 2018), §91.

459 *Leas v. Estonia*, App no 59577/08, (ECtHR, 06 March 2012), §79-84.

460 *Moreira Ferreira v. Portugal* (no. 2), App no 19867/12, (ECtHR, 11 July 2017), §84.

461 *Saunders v. the United Kingdom*, App no 19187/91, (ECtHR, 17 December 1996), §69, *Funke v. France*, App no 10828/84, (ECtHR, 25 February 1993), §44.

462 *Moreira Ferreira v. Portugal* (no. 2), op. cit., §83.

463 *P.K. v. Finland*, App no 37442/97, (ECtHR, 09 July 2002), Admissibility Decision.

464 *Bratyakin v. Russia*, App no 72776/01, (ECtHR, 09 March 2006), Admissibility Decision.

465 *"The Court first finds that the entitlement to a 'public hearing' in Article 6 § 1 necessarily implies a right to an 'oral hearing'."; See. Döry v. Sweden*, App no 28394/95, (ECtHR, 12 November 2002), §37.

466 *"...the concept of a fair trial means that a person charged with a criminal offence should be entitled to attend the hearing."; See. Tierce and Others v. San Marino*, App nos 24954/94/94, 24971/94, 24972/94, (ECtHR, 25 July 2000), §94.

prejudiced idea that the accused has committed the offence charged; (2) the burden of proof is on the prosecution, and (3) any doubt should benefit the accused.[467] Consequently, the presumption of innocence is violated where the burden of proof is shifted from the prosecution to the defence.[468] However, the defence may be required to provide an explanation after the prosecution has made a prima facie case against an accused.[469]

In the context of Article 6, two issues of particular significance must be addressed: the right to legal aid, and the right to be informed and effective participation. These issues will be respectively explained and discussed in the following subsections.

5.1 Right to Legal Aid

In Article 6/3, the minimum rights belong to persons who are charged with a criminal offence are listed, those are: (a) prompt information about the charge,[470] (b) having adequate time and facility to prepare a defence, (c) legal assistance, (d) examining witnesses, and (e) interpreter.

The rights regulated in Article 6/3 are all important for the suspects regardless of any special conditions. However, the right to legal assistance has significant effect for mentally disordered offenders to defend themselves before the courts. Therefore, the right to legal assistance must be further examined.

The most important and well-known case on this subject is the *Salduz v. Turkey* case. According to the Court, the right to access to lawyer at the pre-trial stage and specially during interrogation at the police station protects the right to remain silent and privilege[471]. However, in *Beuze v. Belgium*, the ECtHR stated that the right to access to a lawyer does not start at the pre-trial stage, but earlier.[472] In *Beuze*, it is stated that aims of the right to lawyer include: the prevention of miscarriages of justice, the equality of arms, the counterbalancing of the vulnerability of the suspect, prevention of ill-treatment, and of self-incrimination.[473] The ECtHR underlines that the right to lawyer has two dimensions; consultation which can happen before during or after the interrogation, and the presence of the lawyer during the interrogation. Consultation can assist the defendant choose how to respond to questions and whether to make use of their right to silence, whether or not

467 *Barberà, Messegué and Jabardo v. Spain*, App no 10590/83, (ECtHR, 06 December 1988), §77.

468 *Telfner v. Austria*, App no 33501/96, (ECtHR, 20 March 2001), §15; *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, App nos 26711/07, 32786/10, 34278/10, (ECtHR, 12 May 2016), §63-64.

469 *Telfner v. Austria*, op. cit., §18.

470 When there is a person with mental disorder, the national authorities should take additional steps to enable the person to be informed in detail of the nature and cause of the accusation against them, in order to provide the proper administration of justice; *See. Vaudelle v. France*, App no 35683/97, (ECtHR, 30 January 2001), §65.

471 *Salduz v. Turkey*, App no 36391/02, (ECtHR, 27 November 2008), §55.

472 *Beuze v. Belgium*, App no 71409/10, (ECtHR, 09 November 2018), §142-143.

473 *Beuze v. Belgium*, op. cit., §125-130.

someone uses the right to silence impacts the chances of a proper defence at trial. Therefore, the court recognizes the practical importance of these first interrogations at the police station for a case. The presence of the lawyer has been more difficult to establish also in national law, but according to *Beuze v. Belgium*, it has a strong protective effect. The physical presence of the lawyer at the police interrogation serves as a protective guarantee against abuse and improper compulsion. The Court sees the suspect as vulnerable in need of a support in the face of physical presence of a supporting agent; especially when the suspect is a minor or has diminished mental capacity.[474]

The Court always considers the complexity of the case, as well as the personal situation of the accused, when the applicant was particularly vulnerable, for example, by reason of their age or mental capacity.[475] The personal status of the accused is important especially with regard to the capacity for the case where the legal assistance is not granted.[476] Consequently, the interests of justice mandate that mentally disordered persons need legal aid.[477]

5.2 Right to be Informed and Effective Participation

Effective participation is one of the rights guaranteed under Article 6 of the ECHR.[478] In general, this includes not only the right to be present, but also to hear and follow the proceedings. These rights are inherent in the very concept of an adversarial procedure and can also be derived from the safeguards regulated in Article 6/3 (c), (d), and (e) – "to defend himself in person", "to examine or have examined witnesses", and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court".[479] Article 6/3(a) – "right to be informed on nature and cause of the accusation", is also important, since the authorities are required to take extra measures to ensure that the persons with mental difficulties are informed in detail of the nature and cause of the accusation against them.[480]

In summary, the ECtHR has found that the *effective participation* requires 1) that the defendant has a broad understanding of the nature of the trial process and of what is at

474 *Beuze v. Belgium*, op. cit., §150.

475 *Zdravko Stanev v. Bulgaria*, App no 32238/04, (ECtHR, 06 November 2012), §38.

476 *Quaranta v. Switzerland*, App no 12744/87, (ECtHR, 24 May 1991), §35-36; *Twalib v. Greece*, App no 42/1997/826/1032, (ECtHR, 09 June 1998), §53-54.

477 *Vaudelle v. France*, op. cit., §65.

478 *Murtazaliyeva v. Russia*, op. cit., §91.

479 *Stanford v. the United Kingdom*, App no 16757/90, (ECtHR, 23 February 1994), §26.

480 *"They could have ordered the applicant to attend the appointment with the psychiatrist and to appear at the hearing and, in the event of his failing to comply, arranged for him to be represented by his supervisor or a lawyer. That would have enabled the applicant to understand the proceedings and to be informed in detail of the nature and cause of the accusation against him within the meaning of Article 6 § 3 (a) of the Convention; it would also have enabled the Criminal Court to reach its decision entirely fairly.". See. Vaudelle v. France*, op. cit., §65.

stake for them, including the meaning of any penalty may be imposed, 2) that the defendant should be able to understand the general thrust of what is said in court and to follow what is said by the prosecution witnesses, and 3) if represented by a lawyer, that the defendant is able to explain their version of events to their own lawyers, to point out any statements with which they disagree, and to direct the representative to facts that need to be presented in their defence.[481]

The lack of effective participation in the proceedings may also arise when national authorities fail to address the needs of vulnerable suspects, and fail to make appropriate adjustments.[482] Consequently, according to the ECtHR, when a person is not capable of participating effectively in their trial to the extend required, a violation of Article 6/1, the right to a fair trial, occurs.[483]

In this subsection, general information was provided on the relevant concepts of Article 6 and the ECtHR case law thereon. Below, these concepts will be examined in relation to Article. 5.

5.3 Analysis of Articles 6/1 and 6/3(c) Together with Articles 5/1(e) and 5/4

Within the context of the right to fair trial, there are aspects that are important for the cases regarding mentally disordered offenders: the right to legal aid, the right to be informed, and effective participation. These regulated rights are all vital for defendants regardless of any special conditions, however, the right to legal assistance is critical for mentally disordered offenders to defend themselves before the court. The right of effective participation entails (i) the right to be present, (ii) the right to hear and follow proceedings, (iii) the right to legal aid, (iv) the right to attend the court sessions, and (v) the right to explain their own version of events and challenge the arguments.[484] Consequently, effective participation requires active involvement, and thus, fitness to stand trial is an important notion of a fair trial. In instances where it is obstructed, precautionary measures should be taken.

In relation to the right to effective participation, the issue of fitness to stand trial merits consideration. Fitness to stand trial represents a fundamental concept, particularly within the common law tradition. It is closely associated with the concept of a fair trial, insofar as the accused is required to be able to participate in the legal proceedings.[485] As effective participation necessitates active involvement, fitness to stand trial constitutes an essential

481 *S.C. v United Kingdom,* App no 60958/00, (ECtHR, 15 June 2004), §29.
482 *Hasáliková v. Slovakia,* App no 39654/15, (ECtHR, 24 June 2021), §69.
483 *S.C. v United Kingdom,* op. cit., §36.
484 Van den Anker, L., Dalhuisen, L., & Stokkel, M. (2011). Fitness to Stand Trial: A General Principle of European Criminal Law? *Utrecht Law Review, 7*(3), 120-136, p. 130.
485 Van den Anker et al. (2011), p. 120.

element of a fair trial. In instances where it is impeded, precautionary measures should be taken.

Mentally disordered offenders have the right to adequate legal aid throughout the criminal proceedings, as outlined in Article 6/3(c) of the ECHR. When considering Article 6 in conjunction with Article 5/1(e) and Article 5/4, this scope expands to the execution phase. This is based on the rationale that special procedural safeguards may be necessary to safeguard the best interests of persons who are unable to fully advocate for themselves due to their mental disorder. It shall be underlined that the relevant judicial proceedings do not always need to be attended by the same guarantees as those required under Article 6/1.[486] Nevertheless, it is essential that the mentally disordered offender *should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation.*[487] Thus, mentally disordered offenders who are detained in psychiatric institutions should receive actual legal assistance in the procedures relating to prolongation, suspension, or termination of their detention.[488] This implies that the right to legal aid does not end when the verdict is finalised; instead, it continues throughout the execution of the verdict. In the view of the Court, this outcome is mandated by the nature of the person's disorder, the condition of the person, and the importance of what is at stake for them.[489] Correspondingly, the mentally disordered offenders are not expected to take the initiative in obtaining their legal representation.[490]

According to the ECtHR case law, solely appointing a lawyer would never suffice, unless the lawyer actually provides legal assistance to the mentally disordered offender during the criminal proceedings.[491] The "*necessary legal assistance*"[492] requires the lawyer appointed by the court to seek for the client's best interest, after asking the client's wishes.[493] Otherwise, the lawyer's conduct becomes incompatible with the requirements of effective representation.[494]

In conclusion, it can be stated that special procedural safeguards may be needed to protect the interests of persons who are not fully capable of advocating for themselves because of their mental disabilities, according to the principles derived from the case law on Article 5/1(e), Article 5/4,[495] and Article 6/3(c).[496]

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486 *M.S. v. Croatia (No. 2)*, App no 75450/12, (ECtHR, 19 February 2015), §152.
487 *M.S. v. Croatia (No. 2)*, op. cit., §152; *Stanev v. Bulgaria*, op. cit., §171.
488 *M.S. v. Croatia (No. 2)*, op. cit., §153.
489 *Megyeri v. Germany*, op. cit., §23; *M.S. v. Croatia (No. 2)*, op. cit., §153.
490 *Winterwerp v. the Netherlands*, op. cit., §66; *M.S. v. Croatia (No. 2)*, op. cit., §153.
491 *M.S. v. Croatia (No. 2)*, op. cit., §154; *V.K. v. Russia*, op. cit., §35.
492 *M.S. v. Croatia (No. 2)*, op. cit., §154; *V.K. v. Russia*, op. cit., §35.
493 *V.K. v. Russia*, op. cit., §38.
494 *V.K. v. Russia*, op. cit., §38.
495 Summarized in *M.H. v. the United Kingdom*, op. cit., §77.
496 *V.K. v. Russia*, op. cit., §35-38; *M.S. v. Croatia (No. 2)*, op. cit., §152-153.

SECTION 6: RIGHT TO EQUALITY AND PROHIBITION OF DISCRIMINATION (ARTICLE 14)

Article 14 of the Convention regulates the prohibition of discrimination. The article regulates that *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*. The Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms is signed on 04/11/2000, to underline that all persons are equal before the law and are entitled to the equal protection of the law. However, the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for such measures.[497]

Article 14 of the ECHR applies in relation to the enjoyment of all substantive rights guaranteed by the ECHR, and Protocol No. 12 to the ECHR covers any right which is guaranteed at the national level, even where this does not fall within the scope of an ECHR right.

In general, the concept of discrimination covers cases where a person or group is treated less familiar than another, without proper justification, even if the more favourable treatment is not required for by the Convention. Article 14 does not prohibit differences in treatment which are based on an objective assessment of substantially different real conditions, and which strikes, based on the public interest, a fair balance between the protection of the interests of the community and respect for the rights and freedoms guaranteed by the Convention.[498]

As previously mentioned, even though there is no right to health regulated under the ECHR, the ECtHR holds that issues relating right to health would fall under other regulations such as Article 8 or Article 3. Thus, the complaints on discrimination in access to health care may fall within the scope of Article 14. The Court establishes in its case law that an issue under Article 14 can only arise if there is a difference in treatment of persons in "*analogous*" or relevantly similar situations. According to the ECtHR, an *analogous* situation does not require that the comparison groups be identical.[499]

Discrimination can take place on several grounds; such as, sex, race and colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, age, gender, sexual orientation, parental and marital status, immigration status, status related to employment, disability and other status. The

497 *See.* Preamble to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

498 *Glor v. Switzerland*, App no 13444/04, (ECtHR, 30 April 2009), §73; *Zarb Adami v. Malta*, App no 17209/02, (ECtHR, 20 June 2006), §73.

499 *Qing v. Portugal*, App no 69861/11, (ECtHR, 05 November 2015), §79; *Clift v. the United Kingdom*, App no 7205/07, (ECtHR, 13 July 2010), §66.

Court states that there is no doubt on the scope of Article 14 of the Convention includes the discrimination based on disability, because the list of grounds is not exhaustive.[500]

In this subsection, the general information was provided on the relevant concepts of Article 14 and the ECtHR case law thereon. Instead of a separate subsection for an analysis, it can be briefly stated that Article 14 of the ECHR is relevant to the sentencing of mentally disordered offenders, as it regulates the prohibition of discrimination. During the pre-trial, trial, or execution phases, there shall be no discrimination to the persons on the basis of their disability or disorder. The general conclusion on the rights governed by the ECHR relevant to the sentencing of mentally disordered offenders will be provided under the following section. The ECHR test that constitutes the framework of this dissertation will be set under *7.4 The ECHR Framework for the Mentally Disordered Offenders: the Test.*

SECTION 7: CONCLUSION

In brief, as explained above the right to liberty and security is predominant for answering the main research question. Thus, the case law regarding Article 5 of the Convention was examined first. In spite of the absence of provisions on the right to both physical and mental health, the ECtHR approaches these issues by employing other rights regulated to require High Contracting Parties to provide adequate and appropriate care and to protect the rights of vulnerable persons. Since the ECtHR holds the applications on the right to physical and mental health within the scope of Article 2 and Article 3, these subsequent rights to life and the prohibition of torture, inhuman or degrading treatment or punishment were discussed secondly. Thirdly, the right to respect for private and family life was discussed. Although the ECHR does not contain any regulations on the right to consent, the physical and mental integrity falls under a person's private life, and medical care and treatment without the patient's consent raises serious issues within the framework of private life, no matter how minor the intervention. Furthermore, on the coerced treatment issue, the case law on Article 8, in comparison with Article 3, was provided. Fourthly, the right to a fair trial, in particular, the presumption of innocence, the right to legal aid, and the right to be informed and effective participation were examined. Last but not least, the right to equality and the prohibition of discrimination were discussed within Article 14 of the ECHR and Article 1 of the Protocol No. 12 of the Convention.

This section analyses what has been explained above to create the ECHR test. First, detention principles derived from Article 5 will be given. Second, the test created from the analysis of Article 3 and Article 5/1(e) together will be provided; third, the other rights regulated in the ECHR and their integral analysis for the mentally disordered offenders will be given. At the last part, the final test derived from the ECHR, which will be used at the third and the fourth chapters of this dissertation as a framework to compare and assess the three criminal justice systems, will be created.

500 *Glor v. Switzerland*, op. cit., §80.

7.1 Detention Principles Derived from Article 5

Everybody has the right to liberty and security according to Article 5 of the ECHR. Article 5/1 has been identified by the ECtHR as having three elements[501]; the objective element, the subjective element and state imputability. All three elements must be satisfied before a particular set of circumstances will amount to a deprivation of liberty falling within the scope of Article 5.

Therefore, to be able to start the test according to Article 5, the following pre-test is derived:

1). A person should be "detained",
2). No valid consent is given to the detention,
3). The deprivation of liberty must be imputable to the State.

However, this pre-test is only applicable for the cases brought in front of the ECtHR to pre-assess the circumstances. This pre-test, therefore, is not applicable to the dissertation.

The Court established the following principles for the lawfulness of detention:

1). The detention must be "in accordance with a procedure prescribed by law",
2). Any deprivation of liberty should be consistent with the aim of protecting the individual from arbitrariness.
    a). A period of detention is "lawful" if it is based on a court order.
    b). The reasoning of the detention order is a relevant factor in determining whether the detention must be considered arbitrary.

According to the Article 5/1(e), in order to be regarded as *of unsound mind;* the following three conditions should be met by the High Contracting Parties in order to have "the lawful detention of a person of unsound mind" within the meaning of ECHR Article 5/1(e):

1). the individual must be reliably shown, by objective medical expertise, to be of unsound mind, unless emergency detention is required. A true mental disorder must be established before a competent authority on the basis of objective medical expertise;
2). the individual's mental disorder must be of a kind or degree warranting compulsory confinement. The deprivation of liberty must be shown to have been necessary in the circumstances; and
3). the mental disorder, verified by objective medical evidence, must persist throughout the period of detention.

Article 5 and the related ECtHR case law, additionally, set forth four obligations for the High Contracting Parties:

1). Obligation to inform promptly,
2). Obligation to promptly provide the trial,
3). Obligation to provide remedy to challenge the lawfulness of the detention,
4). Obligation to provide compensation.

501 *Stanev v. Bulgaria*, App no 36760/06, (ECtHR, 17 January 2012), §115.

7.2 Detention Conditions – Analysing Article 3 and Article 5/1(e) Together for the Mentally Disordered Offenders

In summary, as outlined in subsection *3.7 Analysis and Historical Development of Holding Article 5/1(e) and Article 3 Together,* it is necessary that the location where mentally disordered offenders are detained be deemed appropriate in accordance with the criteria outlined in Article 5/1(e). This means that the institution must be suitable to provide adequate care. Moreover, lack of resources is never an acceptable excuse for not providing appropriate medical care under Article 3. Resources may be taken into account under Article 5 if the provision of treatment is delayed, but the delay cannot be significant.

Therefore, the test derived from the ECtHR case law on Article 3 together with Article 5 can be summarised as follow:

1). Adequate medical assistance must be provided:
   a). suitable medical supervision should be given by qualified staff;
   b). proper treatment;
      i). comprehensive therapeutic strategy aimed at treating or preventing the aggravation,
      ii). treatment for the reintegration into society,
      iii). no language barrier blocking the treatment.
2). The place of detention must be an appropriate institution;
   a). admission should be done in appropriate time,
   b). appropriate care should be given,
   c). staffing situation should be equivalent to a general psychiatric hospital in the same country.

7.3 Integral Analysis of Article 3, 6, 8, and 14 Together for the Mentally Disordered Offenders

Besides Articles 5/1(e) and 3, more rights have been examined above specifically related to the human rights belongs to the mentally disordered offenders. When Article 3 is examined alone, the life imprisonment issue will arise. As it is discussed above, in order to determine whether a life imprisonment is *irreducible*, the Court focuses on the existence of a true prospect of release of the life prisoner. Where national law provides the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this may be sufficient to satisfy Article 3. Therefore, when there is no mechanism or possibility for review of a whole life sentence in domestic law, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of this sentence and not just at a later stage of incarceration. In summary, life prisoners should be detained under such conditions, and be provided with such treatment, that they are given a realistic opportunity to rehabilitate themselves in order to have a hope to be released. If the life prisoner is not given such a

chance, it may make the life sentence irreducible and therefore the High Contracting Party may be in violation of Article 3.

Furthermore, Articles 8 and 3 are important for mentally disordered offenders when it comes to coerced treatment. In principle, the Court reiterates that a measure which is necessary from a therapeutic point of view in light of established principles of medicine cannot be regarded as inhuman and degrading according to Article 3. However, the medical treatment against a person's will is considered to be a violation under Article 8, due to the right to respect for private life. In conclusion, according to the ECtHR, treatment with medicine is an interference with physical integrity and if it is against will, there has been a violation of Article 8.

Although all the rights regulated in Article 6 are essential to constitute a fair trial, none of these rights are specifically provided for mentally disordered offenders. Only the right to legal aid, regulated under Article 6/3(c), could have a significant importance on mentally disordered persons facing criminal charges, as they do not have a discretionary power to understand the charge. In some countries' legal systems, there are 'competency to stand trial' or 'fitness to stand trial' assessments; therefore, mentally disordered suspects may not be accepted as eligible to defend themselves before the court. The personal status of the accused is important especially due to the mental capacity for the case where the legal assistance is not granted.[502] Therefore, the interests of justice required that mentally disordered persons need legal aid.[503] Furthermore, the right to have legal assistance should start even before the first police interrogation in order to prevent miscarriages of justice, the equality of arms, the counterbalancing of the vulnerability of the suspect, the prevention of ill-treatment, and of self-incrimination.[504] Furthermore, according to the ECtHR, the authorities are required to take extra measures to ensure the persons with mental difficulties to be informed in detail of the nature and cause of the accusation against them.[505] In addition, when a person is not capable of participating effectively in their trial to the extent required, a violation of Article 6/1 occurs.[506] When considering Article 6 together with Article 5/1(e) and Article 5/4, it is essential that the mentally disordered offender *should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation*.[507] Hence, mentally disordered offenders who are detained in psychiatric institutions should receive actual legal aid in procedures relating to prolongation, suspension, or termination of their detention.[508]

Article 14 of the Convention regulates the prohibition of discrimination. Additionally, the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms underlines that all persons are equal before the law and are entitled to the equal protection of the law. Therefore, it includes the mentally disordered offenders.

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502 *Quaranta v. Switzerland*, op. cit., §35-36; *Twalib v. Greece*, op. cit., §53-54.
503 *Vaudelle v. France*, op. cit., §65.
504 *Beuze v. Belgium*, op. cit., §125-130.
505 *Vaudelle v. France*, op. cit., §65.
506 *S.C. v United Kingdom*, op. cit., §36.
507 *M.S. v. Croatia (No. 2)*, op. cit., §152; *Stanev v. Bulgaria*, op. cit., §171.
508 *M.S. v. Croatia (No. 2)*, op. cit., §153.

7.4 The ECHR Framework for the Mentally Disordered Offenders: the Test

Taking into account all of the above explanations and the rights that both the ECHR and ECtHR case law provide for sentencing mentally disordered offenders, a framework is created to examine the three criminal justice systems. This framework entails a test which will be leading for the content of Chapter 3, and respectively applied in Chapter 4 of the dissertation:

1). Lawfulness of the Detention under Article 5/1(e)
To give a lawful detention order to mentally disordered offenders:
   a). the individual must be reliably shown, by objective medical expertise, to be of unsound mind, unless emergency detention is required. A true mental disorder must be established before a competent authority on the basis of objective medical expertise;
   b). the individual's mental disorder must be of a kind or degree warranting compulsory confinement. The deprivation of liberty must be shown to have been necessary in the circumstances;
   c). the mental disorder, verified by objective medical evidence, must persist throughout the period of detention.

2). Detention Rules According to Articles 3, 5/1(e), and 8
During the detention:
   a). Adequate medical assistance must be provided:
      i). To provide the "adequate medical assistance", it is not enough to only examine and make a diagnosis; it is also essential to provide suitable medical supervision by qualified staff, and
      ii). to provide proper treatment, there should be:
         1). comprehensive therapeutic strategy aimed at treating or preventing the aggravation,
         2). treatment aimed at the reintegration into society,
         3). no language barrier blocking the treatment
         4). no coerced (medication) treatment against one's will (Article 8)
   b). For someone detained under Article 5/1(e) the place of detention must be an appropriate institution: the title of the institution does not matter for the purposes of Article 5, only the possibility of treatment does.
      i). admission should be done in appropriate time, no significant delay.
      ii). appropriate care should be provided there.
      iii). staffing situation should be similar to a general psychiatric hospital run in the same country.

3). The High Contracting Parties shall comply with certain relevant positive obligations related to mentally disordered offenders following Articles 2, 3, 5, 6, and 14:

a). Obligation to protect the life of individuals in a vulnerable position and the lives of vulnerable individuals (Article 2)

b). Obligation to protect individuals from proscribed ill-treatment or punishment (Article 3)

The State must also guarantee that persons are detained in conditions compatible with respect for their human dignity, that the manner and method of the execution of the measure do not expose the detainees to 'distress' or 'hardship' of an intensity beyond the foreseeable amount of suffering inherent in detention and that, having regard to the practical of imprisonment, their health and well-being are adequately safeguarded by, among other things, providing them with the necessary medical assistance. (Article 3)

c). Obligation to offer perspective in cases of long detention and specifically life imprisonment (Articles 3, 5/1(e), and 5/4)

The national law must provide the possibility of review of a life imprisonment with a view to its commutation, remission, termination or the conditional release of the detainee.

Persons of unsound mind who are compulsorily restrained in a psychiatric institution for an indefinite time or long period are also entitled to take proceedings at reasonable intervals before a court to put in issue the lawfulness of their detention. (Article 5/1(e) and Article 5/4)

d). Obligations related to the right to legal aid (Article 6/3(c))

During the whole criminal procedure, the mentally disordered offender has the right to adequate legal aid. The judicial proceedings do not always have to be accompanied by the same guarantees as those required under Article 6/1 for civil or criminal litigations. However, it is essential that the person concerned should have access to a court and the opportunity to be heard in person or through some form of representation. Special procedural safeguards may be needed to protect the interests of persons who are not fully capable of advocating for themselves because of their mental disabilities. (Article 5/1(e) and Article 5/4)

e). Obligation to grant effective participation (Articles 5/1(e), 5/4 in conjunction with 6/1, 6/3(a), (b), (c))

The mentally disordered offender should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. The "*necessary legal assistance*" shall be provided during criminal proceedings to protect the right to be informed and to effective participation. The High Contracting Parties should take extra measures to ensure that mentally disordered offenders are informed in detail about the nature and cause of the charges against them.

f). Obligation to provide adequate safeguards in the legal process (Article 5/1(e) and Article 5/4)

The procedure followed have a judicial character and provide the person concerned with adequate safeguards for the type of deprivation of liberty at issue; in order to determine whether a procedure provides adequate safeguards, the particular nature

of the circumstances in which such proceeding takes place should be taken into account.

g). Obligation to provide the right to speedily challenge the lawfulness of the detention (Article 5/1(e) and 5/4)
The initial detention period may be imposed by an administrative authority as an emergency measure provided that it is of short duration and the person concerned is able to bring judicial proceedings "speedily" to challenge the lawfulness of any such detention including, where appropriate, its lawful justification as an emergency measure.

h). Obligation to ensure the rights without discrimination of a mental disorder (Article 14)
All rights should be exercised without discrimination of a mental disorder, during the any phase of the criminal procedure.

CHAPTER 3

INTRODUCTION TO AND COMPARISON OF THREE CRIMINAL JUSTICE SYSTEMS

CHAPTER 3 **INTRODUCTION TO AND COMPARISON OF THREE CRIMINAL JUSTICE SYSTEMS**

After setting the ECHR framework in Chapter 2, this chapter provides (introductory) information on the Turkish, English and Welsh, and Dutch criminal justice systems, necessary to assess whether these systems comply with the ECHR test in Chapter 4. The present chapter explores how the sentencing of mentally disordered offenders works in three different criminal justice systems, including what mental disorder means, what the degrees of criminal responsibility are, how mental disorder can be 'proven' or established, what the procedural rights of the offender with mental disorder are, what the verdict could be, which facilities there are specifically for offenders with mental disorder, what the treatment prospects are, and so forth. The comparison provided in this chapter is intended only to support the compliance test in Chapter 4, regarding the topic at hand, and therefore does not constitute a general or complete comparison of these criminal justice systems.

Chapter 3 addresses the comparative sub-question of "*What are the legal and practical consequences of being a mentally disordered offender related to sentencing in Türkiye, England and Wales, and the Netherlands?*" as well as subsequently sub-question: "*What can be learned from the comparison of three criminal justice systems?*" It can be understood from the phrasing of the sub-questions that Chapter 3 takes the broader context of sentencing into account; whereas the test created in Chapter 2 is applied in Chapter 4 is limited to sentences specifically intended for mentally disordered offenders.

Prior to providing the information on these three criminal justice systems, overarching terminology that will be used throughout this chapter will be determined to be able to assess later how national terminologies differ from it. The criminal justice systems will then be examined in three parts: substantive criminal law, criminal procedural law, and execution law. The rationale for this order is to first explain how relevant concepts are defined substantively, present how these can be proven or established during the criminal procedural proceedings, explain how the sentence can be reached, and then what the execution phase can look like. At the end of the chapter, the comparative analysis will be provided, under Section 6.

Considering that the Turkish criminal justice system is the most unknown one, compared to other two systems, it will be presented in relatively more detail, as explained in Chapter 1.

SECTION 1: OVERARCHING TERMINOLOGY

Definitions and use of terminologies vary immensely in relation to the legal understanding of the country. Hence, to create concurrence, first, overarching terminology will be established. However, some specific terminology may still be used later in the chapter when it is relevant to explain the concept in the respective criminal justice system better.

1.1 Suspect, Defendant, Convict, Offender

In the Turkish criminal justice system, according to Article 2/1 of the Turkish Code of Criminal Procedure ("TCCP"), the investigation phase starts with a suspicion of a crime that has come to the knowledge of the competent authorities and ends with the admission of the indictment, and the prosecution phase starts with the admission of the indictment and ends when the verdict is final. The person who is the subject of the criminal investigation is called suspect (*şüpheli*); and the subject of the criminal prosecution is named accused (*sanık*). According to the preamble of the Article 2 of the TCCP if the criminal prosecution results against the defendant and the person is found to be the perpetrator of the crime; then the person's status will become convict (*hükümlü*).

In England and Wales, the Code for Crown Prosecutors ("CCP") regulates in Article 1.4 that " *'Suspect' is used to describe a person who is under consideration as the subject of formal criminal proceedings; 'Defendant' is used to describe a person who has been charged or summoned; 'Offender' is used to describe a person who has admitted guilt as to the commission of an offence, or who has been found guilty in a court of law*.". These definitions match perfectly with the Turkish terminology.

According to Article 27 of the Dutch Code of Criminal Procedure ("DCCP") (*Wetboek van Strafvordering*) a person shall be deemed a suspect (*verdachte*) before the prosecution has commenced when, from the facts or circumstances of the case, there is a reasonable suspicion of having committed a criminal offence. The word *verdachte* is also used for *defendant*, after the prosecution phase has commenced and during trial, in Article 271 of the DCCP. Even though the same terminology is used for different phases of the criminal proceedings, different terminology can be used to indicate the offender in different phases for the sake of translation. Furthermore, Article 27 of the DCCP mentions convict (*veroordeelde*), which is logically the status after conviction.

In this study, the notion of mentally disordered 'offender' will be used as an overarching terminology to refer to a person who has a mental disorder while being a suspect, accused, defendant, or convict. This terminology is by no means intended as a negation of the presumption of innocence, as only for the convict guilt has been established, but is chosen for pragmatic reasons since it is also common terminology in literature regarding this target group.

1.2 Imputability, Insanity, Criminal Responsibility

Even in cases where it is clear that a person's behaviour meets the legal definition of a criminal offence, the question may arise whether that person can be convicted of that offence.[509] In criminal justice systems, in general legal concepts are present that exclude the criminal liability: excuses and justifications can be distinguished.[510]

509 Blomsma, J., & Roef, D. (2019). Justifications and Excuses. In J. Keiler, & D. Roef, *Comparative Concepts of Criminal Law* (pp. 207-252). Cambridge: Intersentia, p. 207.

510 Haenen, I. (2016). Justifying a Dichotomy in Defences. The Added Value of a Distinction between Justifications and Excuses in International Criminal Law. *International Criminal Law Review*(6), 547-559, p. 558

The distinction between justifications and excuses is a debated topic. The dichotomy plays an important role to create a fundamental distinction between wrongfulness and blameworthiness. Justifications focus on the circumstances in which something happened – the specific circumstances of the case; whereas excuses focus on the defendant's state of mind.[511] Justifications negate *wrongfulness* and excuses invalidate *blameworthiness*.[512] The dichotomy was introduced in the Netherlands about a century ago, and even though this division is generally not used in England and Wales, justifications and excuses can be identified within their set of defences.[513] In the Turkish criminal justice system, justifications also exist, however this concept does not include the *imputability*.[514]

The Turkish criminal justice system uses imputability (*isnat edilebilirlik*) as a literal translation of Italian terminology *imputabilità*. As a definition, imputability is the collection of the qualifications that should apply to a defendant in order to be able to be punished for the act that is criminalised by law.[515] It is an umbrella term to comprise not being a minor, not being deaf mute, not being mentally disordered, and not having temporary reasons that exempt the imputability. As the criteria will be discussed under *3.1.1 Exemptions of Criminal Responsibility* below, no further explanation is provided here.

In England and Wales, traditionally the term "insanity defence" is used for the exemption criminal liability in cases of mental disorder (within their procedural structure of defences), even though more recently it has been considered off-putting or even offensive to people. Therefore, 'being exempted from criminal liability' has been advocated.[516] In the Criminal Procedure (Insanity) Act 1964 and in academia however, "*insanity*" is still in use.

The Dutch criminal justice system uses *ontoerekenbaarheid* in the Dutch Criminal Code (DCC) (Wetboek van Strafrecht) Article 39 and it literally means the exemption from attribution (of blame).[517] In literature it is often translated to English as criminal responsibility.[518]

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511 Haenen 2016), p. 549,550.

512 Blomsma & Roef (2019), p. 250.

513 Blomsma & Roef (2019), p. 250.

514 In the Turkish criminal justice system, *justifications for compliance with the law* (hukuka uygunluk nedenleri) are delineated as follows: the fulfilment of the commands of the law or a superior or competent authority; self-defence; the state of necessity; the exercise of an existing right; and the consent of the person concerned. *See.* Hafızoğulları & Özen (2010), p. 235-263.

515 Toroslu, N., & Toroslu, H. (2018). *Ceza Hukuku Genel Kısım*. Ankara: Savaş Yayınevi, p. 402.

516 *See.* The Law Commission (2013). *Criminal Liability: Insanity and Automatism A Discussion Paper – Summary for non-specialists*. Retrieved 30 January 2023, from https://www.lawcom.gov.uk/app/uploads/2015/06/insanity_discussion_summary.pdf, p. 3.

517 Also the term 'ontoerekenings*vat*baarheid' is used, which translates as susceptibility for attribution. As it seems to refer to a fixed characteristic of a person it is considered to be more of a behavioural scientific nature and also less fitting for a temporary state during the offence. Van der Wolf, M., Van Marle, H. & Roza, S. (2022). A Dutch Perspective. In M. van der Wolf (Ed.), *Safeguarding the Quality of Forensic Assessment in Sentencing a Review Across Western Nations* (pp. 200-229). Routledge, p. 200.

518 Kooijmans, T., & Meynen, G. (2017, October). Who establishes the presence of a mental disorder in defendants? Medicolegal considerations on a European court of human rights case. *Frontiers in Psychiatry, 8*(199), 1-6, p. 2; Gröning, L., Haukvik, U. K., Meynen, G. & Radovic, S. (2020).

In this dissertation 'criminal responsibility' will be used as the umbrella term to cover the relevant concept for this research. In other words, criminal responsibility is being *capable* to be held accountable by a criminal court for one's actions.[519] However, 'imputability' or 'insanity' may be used for specific referral to the respective national concept.

1.3 Mental Disorder

The concepts of mental 'disorder', 'illness', 'impairment', 'injury', 'syndrome', 'disability' are most of the time used interchangeably.[520] Often used terminology like handicap, retardation, disease, dysfunction, impairment, or disability are however considered stigmatizing in recent literature.[521]

The Mental Health Act ("MHA") 1983 refers to mental disorder, Article 32 of the Turkish Criminal Code mentions mental disorder (*akıl hastalığı*), and Article 39 of the Dutch Criminal Code mentions mental disorder (*psychische stoornis*), psychogeriatric disorder (*psychogeriatrische aandoening*), or intellectual disability (*verstandelijke handicap*). However, the latter two Dutch terms are only in this provision for compatibility with certain civil law terminology, but have no additional meaning (as these conditions also can be considered to be falling under the umbrella term of mental disorder) in this context.[522]

In this dissertation, therefore, *mental disorder* will be used as overarching term.

1.4 Sentence, Sanction, Penalty and (Security) Measure

As explained in Chapter 1 this research deals with sentencing in a broad sense. A sentence can in that sense be considered an equivalent of the term 'sanction', a legal consequence that may follow the violation of the criminal norm.[523] In most criminal justice systems, especially those based in or on the Continental European legal tradition, there are different types of sanctions: such as penalties and (security) measures. Of course, there are also different types of penalties; such as imprisonment and judicial fine, and possibly different types of measures. In some systems, a combination of penalties and (security)

Constructing criminal insanity: The roles of legislators, judges and experts in Norway, Sweden and the Netherlands, *New Journal of European Criminal Law, 11:3*, 390-410, p. 398.

519 *See*. Tadros, V. (2007). *Criminal Responsibility*. Oxford: Oxford University Press, p. 134.

520 Bouic, L. (2021). *English Mental Health Law: Arguments for Justice, Equality, and Enhanced Compatibility with the United Nations Convention on the Rights of Persons with Disabilities*. Manchester: The University of Manchester, p. 197.

521 Bouic (2021), p. 198-199.

522 Van der Wolf, M., & Bijlsma, J. (2022). Het stoornisbegrip in het strafrecht en de pro Justitia rapportage. In H.J.C. van Marle, P.A.M. Mevis, S.J. Roza, M.J.F. van der Wolf, *Gedragskundige rapportage in het strafrecht* (pp. 263-286). Deventer: Kluwer, p. 266.

523 Toroslu & Toroslu (2018), p. 36.

measures is also possible. However, in some systems, generally stemming from the Anglo-American common law tradition, such a distinction, let alone a *twin-track* system of penalties and security measures, is not in use. The criminal justice system of England and Wales, for instance, does not have such a distinction, which theoretically assumes that punishment is mostly retrospective and retributive, while (security) measures are mostly prospective and preventive in nature.[524] Whereas indeterminacy of duration is a characteristic of measures exclusively in a twin-track system, in England and Wales specific punitive sentences exist that can be extended or otherwise indeterminate in duration. From that perspective the distinction is not reflected in practice, rendering the designation of security measures irrelevant: *"if it looks like a duck, swims like a duck, and quacks like a duck…"*.[525] This opinion also reflects that for the offender, the restrictions will feel similarly punitive in nature, even if the name is different and in theory the suffering they feel is not intended (as it is in penalties).[526]

In the Turkish criminal justice system, *"security measures"* are the remedies that supplement the penal system in cases where punishment cannot be applied, or even if it is applied, when it is insufficient, or when punishment is not able to prevent the commission of new crimes.[527] Different from the other systems, where these goals are characteristics of the sentence after conviction, is that the punitive or preventive goal is already present in the prosecution. When the prosecution is of a punitive nature, the main aim is to reach the factual truth and punish the offender; however, the prosecution directed towards security measures is about rehabilitation and social reintegration.[528] Since the characteristics of penalties and security measures are different, they can be applied separately or simultaneously.

In the Netherlands, there is a twin-track system as well, but only in sentencing (after conviction). However, the distinction between penalties and measures is no longer as absolute as it traditionally was. Measures may also serve other goals than prevention and can be aimed at restoration (and target capital). Measures that are still aimed at prevention are possibly also of determinate duration, even though they may still be longer than the amount of guilt allows. Vice versa, the penalty of a prison sentence may also be imposed for a longer duration than the amount of guilt would allow. Hence, it has been argued that the Dutch are taking a more pragmatic than rigid approach to the distinction.[529]

In explaining the sentencing or sanctioning systems of the three criminal justice systems under *Section 3* on the substantive criminal law and under *Section 6*, when relevant the concepts of penalty and security measure are distinguished to understand the specificities of the respective national possibilities.

524 Van der Wolf (2016), p. 46.
525 Stated by Prof. Nicky Padfield, *see.* Van der Wolf (2016), p. 46.
526 Van der Wolf (2016), p. 46.
527 Hafızoğulları, Z. (1973). *Ceza Normu*. Ankara: Sevinç Matbaası, p. 233-273.
528 Bayındır, S. (2018). *Türk Ceza Hukukunda Akıl Hastalığı*. İstanbul: On İki Levha Yayıncılık, p. 132.
529 Van der Wolf (2016), p. 47.

SECTION 2: INTRODUCTION TO AND HISTORICAL BACKGROUND OF THREE CRIMINAL JUSTICE SYSTEMS

After setting the overarching terminology, this section provides an introduction to every one of the three criminal justice systems by also providing their historical background. The latter is important as a necessary introduction to these three completely different justice systems in order for the reader to apprehend the discussion in the following Chapter 4.

2.1 Criminal Justice System of Türkiye

The Turkish criminal justice system is not a well-known system internationally, due to the lack of information in the English language. As highlighted in the first chapter, in addition to examining the developments in the Turkish criminal justice system regarding sentencing mentally disordered offenders, this research project will, as a secondary aim, fill this gap. To be able to discuss the current situation and problems of practice, fundamental knowledge must be provided first, including a brief sketch of the history of criminal regulations.

The former Turkish state, the Ottoman Empire, had a legal system that was entirely based on Islamic principles and religious rules.[530] After the fall of the Ottoman Empire, Mustafa Kemal Atatürk founded the Grand National Assembly of Türkiye ("TBMM"), and a republic was proclaimed. Following this great step, an urgent need arose to have codes and regulations to govern the country, since it was not intended to continue with Ottoman rules and regulations. It is important to mention that in the years between 1920 and 1926, there was no criminal code or regulations in force due to the ongoing war. During the Ottoman Empire period, the Italian Criminal Code was translated into the Turkish language, and therefore on the very first days of the Republic of Türkiye, it was used as a template to draft a new Turkish Criminal Code ("TCC").[531] Therefore, it can be said that the very first TCC was adapted from the Italian Criminal Code, as a result of the legal reform aiming at secularisation and westernisation.[532] Since it is the origin of the Code, the Italian doctrine and case law has been used for many years to understand and

530 In Islamic-Ottoman criminal law, criminal law sanctions consisted of three groups: penalties, security measures and compensation for the damages occurred as a result of the offence. The penalties, depending on the gravity of the offence, were death, amputation, beatings, imprisonment, deportation, and fines. For further information, *see.* Avcı, M. (2016). Osmanlı Ceza Hukukunda Cezaların Tasnifi. *II. Türk Hukuku Tarihi Kongresi Bildirileri* (pp. 639-656). İstanbul: On İki Levha.

531 The Turkish Code of Criminal Procedure, however, was adopted from Germany.

532 İlkkaracan, P. (2010). Re/forming the Penal Code in Turkey from a Gender Perspective: The case of a successful Campaign. In J. Gaventa, & R. McGee, *Citizen Action and National Policy Reform: Making Change Happen* (pp. 195-216). London: Zed. p. 198.

interpret the new regulations. Over time, criminal law scholars in Türkiye began to be strongly influenced by German law, causeing amendments to the TCC.[533] Especially the Law on Execution of Sanctions, which entered into force in 1965, had great influence by the 1962 draft German Criminal Code.[534] It was claimed that there was no integrity anymore in this obsolete TCC, since it was amended 70 times before it was repealed.[535] When Türkiye was declared a candidate country in 1999 for the European Union ("EU"),[536] in order to actually become eligible for accession to the EU, amendments to the three main pillars of the Turkish criminal justice system has been made. The new Turkish Criminal Code ("TCC"),[537] the Turkish Code of Criminal Procedure ("TCCP"),[538] and the Law on Execution of Penalties and Security Measures ("EPSM")[539] were published in the Official Gazette in 2004 and entered into force in 2005.

2.1.1 Phases of the Criminal Justice System

Since Türkiye is a country of civil law, the inquisitorial method is mainly adopted for the criminal procedure.[540] The Turkish criminal justice system, as a whole, consists of three main phases: investigation (*soruşturma*), prosecution (*kovuşturma*), and execution (*infaz*). Definitions are provided under Article 2/1 of the TCCP. Accordingly, the investigation is the phase that starts with a suspicion of a crime that had been learned by the competent authorities and ends with the admission of the indictment. The prosecution phase starts with the admission of the indictment and ends when the verdict is final. The person who is the subject of the criminal investigation is called "*suspect*"; and the subject of the

533 Heper, A. (2016). Ceza Hukuku ve Hukuk Felsefesi İlişkisi Almanya ve Türkiye Karşılaştırması. In H. Ökçesiz, G. Uygur, İ. Akı, & N. Özdemir, *Hukuk Felsefesi ve Sosyolojisi Arkivi* (pp. 167-183). İstanbul: İstanbul Barosu, p. 167-168.

534 Jescheck, H.-H. (1994). Türk Ceza Kanununun Ön Tasarısında Yer Alan Kusur İlkesinin Mukayeseli Hukuk Açısından İncelenmesi. *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, 54*(1-4), 15-31, p. 16.

535 Sözüer, A. (2019). Türk Ceza Hukuku Reformu: Dünü, Bugünü ve Yarını. *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 21*, 3031-3050, p. 3040.

536 *See.* < https://ec.europa.eu > accessed 28 June 2021.

537 To summarise briefly, the TCC is formed of two books: general provisions and special provisions: the first book regulates the basic principles, definitions, jurisdiction rules, principles of criminal responsibility, rules for jointly committed offenders, aggregation of offences, sanctions, security measures, determination and individualisation of sanctions, discontinuance of proceedings, and setting aside the sentence rules; and the second book regulates special crimes and their minimum and maximum punishments.

538 The Turkish Code of Criminal Procedure includes 7 books: 1) general provisions, 2) investigation phase, 3) prosecution phase, 4) victim, complainant, person liable for pecuniary compensation, intervening party, 5) special adjudication procedures 6) legal remedies, 7) court expenses and several other provisions.

539 The EPSM has two books: The first book regulates purpose, basic principles, imprisonment and security measures; and the second one regulates other penalties, measures, conditional release and detention. Article 1 provides the purpose of the Law which is to regulate the procedures and principles regarding the execution of penalties and security measures.

540 Erman, B., & Eroğlu, F. (2013). Role of Medical Experts in Courts Under Turkish Law. In R. Beran, *Legal and Forensic Medicine* (pp. 945-960). Berlin: Springer-Verlag Berlin Heidelberg, p. 947.

criminal prosecution is named "*defendant*". If the criminal prosecution results in finding the person as the perpetrator of the crime; then the person will named as "*convict*".

In order to unify the terminology in this thesis, instead of investigation phase and prosecution phase, the terminology of "pre-trial phase" and "trial phase" will be used.

2.1.1.1 Pre-trial Phase

In Türkiye, all criminal offences are prosecuted in the name of the Republic. Therefore, the Public Prosecution Office has a quasi-judicial, quasi-administrative function:[541] while playing a significant role in criminal prosecution, it also represents the executive power of the government. The prosecutors are tasked with conducting the compulsory investigation and deciding whether it is necessary to initiate a public prosecution, and whether there are factual findings which indicate that a crime has been committed.[542] If the preliminary investigation justifies the initiation of a public prosecution based on sufficient evidence, the public prosecutor prepares and submits the indictment to the competent court through an accusation.[543] Due to having a quasi-judicial and quasi-administrative function, the public prosecutor is obliged to collect evidence on behalf of both parties.

The case shall only be opened when the court accepts the indictment.[544] Criminal courts have 15 days to read and accept the indictment or remit to the public prosecutor.[545] However, due to the workload, no Court is able to read and review indictments on time, and consequently this causes automatic acceptance.

According to the TCCP, the police do not have the authority to conduct any investigation unless there is a specific order of the Public Prosecutor.[546] The police function as both administrative police and judicial police. However, police officers are not hired based on this separation of functions, and thus, there are no special criminal police units within the police force to conduct preliminary investigations. All the police forces, therefore, are authorised to fulfil judicial duties, albeit under the order of the Public Prosecutor.[547] According to Article 160 of the TCCP, the public prosecutor shall investigate and give commands to the judicial police in order to ascertain the factual truth as the basis of a fair trial. The police must report all arrests and interrogations of and interviews with the suspect to the public prosecutor.[548] The regulations concerning pre-trial detention and police interrogation must be interpreted in light of Article 5 of the ECHR. The source of this application lies in Article 90/5 of the Constitution of the Republic of Türkiye. According to the regulation, "*International treaties that have been duly put into effect shall have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds of unconstitutionality. In the event of a discrepancy between the*

541 Yenisey, F. (2021). *Criminal Law in Turkey*. Alphen aan den Rijn: Kluwer Law International, §368.
542 Article 160/1 of the TCCP.
543 Article 170 of the TCCP.
544 Article 175/1 of the TCCP.
545 Article 174/1 of the TCCP.
546 Article 160/1 of the TCCP.
547 Articles 160/1 and 164 of the TCCP.
548 Article 90/5 of the TCCP.

provisions of international treaties on fundamental rights and freedoms that have been duly put into force and those of domestic legislation, the former shall prevail.". Therefore, the provisions of the ECHR take precedence over any code that has been regulated and enacted in Türkiye.

The TCCP also regulates the *suspect*'s rights during the preliminary investigation. The defence counsel has unrestricted access to the file of the investigation. Suspects have the right to have a lawyer present during police questioning,[549] to be questioned by a judge, and to have their lawyer present during questioning in case of arrest.[550]

2.1.1.2 Trial Phase

As it is given above, according to Article 2/1 of the TCCP the investigation phase ends, and the prosecution phase starts with the admission of the indictment; and when the verdict is final, the prosecution phase ends. At this stage, the *suspect* becomes the *accused*.

The *accused* has a stronger position during the trial phase, compared to the *suspect* in the pre-trial phase. The main reason is that accused persons are provided with the right to bring witnesses before the court, the right to have a non-public hearing, and the right to have the "*last word*" at the end of the trial, before the verdict is declared.[551] In the Turkish criminal justice system, the *guilty plea* is unknown. All criminal hearings are open to the public[552], and the impartiality of the judge is guaranteed by the Code.[553] Although hearings are open, no judgment is publicly published. There is a database on which judges can reach all judgments and the minutes of all hearings; and for lawyers, there is another sort of database that allows them to reach case files, and to file a petition or plea of defence online for the cases that they are assigned or appointed as a lawyer. Yet, legal scholars and citizens have limited or no access to find or reach court cases.

In the Turkish criminal justice system, there are three types of first-instance criminal courts: criminal judges of peace (*sulh ceza hakimlikleri*), penal courts of first instance (*asliye ceza mahkemeleri*), and penal courts of assize (*ağır ceza mahkemeleri*).[554] The criminal judge

549 Article 147 of the TCCP.

550 Article 91/6 of the TCCP.

551 Article 216/3 of the TCCP.

552 Article 182 of the TCCP regulates that all hearings shall be open to the public. In cases where common morality or public security makes it absolutely necessary, the court may decide to hold part or all of the hearing in private. Both the justidied decision to hold the hearing in private and the verdict shall be announced at the open hearing.

553 Article 22/1 and 23 of the TCCP.

554 The Turkish criminal justice system does not have the concept of a jury. Criminal courts run the trial phase. In Türkiye there not any special undergraduate programs at any faculty of law; there is only one programme, titled "Law", in general. This means that lawyers, judges, prosecutors, and notaries must complete the same four-year bachelor's degree program. However, graduating from a four-year law school does not immediately provide anyone a title. After graduation, jurists who are willing to become a lawyer must apply to the Turkish Bar Association and complete a one-year internship program; 6 months in a courthouse in order to observe and analyse how the legal system works in real life; and after that, 6 months in a law office with a lawyer with at least 5 years of experience. Jurists who want to practise law as judges or prosecutors have to take a written and an oral exam. There are two different sorts of the exam: one for administrative

of peace is a one-judge court that is in charge with the investigation phase to deliver judicial decisions. They also provide appellate reviews on the decisions given by another criminal judge of peace.[555] It may be, therefore, called a closed-circuit system, due to the fact that the criminal judges of peace shall review the objections and appeals of the decisions given by the same degree judges. Criminal courts of general jurisdiction also consist of one judge, however criminal courts of assize consist of three judges.[556] The main distinction between these two first instance courts is the severity of the punishment regulated for the alleged crime. The main rule is that when the alleged crime requires imprisonment sentence of 10 years or less, criminal courts of general jurisdiction are the competent courts; when it is more than 10 years, criminal courts of assize are competent.[557] When the competent court terminates the hearing, the members of the court go to their chamber to deliberate the verdict and the sentence. There is no separate hearing for the sentence, and therefore the same court declares the verdict and the sentence together, in a public session.

The general remedy against a verdict made by a first instance court is appeal. In 2016, the appeal regulations had been changed, and a new degree of court was introduced. Regional Courts of Justice (*Bölge Adliye Mahkemeleri*) are currently in between the first instance courts and the *Yargıtay*, the Supreme Court, in order to take weight off the shoulders of the *Yargıtay*. Regional Courts of Justice shall re-hear the case and decide on the facts itself. Appeal to the judgment of a Regional Courts of Justice is also possible to the *Yargıtay*. However, the *Yargıtay* cannot decide on the facts, but only assesses the application of law.

2.1.1.3 Execution Phase

In the Turkish criminal justice system, the trial phase ends, and the execution phase starts when the verdict is final. Every sentence (imprisonment and/or judicial fine) and every security measure shall be then sent to the Public Prosecution Office of the place where the competent court is located, for execution.[558]

justice and one for 'judicial' justice (civil and criminal law). The jurist, who passed the 'judicial' justice exam, elected and assigned, has to complete two years of internship, only afterwards they can work as a public prosecutor or a judge in criminal justice or civil justice systems. There is no specialisation supported, anybody can be assigned as a public prosecutor after working ten years as a judge in a family court. Criminal judges wear a black robe with a red collar, civil judges wear a black robe with a green collar, and administrative judges wear a black robe with a grey collar; this dress regulation was made by the Council of Judges and Prosecutors (*Hâkimler ve Savcılar Kurulu*).

555 Article 10 of the Law on the Establishment, Duties, and Powers of Judicial Jurisdiction Courts and Regional Courts, no. 5235.

556 Article 9 of the Law on the Establishment, Duties, and Powers of Judicial Jurisdiction Courts and Regional Courts, no. 5235.

557 There are some exemptions regulated in Article 12 of the Law on the Establishment, Duties, and Powers of Judicial Jurisdiction Courts and Regional Courts

558 Aras, B. (2016). *İnfaz Aşamasında İnfaz Hakimliğinin ve Esas Mahkemesinin Görev ve Yetkileri*. Ankara: Yetkin Yayınları, p. 46.

Article 3 of the Law on Execution of Penalties and Security Measures ("EPSM") provides the main purposes of the execution of criminal penalties and security measures: *prevention* and *resocialisation*. According to Article 3 of the EPSM, to ensure *the general and special crime prevention*, the factors preventing the convicted person from re-offending should be strengthened, society should be protected against crime, re-socialisation of the convict should be promoted, and their adaptation should be facilitated towards to a productive and responsible lifestyle that respects laws, regulations, and social norms. The preamble of the EPSM also emphasises that the purpose of Article 3 is to make the convicted person a productive participant of society, to gain a personality that respects social rules and laws and regulations and to facilitate their adaptation to a responsible lifestyle.[559] As can be seen, it is possible to categorise the objectives intended to be achieved by the execution of penalties and security measures under two headings: *prevention* and *reintegration*.

The prevention purpose has two aspects: *general crime prevention* and *individual crime prevention*. The *general* one is to teach persons the prohibitions specified in the law and prevent their violations through the threat of punishment, and execution of the sentences. The resocialisation of the offender is the *individual* crime prevention purpose. The aim should be the prevention of recidivism, and reintegration of the person into society.[560] Therefore, the purpose of the execution is not retaliation, expiating, or suffering. Resocialisation is important for all types of conviction, even if it concerns life-long imprisonment. One should always be able to hope for a return to society and the execution rules must thus be regulated for reintegration.[561]

The obligations and rights of the convicts are regulated under both the EPSM and its By-Law. Accordingly, the convicts have the right to consult with a lawyer and notary, the right to participate in cultural and artistic activities, the freedom of expression, the right to use the library and benefit from periodical or non-periodical publications, the right to make telephone calls, the right to benefit from radio, television broadcast and internet facilities, the right to receive and send letters, faxes, and telegrams, the right to accept gifts, the freedom of religion and belief, the right to health, the right to work, the right to individualisation, the right to education, the right to visitors, the right to sports and activity, and lastly the right to request a special leave.[562]

It is also important to provide some general information on Turkish institutions. Penal execution institutions in Türkiye can be distinguished in a) *closed* penitentiary institutions, b) high security *closed* penitentiary institutions, c) women *closed* penitentiary institutions, d) juvenile *closed* penitentiary institutions, e) youth *closed* penitentiary institutions, f) *open* penitentiary institutions, g) observation and classification centres,

559 *See.* The Preamble at < https://www5.tbmm.gov.tr/sirasayi/donem22/yil01/ss710m.htm> accessed 18 March 2024.

560 Özbek, V. Ö. (2021). *İnfaz Hukuku*. Ankara: Seçkin Yayıncılık, p. 43-45.

561 Özbek (2021), p. 47.

562 *See.* Articles 59-96 of the EPSM, and Articles 72-116 of the By-Law on the Administration of Penal Institutions and the Execution of Penalties and Security Measures ("By-Law", *Ceza İnfaz Kurumlarinin Yöneti˙mi˙ İle Ceza ve Güvenli˙k Tedbi˙rleri˙ni˙n İnfazi Hakkinda Tüzük*).

and h) child education centres.[563] *Closed* institutions are facilities with internal and external security guards, equipped with technical, mechanical, electronic or physical barriers against escape, room and corridor doors are kept closed.[564] High security closed institutions are facilities with internal and external security guards, equipped with technical, mechanical, electronic and physical barriers against escape, where convicts subject to a strict security regime are placed in one or three-person rooms with room and corridor doors kept constantly closed.[565] *Open* institutions are the institutions where priority is given to the rehabilitation, employment and occupational training of convicts, with no obstacles against escape and no external security guards, yet with sufficient surveillance and supervision of institution officials in terms of security.[566] Sentences of first-time offenders and those sentenced to imprisonment for two years or less may be served directly in *open* institutions.

The execution of the imprison sentence of the convict with a mental disorder can be adjourned and the convict can be taken under protection and treatment in Highly Secured Forensic Psychiatry Hospitals ("YGAP", Yüksek Güvenlikli Adli Psikiyatri Hastanesi) until they recover; the period spent in these institutions shall be considered as time spent in the penitentiary institutions.[567] The sentences of those who developed mental disorders due to imprisonment or other reasons, but were not deemed necessary to be kept in mental healthcare hospitals and thus were sent back to the penitentiary institutions, shall be executed in specially designated sections of those institutions.[568]

In cases where the verdict entails the security measure specific to the mentally disordered offenders instead of imprisonment, the Court shall forward the judgment to the Public Prosecutor's Office, and this judgement shall be written on a separate execution record book[569] by the Public Prosecutor's Office.[570] The new concept of YGAP Hospitals will be explained further under the *5.1.2.2 Types of Facilities* subsection below. However, it is already important to note that currently 6 YGAP Hospitals are open and in operation.

In Türkiye, as of 01 December 2023, there are a total of 405 penal execution institutions, including 274 *closed* penal institutions, 99 detached *open* penal institutions, 4 Children's Training Centre, 11 *closed* penal execution institutions for women, 8 *open* penal execution institutions for women, 9 *closed* penal execution institutions for children and youth; and

563 Article 3/1(g) of the By-Law.
564 Article 10 of the By-Law.
565 Article 11 of the By-Law.
566 Article 16 of the By-Law.
567 Article 54 of the By-Law.
568 Article 9 of the By-Law.
569 According to Article 10 of the *Directive on Books and Documents to be Used in Penal Institutions and Their Issuing*, execution record book is for the convicts to be recorded each year by the prison clerk responsible for execution affairs. The registration number in this book constitutes the registration number of the convict.
570 Article 60 of the By-Law.

the total capacity of these institutions is 297.200 persons.[571] According to the latest publicly available statistics, in 2022, 275.965 convicted and 38.537 detained persons were placed in those institutions.[572]

2.2 Criminal Justice System of England and Wales

The United Kingdom geographically and constitutionally has four components: England, Wales, Scotland, and Northern Ireland.[573] Within these four, however, there are three separate court/judicial systems; England and Wales, Scotland and Northern Ireland.[574] The jurisdiction of England and Wales comprises the countries England and Wales. Historically, these two countries have been always tightly intertwined.[575] With the Law in Wales Acts 1535 and 1542, which are also labelled as *Acts of Union*[576], Wales was *incorporated, united and annexed to and with* England.[577] The legal system of England has been extended to Wales. England and Wales are, therefore, treated as a single jurisdiction.[578]

England and Wales have an uncodified constitution. The court system is adversarial, including the juvenile courts. The criminal justice system is defined as the historical pioneer of the common law system.[579] Criminal cases are tried in either a Crown Court or a Magistrates' Court. The Crown Court sits with a judge and jury, and there are three levels of Crown Court centres: first-tier centres, second-tier centres, and third-tier centres. The types of criminal offence are divided into four classes, depending on their gravity, and some can only be tried by a High Court judge, while others can be tried by circuit judges or recorders. Magistrates' courts deal with the least serious offences.[580] Criminal offences are classified according to the mode of trial; offences may be indictable, summary, or triable either way.[581] Only the most serious cases are tried by a judge and jury. In England few cases result in a jury trial: most cases that come before the Crown Court result in

571 *See*. The website of the Republic of Türkiye Ministry of Justice General Directorate of Prisons and Detention Houses, <https://cte.adalet.gov.tr/Home/SayfaDetay/cik-genel-bilgi> accessed 16 January 2024.

572 <https://cte.adalet.gov.tr/Resimler/Dokuman/istatistik/istatistik-1.pdf> accessed 18 March 2024.

573 *See*. United Kingdom: IALS Library Guides, <https://libguides.ials.sas.ac.uk/unitedkingdom/> accessed 16 January 2024.

574 *See*. <https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/justice-sys-and-constitution/> accessed 16 January 2024.

575 Barber, N.W. (2021). *The United Kingdom Constitution: An Introduction*. Oxford: Oxford University Press, p. 227.

576 Barber (2021), p. 229.

577 *See*. <https://www.legislation.gov.uk/aep/Hen8/27/26/contents> accessed 28 December 2023.

578 After the Welsh Language Act 1993, persons now have the right to speak Welsh in judicial proceedings. *See*. Barber (2021), p. 235.

579 *See*. <https://bjs.ojp.gov/content/pub/pdf/wfbcjsew.pdf> accessed 18 April 2023.

580 Ashworth, A. (2010). *Sentencing and Criminal Justice*. Cambridge: Cambridge University Press, p. 1-2.

581 Padfield, N. (2012). *Criminal Law*. Oxford: Oxford University Press, p. 8.

guilty pleas, and therefore there is no trial.[582] Most of the offences, especially recent ones, have been established by law, but others have simply developed through common law. This means that definitions have slowly evolved through judgements over the centuries.[583] Parliament regulates a statutory maximum penalty for the offences.[584]

Comparing to the Turkish criminal justice system, the English and Welsh criminal justice system is relatively well known internationally. Thus, the information provided on England and Wales will be more brief.

2.2.1 Phases of the Criminal Justice System

The criminal justice system in England and Wales is a result of 1000 years of legal development.[585] The English and Welsh model of judiciary still evolves every day. Currently, key actors of the pre-trial and trial stages are police forces, Police and Crime Commissioners, Crown Prosecution Service (CPS), Her Majesty's Court and Tribunal Service (HMCTS), Magistrates' courts, the Crown Court, the Court of Appeal, and the Sentencing Council.[586]

The phases of the criminal justice system of England and Wales will be briefly explained below under three stages: investigative (or pre-trial), trial, and execution.

2.2.1.1 Pre-trial Phase

The pre-trial phase is where the decision has been made to proceed with the case and further investigations are in progress, or a court hearing is awaiting; while the trial phase is where the court process -involving determination of guilt and/or sentence- is ongoing.[587] According to Section 22 of the Criminal Procedure and Investigations Act 1996 (CPIA); a criminal investigation is "*an investigation conducted by police officers with a view to it being ascertained; (a)whether a person should be charged with an offence, or (b)whether a person charged with an offence is guilty of it*".

The Crown Prosecution Service ("CPS") prosecutes criminal cases investigated by the police and other investigative organisations in England and Wales. The CPS is an independent organisation, thus their decisions are independent from the police and government.[588] The Code for Crown Prosecutors makes explicit reference to the issue of

582 Padfield (2012), p. 10.

583 Padfield (2012), p. 12.

584 Ashworth (2010), p. 1; Padfield (2012), p. 11.

585 For further information *See*. <https://www.judiciary.uk/about-the-judiciary/history-of-the-judiciary/> accessed 20 September 2022.

586 For further information *See*. House of Commons Library (2022), A short guide to the criminal justice system, https://researchbriefings.files.parliament.uk/documents/CBP-9331/CBP-9331.pdf, Accessed 20 September 2022, p. 1-3.

587 <https://www.prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf> accessed 20 September 2022, p. v.

588 The Crown Prosecution Service <https://www.cps.gov.uk/about-cps> accessed 25 June 2023.

Contrary to the legal systems of many European countries, the principle of the separation of the prosecution from the police investigation is a fundamental aspect of the independence. The

independence: "*Prosecutors must be free to carry out their professional duties without political interference and must not be affected by improper or undue pressure or influence from any source*".[589] During the pre-trial phase, the CPS decides whether a case shall be prosecuted, determines the proper charges for complex cases, advises the police in the initial stages of the investigation, and delivers information, aid, and support to victims and prosecution witnesses; during the trial phase, prepares the case and presents it at the court.[590]

The evidential stage is the first step to the decision to prosecute. Prosecutors must be convinced that there is sufficient evidence to establish a "*realistic prospect of conviction*" on each charge. When the first stage is fulfilled, in a second stage the prosecutor shall assess the public interest. Only in cases where both stages have been passed, the CPS will initiate or proceed with a prosecution.[591]

The Code for Crown Prosecutors ("CCP") regulates the general principles Crown Prosecutors should follow when they make decisions on cases.[592] According to the Article 1.4 of the CCP *suspect is* a person who is under consideration as the subject of formal criminal proceedings; *defendant* is a person who has been charged or summoned; and *offender* is a person who has admitted guilt or who has been found guilty in a court of law.

Article 3.2 of the CCP regulates that the police and other investigators are in charge of conducting investigations into any alleged crime and deciding how to use their resources. This includes decisions to start or continue an investigation and on the scope of the investigation. At this stage, prosecutors play an advisory role to provide advice to the police and other *investigators about possible reasonable lines of inquiry, evidential requirements, pre-charge procedures, disclosure management and the overall investigation strategy*. That kind of advice helps the police and other investigators to conclude the investigation within a r*easonable period of time* and to construct *the most effective prosecution case*. Prosecutors cannot direct the police or other investigators, according to Article 3.3 of the CCP. It should be also emphasized that prosecutors are required by Article 2.10 of the CCP, to

prosecutor is not granted any supervisory authority over police officers or their conduct of the investigations; whilst the police are encouraged, and in some cases required, to seek advice on charging decisions from the CPS. Despite the functional separation and independence of the police and the prosecution, the Crown Prosecutor is reliant on the information provided by the police investigation in making decisions and in assembling and presenting the prosecution case. *See.* Hodgson, J.S. (2022). Chapter 3: Prosecution in adversarial and inquisitorial procedures: the weakening of professional autonomy. In D. Nelken, & C. Hamilton (Eds.), *Research Handbook of Comparative Criminal Justice* (pp. 49-65). Cheltenham, UK: Edward Elgar Publishing, p. 51.

589 *"The independence of the prosecutor is central to the criminal justice system of a democratic society. Prosecutors are independent from persons or agencies that are not part of the prosecution decision-making process. CPS prosecutors are also independent from the police and other investigators. Prosecutors must be free to carry out their professional duties without political interference and must not be affected by improper or undue pressure or influence from any source." See.* General Principle 2.1 of the Code for Crown Prosecutors.

590 The Crown Prosecution Service <https://www.cps.gov.uk/about-cps> accessed 25 June 2023.

591 The Crown Prosecution Service <https://www.cps.gov.uk/about-cps> accessed 25 June 2023.

592 The Code for Crown Prosecutors (2018) <https://www.cps.gov.uk/publication/code-crown-prosecutors> accessed 25 June 2023.

apply the principles of the ECHR at each stage of the case, in addition to the Human Rights Act 1998, CCP guidelines, Criminal Procedure Rules and Criminal Practice Directions, and the Sentencing Council Guidelines.

During the investigation, defendants may desire to plead guilty of all or some of the charges. The Crown Prosecutor should only accept the plea when: *a) the court is able to pass a sentence that matches the seriousness of the offending, particularly where there are aggravating features; b) it enables the court to make a confiscation order in appropriate cases, where a defendant has benefitted from criminal conduct; c) it provides the court with adequate powers to impose other ancillary orders, bearing in mind that these can be made with some offences but not with others.*[593] However, prosecutors must *never* accept guilty pleas, just because the plea is convenient.[594] The decision to accept the plea rests with the prosecutor, yet, it must be made clear to the court on what basis any plea is advanced and accepted.[595]

A decision to prosecute will result in an appearance in a magistrates' court either for trial or if appropriate, committal or sending to the Crown Court. This decision concludes the pre-trial phase and initiates the trial phase. Out-of-court disposals may also be an alternative for a prosecution, if it is an appropriate response to the offender and/or the seriousness and consequences of the offending, according to the Article 7.1 of the CCP.

2.2.1.2 Trial Phase

During the trial phase, the prosecution must present evidence that proves beyond reasonable doubt that the defendant perpetrated the charged offence; however, it is not the duty of the defendant to prove their innocence, due to the presumption of innocence.[596]

In England and Wales, there are two first instance courts: the magistrates' court and the Crown Court. Magistrates are laypersons chosen from the society to serve, without payment, who sit with a legal advisor. Having laypersons in court as a decision-making mechanism is not as much used in civil law systems. Before their appointments as magistrates, they must undertake a course on basic instruction to their duties.[597] As of 2024, the number of magistrates in post in England and Wales was 14,576,[598] representing a decrease of almost half from the 25,170 recorded in 2012.[599]At least 26 times a year, magistrates are expected to appear in court. A lay justice may resign at any time;

593 Article 9.1 of the CCP.

594 Article 9.4 of the CCP.

595 Article 9.6 of the CCP.

596 *See.* < https://www.hse.gov.uk/enforce/enforcementguide/court/rules-trial.htm > accessed 26 April 2023.

597 Sprack, J., & Engelhardt–Sprack, M. (2019). *A Practical Approach to Criminal Procedure.* New York: Oxford Academic, p. 82-83.

598 *See.* < https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2024-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders-2024-statistics> accessed 11 January 2025.

599 *See.* < https://judicialappointments.gov.uk/wp-content/uploads/2020/10/diversity-of-the-judiciary-2020-statistics-web.pdf > accessed 11 January 2025.

furthermore, in cases where a magistrate demonstrates incapacity or misbehaviour, persists on failing to meet the standards of competence, or declines or neglects to take a proper part in the exercise of their functions as a magistrate; lay magistrates may be removed by the Lord Chancellor.[600] At the age of 70, a lay magistrate has to retire.[601] District judges (magistrates' courts), on the other hand, are professional and paid members of the judiciary, thus they are assigned to particular regions.[602] Approximately half of full-time appointees are based in London and the other half in the provinces.[603]

"Summary only offences" are held in a magistrates' court. It shall be noted that the district judge can hear a case sitting alone, however at least two magistrates must sit together for the purposes of a *summary trial*.[604] *"Either way offences"* can be heard in either the magistrates' court or the Crown Court, and *"indictable only"* offences can only be heard in the Crown Court.[605] In cases involving either way offences, if a defendant pleads guilty, the magistrates' court may hear the case, when they decide that they do not have sufficient powers to render the appropriate sentence, the case may be referred to the Crown Court. When the defendant pleads not guilty, the defendant will be asked whether they consent to summary trial, or they prefer the Crown Court trial.

Having a jury as a decision-making mechanism is not as customary in civil law systems, there is a need for further explanation. The jury[606] is described as the 'jewel in the Crown' of the British criminal justice system.[607] It is accepted as a sacred body because of its ancient origins, yet, only about 1% of the criminal cases in England and Wales end

600 The Courts Act 2003, s11.

601 Sprack & Engelhardt–Sprack (2019), p. 84.

602 Sprack & Engelhardt–Sprack (2019), p. 84.

603 Sprack & Engelhardt–Sprack (2019), p. 84.

604 *"Apart from the power of the district judge to sit alone, there is at present no rigid distinction between their powers and those of the lay magistracy."*, Sprack & Engelhardt–Sprack (2019), p. 84.

605 <https://www.hse.gov.uk/enforce/enforcementguide/court/magistrates-intro.htm> accessed 26 April 2023.

606 Until 1972, there was a statutory 'property qualification' to be a juror, however this was found to be an exclusion for the majority of the adult population and was therefore lifted with Juries Act 1974. The only qualifications are now to be at least 18 years old but not over 70, to have habitual residence in the country for more than 5 years since the age of 13, and to be registered as an elector for parliamentary or local government. The dominant principle of the selection from that register is random selection. Every person who received a jury summon shall respond within 7 days and return the completed form by post; in cases where a person does not return the form or turn up for the jury service, there will be a fine up to £1,000. According to the Juries Act 1974, s 9B and s 10, the court has the discretion to dismiss a jury if it finds that the person will be unable to act effectively as a juror due to disability or insufficient understanding of the English language.
Further information, *see*. Review of the Criminal Courts of England and Wales (September 2021), <https://www.criminal-courts-review.org.uk/chpt5.pdf>, accessed 16 October 2023.

607 Review of the Criminal Courts of England and Wales (September 2021), <https://www.criminal-courts-review.org.uk/chpt5.pdf>, accessed 16 October 2023, p. 135.

in a jury trial.[608] While the jury considers its verdict, it must remain under the custody of the jury bailiff; during this stage, even the jury bailiff is not allowed to go into the jury room or speak to jurors, unless the judge orders so.[609] Interrelatedly, the jury cannot be separated.[610] While considering the verdict, the jury may ask the judge to elaborate on legal issues raised in the case; also to remind the jurors of some of the evidence.[611] In cases where the jury has a question or note for the judge, it should be written down and given to the jury bailiff to be passed on to the judge.[612] The judge directs the jury to try to reach a unanimous verdict. If the jurors are successful in this, at the end of their considering time, they must return a verdict on each count and on each accused. The foreman declares the decision of the jury as "guilty" or "not guilty".[613] Where a jury cannot agree on the verdict, the judge discharges the jury.[614] As a rule, the judge does not have the power to reject the jury's verdict, regardless of whether the judge disagrees with it; nor may the judge put questions to the jury about the verdict.[615]

Entering a plea does not occur in the Turkish criminal justice system. Thus, for better comparison later, some explanation is provided. After entering a not guilty plea, it is possible at any time to change it for a guilty plea. When the defendant has pleaded guilty but later enters a plea of not guilty, the court should continue as if the defendant had pleaded not guilty.[616] It is possible to refuse to plead or remain silent.

The trial will ordinarily progress as follows: *counsel for the prosecution opens his case, witnesses for the prosecution, counsel for the defence may open his case, witnesses for the defence, counsel for the prosecution sums up his case, counsel for the defence sums up his case, summing up to the jury by the judge, jury retires and returns with its verdict.*[617]

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608 Review of the Criminal Courts of England and Wales (September 2021), <https://www.criminal-courts-review.org.uk/chpt5.pdf>, accessed 16 October 2023, p. 135.

609 Sprack & Engelhardt–Sprack (2019), p. 311.

610 Sprack & Engelhardt–Sprack (2019), p. 312.
If the judge permits the jury to separate during consideration of their evidence, then the judge shall inform the jury on not to seek for further evidence or information outside of the hearing and not to talk to anyone about the case. Oliver [1996] 2 Cr App R 514.

611 Sprack & Engelhardt–Sprack (2019), p. 313.

612 Sprack & Engelhardt–Sprack (2019), p. 314.

613 Sprack & Engelhardt–Sprack (2019), p. 317.
Until 1967, jury verdicts had to be unanimous, however, the Juries Act 1974 s17 regulates that *the verdict of a jury in proceedings in the Crown Court or the High Court need not be unanimous if (a) in a case where there are not less than eleven jurors, ten of them agree on the verdict; and (b) in a case where there are ten jurors, nine of them agree on the verdict.*

614 Sprack & Engelhardt–Sprack (2019p. 326.

615 Sprack & Engelhardt–Sprack (2019 p. 328.

616 <https://www.hse.gov.uk/enforce/enforcementguide/court/magistrates-hearing.htm>, accessed 26 April 2023.

617 < https://www.hse.gov.uk/enforce/enforcementguide/court/crown-court.htm> accessed 26 April 2023.

The magistrates' court can provide a verdict; it may be either conviction or dismissal.[618] The defence has the right to appeal against a magistrates' court decision to the Crown Court on the point of law or fact. When a defendant pleads not guilty, they may appeal against conviction or sentence, however when they plead guilty, they can only appeal against the sentence.[619] Against a dismissal verdict, an appeal can be made by the prosecution by way of stating the case to the Divisional Court of the Queen's Bench Division.[620] However, the appeal cannot be made against a decision of fact.

The Court of Appeal (Criminal Division) may confirm, reverse, or vary the decision.[621] A further appeal, against a decision of the Court of Appeal, may be made to the Supreme Court.[622] When a defendant is convicted by the Crown Court, then they may appeal to the Court of Appeal on a point of law or on a point of fact.[623] It is also possible to appeal against the sentence.[624]

Criminal trials in common law jurisdictions typically involve two distinct phases. The first phase focuses on the facts, the guilt or innocence of the accused and ends with a conviction or acquittal; whereas a second phase, often called the sentencing hearing, is held to determine the nature and extent of the sentence.[625] Thus, different than the Turkish criminal justice system, in England and Wales, there are different fact-finding hearings and sentencing hearings. The key procedural difference of these two phases lies with the jury, as the jury decides on the facts, or on insanity, and the judge determines the sentence.[626]

As it is stated above, when a court finds a person guilty, the judge or the magistrate shall pass a sentence as a punishment.[627] In England and Wales, approximately 96% sentencing decisions are taken in the Magistrates' Court.[628] The sentence is determined on the basis of a number of factors, including the type, seriousness, and circumstances of the crime, and age, criminal record, and plea of the defendant.[629]

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618 <https://www.hse.gov.uk/enforce/enforcementguide/court/magistrates-contested.htm#P92_11108> accessed 26 April 2023.

619 Magistrates' Courts Act 1980, s.108. *R v Birmingham Crown Court, ex parte Sharma* [1988] Crim LR 741.

620 Magistrates' Courts Act 1980, s.111.

621 Criminal Procedure and Investigations Act 1996, Section 35(3).

622 Criminal Appeal Act 1968, Section 31.

623 Criminal Appeal Act 1968, s.1, as amended by CAA 1995, s.1.

624 Criminal Appeal Act 1968, s.9.

625 Horovitz, A. (2007). The emergence of sentencing hearings. *Punishment & Society*, *9*(3), 271-299, p. 271.

626 Horovitz (2007), p. 271.

627 Crown Prosecution Service, <https://www.cps.gov.uk/legal-guidance/sentencing-overview-general-principles-and-mandatory-custodial-sentences > accessed 28 April 2023.

628 Roberts, J.V. (2012). Structuring Sentencing in Canada, England and Wales: A Tale of Two Jurisdictions. *Criminal Law Forum* 23, 319–345, p. 321-322.

629 <https://www.gov.uk/how-sentences-are-worked-out> accessed 25 June 2023.

The Attorney General's Guidelines provide guidance on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise in paragraph B:4: "*…The prosecution advocate represents the public interest, and should be ready to assist the court to reach its decision as to the appropriate sentence. This will include drawing the court's attention to: … any relevant sentencing guidelines and guideline cases; and the aggravating and mitigating factors of the offence under consideration*".

The Sentencing Council, which is an independent, non-departmental body, is responsible for monitoring sentencing in England and Wales.[630] The Sentencing Council also has the role to issue guidelines on sentencing which the court must follow. According to Section 125 of the Coroners and Justice Act 2009, the only exemption to follow these guidelines is when the interest of justice requires not to do so. As amended in Section 174(2) of the Criminal Justice Act 2003, the court must state its reason for doing so.

There are four types of sentences (in the broad sense of this thesis): discharge, fine, community sentence, custodial sentence.[631] For the offences committed on and after 12th March 2015, the magistrates' court may issue an unlimited fine, imprisonment for a term not exceeding six months, or both.[632] However, when the defendant has been convicted of more than one offence, a magistrates' court is entitled to impose a penalty for one offence and issue a "*no separate penalty*" order for the remaining offences, if it is deemed that an appropriate sanction has already been imposed. "*Indictable-only*" offences can only be tried at the Crown Court, and the maximum sentences are regulated in the Sentencing Guidelines for the individual offence.[633]

A *Note on Sentence* should be provided when it may assist the Crown Court or the Magistrates' Court, since the cases are complex or unfamiliar, including serious, complex and high-profile cases such as those handled by the Central Casework Divisions and Complex Casework Units.[634] This *Note on Sentence* should address the following matters:[635]

- *any relevant statutory limitations on sentence;*
- *the names of any relevant sentencing authorities or guidelines;*
- *the scope for any ancillary orders (for example, concerning anti-social behaviour, confiscation or that deportation will need to be considered);*
- *the age of the defendant; and*

630 < https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-the-sentencing-council/ > accessed 28 April 2023.

631 < https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/ > accessed 28 April 2023.

632 Health and Safety at Work etc. Act 1974 Schedule 3A; Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

633 *See.* < https://www.sentencingcouncil.org.uk/crown-court/ > accessed 28 April 2023.

634 <https://www.cps.gov.uk/legal-guidance/sentencing-overview-general-principles-and-mandatory-custodial-sentences > accessed 28 April 2023.

635 *See.* <https://www.cps.gov.uk/legal-guidance/sentencing-overview-general-principles-and-mandatory-custodial-sentences > accessed 28 April 2023.

- *information regarding any outstanding offences known at the time: this information is most likely to need to be updated by the trial advocate at the actual sentencing hearing.*

2.2.1.3 Execution Phase

The term "disposals" refers to the range of options available to the court when a person is found to be unfit or found to meet the criteria of the insanity defence, and the facts are proven; and the term "sentencing" refers to cases where the defendant is found to be fit to plead and to stand trial and either pleads guilty or is found guilty.[636]

In accordance with s.5 of the Criminal Procedure (Insanity) Act 1964, the available *disposals* in a Crown Court are as follows: a) hospital order (with or without a restriction order), b) guardianship order (supervision order), c) absolute discharge. Furthermore, s.5(3A) of the Criminal Procedure (Insanity) Act 1964 regulates that the court has the competence to make an order for absolute discharge, provided that it is deemed to be the most appropriate course of action in the light of all the circumstances of the case.[637]

There are four types of *sentences* available to the courts, depending on the seriousness of the crime and dangerousness of the offender. These are discharge, fines, community sentences, and imprisonment. Community sentences combine punishment with activities designed to help change the behaviour of the offender and therefore it can include mental health treatment, drug treatment, alcohol treatment, and supervision.[638] After being sentenced to imprisonment, persons may be taken from the court and transported initially to the nearest *reception prison*.[639] The main function of reception prisons is to serve the courts, holding persons on remand and convicted unsentenced persons.[640] Persons are then relocated to another location depending on the security category, the nature of the crime, the length of sentence, and other factors which are relevant to be taken into account.[641]

England and Wales have the highest imprisonment rate in Western Europe.[642] Due to the growing demand for prison, it experiences a noticeable increase in its prison population.[643] Recognising the need to improve mental health services in prisons, the government transferred responsibility for prison health services entirely from HM Prison

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636 Justice, p. 87.
The difference will be elaborated on under subsection *3.2.5.1 Disposals vs Sentencing*.

637 These disposals will be explained under *Section 5* on the execution.

638 <https://www.cps.gov.uk/cps-page/sentencing> accessed 13 September 2023.

639 A first reception is a measure that applies when a detainee is first taken into custody after a court hearing for a particular set of crimes committed. *See.* <https://data.justice.gov.uk/prisons/offender-management/receptions> accessed 27 December 2023.

640 Prison Estate: *See.* https://assets.publishing.service.gov.uk/media/65cb2baa103de2000cb8f348/The_Prison_Estate_and_Probation_Service_Region_register_Jan_2024.xlsx accessed 07 May 2024.

641 <https://www.familiesoutside.org.uk/publications/information-sheets/expect-starting-prison-sentence/> accessed 02 December 2023.

642 Durcan, G. (2008). *From the Inside: Experiences of prison mental health care.* London: Sainsbury Centre for Mental Health, p. 9.

643 Durcan (2008), p. 19.

Service to the NHS in April 2006.[644] According to the House of Commons Committee report of 2022, there are 119 prisons in England and Wales, and they are a mixture of public and private establishments.[645] The prison system is designed to protect the public: while prisoners are safe, future crimes are prevented and rehabilitation is promoted to reduce recidivism.[646] The Statement of Purpose of the HM Prison Service states: *"Her Majesty's Prison Service serves the public by keeping in custody those committed by the courts. Our duty is to look after them with humanity and help them lead law abiding and useful lives in custody and after release"*.[647] Some of the current problems in mental health care in prisons include lack of understanding between different services in prison, lack of attention to replacement, better planning for the release, access to psychological therapy and advice about medication.[648]

There are three levels of security in forensic mental health: high, medium, and low. Inpatient treatment for offenders with mental disorders within these three levels of security forensic care is aimed at improving symptoms, reducing risks and facilitating reintegration into society.[649] The (secure) forensic mental health system will be further explained later.

2.3 Criminal Justice System of the Netherlands

The Kingdom of the Netherlands currently consists of four autonomous countries: the Netherlands, Aruba, Curaçao, and Sint Maarten –including three public bodies in the Caribbean region: Bonaire, Sint Eustatius, and Saba. In 1886, the Dutch Criminal Code (*Wetboek van Strafrecht,* "DCC")[650] entered into force; yet, the current situation is in sharp

644 Durcan (2008), p. 9.

645 House of Commons Education Committee (2021). *Not just another brick in the wall: why prisoners need an education to climb the ladder of opportunity*: <https://committees.parliament.uk/publications/22218/documents/164715/default/>, p. 26, accessed 02 December 2023.

646 Ministry of Justice (2021). Prisons Strategy White Paper, p. 5: <https://assets.publishing.service.gov.uk/media/61af18e38fa8f5037e8ccc47/prisons-strategy-white-paper.pdf> accessed 02 December 2023.

647 Peay (2011), p. 119.

648 Durcan (2008), p. 7.

649 Senn et al. (2020), p. 2.

650 The history of the Dutch Criminal Code is rooted in 1811, when the Penal Code for the Kingdom of Holland was replaced by the French *Code Pénal*; after the re-establishment of independence in 1813, the French code remained in force with some significant amendments. The code was in force until 1838 and then replaced by a National Statue Book, however it was also a following the French code. Major reforms have been made, and the reflections of the classical school has been replaced with more humane sanction system and more humane prison system, over time. *See.* Tak, P. J. P. (2003). *The Dutch Criminal Justice System*, Den Haag: WODC, p. 15; Bonger, W. A. (1933) Development of the Penal Law in the Netherlands, *Journal of Criminal Law and Criminology (24)*, 260-270, p. 260.

contrast to that of 1886.[651] The Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*, "DCCP") has been enacted in 1926; however, it has also been subjected to many reforms up until now.[652] The Dutch criminal and criminal procedural law comprise a European continental civil law system.[653]

After the 1960s, the Netherlands started becoming more tolerant towards incivilities, petty crimes, drugs, and even euthanasia.[654] The Dutch legal culture was (and by some is) defined as tolerant and lenient towards wrongdoers,[655] also expressed by a Dutch expression *'soft whenever possible, tough when necessary (zacht waar het kan, hard waar het moet)'*.[656] In the mid-1980s however, the Dutch government had a *"punitive turn"*, and in the early 1990s, a number of new prisons were established and opened. This *punitive turn* and new prison construction programme led to a significant shift in the prison population until 2005.[657] Recent figures demonstrate that the prison population, after a period of decline, has been increasing again after 2017.[658]

In the Dutch criminal justice system there are four criteria related to the legality) principle; no conduct can be criminalised unless so defined by written legal rule (*nulla poena sine lege*), criminal statues must be interpreted strictly, no penalty can be given to the acts committed before the adaptation of the statute (*nullum crimen nulla poena sine lege*), and penalties can be imposed only if they are regulated in the statute.[659]

As it is characterised as continental European jurisdictions, the Dutch criminal justice system also has an inquisitorial system. Thus, similar to the Turkish criminal justice system and in contrast with England and Wales, judges play a significant role in fact-finding. In the past, the Dutch criminal justice system was described as the most inquisitorial jurisdiction in Western Europe.[660] However, with the effect and influence

651 Haentjens, R. & Swart, B. (1997). In B. Swart & A. Klip, *International Criminal Law in the Netherlands*. Freiburg: iuscrim, 21-47, p. 21.

652 Crijns, J., & Van der Woude, M. (2022). The Criminal Justice System. In L. van den Herik, E. Hondius, & W. Voermans, *Introduction to Dutch Law* (pp. 501-534). Alphen aan den Rijn: Wolters Kluwer, p. 504.

653 Bal, P., & Koenraadt, F. (2007). Dutch Criminal Law and Procedure: A bird's eye view. In F. Koenraadt, A. Mooij, & J. van Mulbregt, *The Mental Condition in Criminal Law* (pp. 13-35). Amsterdam: Dutch University Press, p. 13.

654 Van Klink, B., & Arnoldussen, T. (2022). Dutch Legal Culture: Limits to the Soft Approach. In L. van den Herik, E. Hondius, & W. Voermans, *Introduction to Dutch Law* (pp. 13-44). Alphen aan den Rijn: Wolters Kluwer, p. 19-20.

655 Crijns & Van der Woude (2022), p. 501.

656 Van Klink & Arnoldussen, p. 13, 17.

657 Crijns & Van der Woude (2022), p. 501-502; *see.* also the Figure 19.1 at p. 503.

658 Crijns & Van der Woude (2022), p. 502.

659 Crijns & Van der Woude (2022), p. 505.

660 Nijboer, J.F. (2000). The significance of comparative legal studies. In J.F. Nijboer and W.J.J.M. Sprangers (Eds.), *Harmonisation in Forensic Expertise: An Inquiry into the Desirability of and Opportunities for International Standards*. Den Haag: Thela Thesis.

of the ECHR and the case law of the ECtHR, some adversarial features have been added to the system.[661]

The Kingdom of the Netherlands is a party to most important human rights treaties. According to Article 93 and 94 of the Dutch Constitution, without any requirement of translation into domestic legislation, international treaties have direct effect in the Dutch legal order, and thus, national regulations which violates international norms are null and void.[662] The European Convention on Human Rights is one of those international treaties, and it has great importance for the criminal procedure.[663]

2.3.1 Phases of the Criminal Justice System

Criminal procedure in the Netherlands can first be divided in a pre-trial investigation phase and the public trial phase. There must be a reasonable suspicion that the crime was committed before a criminal investigation may be initiated. Following the verdict, the execution phase starts.

2.3.1.1 Pre-trial Phase

The pre-trial phase is defined in Article 132a of the DCC, however the DCCP uses the terminology of "investigative phase". According to Article 132a, the phase is defined as the investigation of criminal offences under the authority of the public prosecutor for the purpose of taking criminal decisions. The pre-trial phase is of a tempered inquisitorial nature.[664] The pre-trial phase is mainly led by the police, while the Netherlands Public Prosecution Service (*Het Openbaar Ministerie*, "OM") is in charge of the police investigation. However, the public prosecutor may delegate others with legal competence to investigate, such as police officers, police officials, military service members, special investigation forces, and extra ordinary investigators, according to the Article 141 and 142 of the DCCP. For serious cases, the public prosecutor may provide the police with detailed information, such as reducing or extending the scope of the investigation.[665]

661 Mevis & Van der Wolf, 2021.

662 *"Article 93: Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.*
Article 94: Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.", See. < https://www.rechtspraak.nl/SiteCollectionDocuments/Constitution-NL.pdf > accessed 13 April 2023.

663 Van Kempen, P. H., Krabbe, M., & Brinkhoff, S. (Eds.) (2019). *The criminal justice system of the Netherlands*. Cambridge: Intersentia, p.7.

664 Tak (2003), p. 55.

665 Brinkhoff, S., Bemelmans, J., & Kuipers, M. (2019). Criminal Procedure Law. In P. van Kempen, M. Krabbe, & S. Brinkhoff, *The Criminal Justice System of the Netherlands* (pp. 97-136). Cambridge: Intersentia, p. 108.

The Public prosecutor is also the only authority to subpoena the suspect, submit the indictment to the court, and issue a *punishment order*[666].[667] The public prosecutor will only prosecute when the public necessity requires so, otherwise, they will dismiss the case. The only exemption to this rule is when a Court of Appeals orders the prosecution.[668]

According to Article 180 of the DCCP, the investigative judge (*rechter-commissaris*) supervises the progress of the ongoing pre-trial investigation: the judge is obliged to observe that the criminal investigation is not unduly delayed and may also set the public prosecutor a time limit for conclusion of the criminal investigation. During the pre-trial phase, the investigative judge also determines whether a suspect should remain in custody, further investigating the crime is necessary, or may order a witness to be present to give a statement in a hearing, order interception of correspondence, or order psychiatric evaluation of the suspect.[669]

There are alternatives to the pre-trial detention such as conditional suspension of the detention, a conditional waiver by the public prosecutor. During suspension, conditions may include probation supervision, electronic monitoring, house arrest, community service, treatment, training/learning, a drug/alcohol treatment programme, and an order to stay away from certain locations, or certain persons.[670] Pretrial detention may be carried out in an institution for behavioural observation of the accused, by court order.[671]

Article 67a DCCP regulates two grounds on which pre-trial detention can be ordered: a) if certain conduct of the accused, or certain circumstances relating to him personally, shows serious danger of flight; or b) if certain circumstances show that there are serious grounds for social safety requiring the immediate deprivation of liberty. Moreover, Article 67 lists the sorts of crimes for which pre-trial detention is allowed.

The defence lawyers also play a role in the pre-trial phase. Suspects have the right to choose and pay for their own lawyers; however, the vast majority of arrested suspects receive legal aid to have a lawyer assigned by the Regional Legal Aid Council.[672] Article 29 of the DCCP regulates the right to remain silent and the privilege against self-incrimination. According to the Article 18 of the Constitution, the right to legal aid is a fundamental right. After the famous *Salduz v. Turkey* case[673] on Article 6 of the ECHR, the Dutch criminal procedure acknowledged the right to be assisted by a lawyer, also during the police interrogation. Article 28b of the DCCP now regulates the right to lawyer,

666 Punishment order (*strafbeschikking)* is regulated under Article 257a DCCP.

667 Van Toor, D. (2020) The Dutch Pre-trial Procedure. In E. Johnston, R. Erbaş & D. Jasinski (Eds.), A Comparative Analysis of Pre-Trial Procedure in Europe: The Search for an Ideal Model. Istanbul: Istanbul University Press, 41-66, p. 49.

668 Van Toor (2020), p. 51.

669 Tak (2003), p. 50.

670 De Kok, M., Tigges, L., & Van Kalmthout, A. (2020). *Probation in Europe, The Netherlands.* Utrecht: Confederation of European Probation, p. 22-25.

671 Van der Wolf & Mevis (2022), p. 384.

672 Brinkhoff et al. (2019), p. 109.

673 *Salduz v. Turkey*, App no 36391/02, (ECtHR, 27 November 2008).

also for vulnerable suspects. According to it, if a vulnerable suspect or a suspect of an offence, punishable by imprisonment of 12 years or more according to the legal description, has been arrested, the assistant public prosecutor who, at the arraignment, orders that the suspect be detained for investigation shall immediately notify the Board of the Legal Aid Council of their arrest, so that the Board may appoint a legal counsel. This notification may be omitted if the suspect has chosen a counsel and this or a substitute counsel will be available in due time.[674] If a suspect arrested for a criminal offence for which pre-trial detention has been admitted requests legal assistance, the assistant public prosecutor who, at the arraignment, orders that the suspect be detained for investigation shall notify the Board of the Legal Aid Council without delay, so that the Board appoints a legal counsel.

In the end of any police investigation or judicial investigation, the prosecutor has to make a decision whether to dismiss the case, settle the case by means of transaction, *punishment order*[675], or serve a subpoena against the offender.[676] In that sense, the pre-trial phase ends and the trial phase starts with the decision to prosecute.

2.3.1.2 Trial Phase

The pre-trial criminal proceedings take place behind closed doors, while the trial phase is, as a rule, public (although exceptions are in place for juvenile and mentally disordered defendants).[677] In the Dutch criminal justice system, the adjudication of criminal cases, including sentencing, is in principle the exclusive task of the judiciary.[678] According to the Dutch Constitution and Article 6 of the ECHR, a trial is mandatory before punishment (*procesverplichting*, *nulla poena sine iudicio*).[679]

There are various courts that employ full-time or part-time judges. As stated above, a jury system does not exist in the Netherlands. The trial court of general jurisdiction for serious offences (*misdrijven*) and misdemeanours (*overtredingen*) is the district court (*rechtbank*), appeals from the district courts are heard at the Court of Appeal (*gerechtshof*), and appeals in cassation are heard at the *Hoge Raad,* the Supreme Court.[680] Since the *Hoge Raad* shall not decide on the facts, but assess the application of law, the case cannot be re-heard. The Netherlands has 11 districts, and each has its own court; and 11 districts are divided into four areas of Court of Appeal: The Hague, Amsterdam, Arnhem-Leeuwarden, and 's-Hertogenbosch.[681]

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674 Article 28b/1 of the DCCP

675 *Punishment order* (*strafbeschikking),* which is regulated under Article 257a of the DCPD, is a type of sentencing that can be imposed by the public prosecutor, outside of the courtroom without interference of a judge. The punishment order may be issued when the committed offence is punishable with imprisonment of not more than six years according to the statutory description.

676 Tak (2003), p. 52.

677 Crijns & Van der Woude (2022), p. 525.

678 Crijns & Van der Woude (2022), p. 520.

679 Crijns & Van der Woude (2022), p. 520.

680 Crijns & Van der Woude (2022), p. 512.

681 < https://www.rechtspraak.nl/English/Judicial-system-and-legislation > accessed 28 April 2023.

The trial phase has an accusatorial character.[682] Comparable to the Turkish criminal justice system, the main purpose of the trial phase is to discover the truth. The *guilty plea* is unknown.[683]

At the trial phase, not only the public prosecutor, the defendant, and the defence counsel, but also the judge is entitled to call for witnesses and expert witnesses to a hearing. Thus, the inquisitorial judge plays an active role in questioning the defendant, witnesses, and expert witnesses.[684] In the end, the court must decide whether the facts in the indictment are proven, whether the facts constitute a criminal offense, if the defendant is criminally liable, and what sentence should be imposed.[685] The last word before the competent court closes the trial belongs to the accused[686], as is the case in the Turkish criminal justice system. After terminating the hearing, the members of the court go *in camera* to deliberate the verdict and the sentence. The verdict and sentence are also read in a public session.

Under some unique circumstances, courts may suspend further prosecution, for instance, when the defendant is not fit to stand trial.[687] In other cases, a court must reach a verdict that can be dismissal (*ontslag van rechtsvervolging*), acquittal (*vrijspraak*), or conviction.[688] Dismissal could take place when the facts are proven but not constitute a criminal offence, or the offender is not liable due to a justification or a defence; the accused can only be acquitted when the essential facts of the indictment are not proven by the evidence presented to the court; and a sentence may be imposed when there is enough proof and the accused is proven liable for the offence.[689] *Ontslag van rechtsvervolging* also includes the cases in which the defendant cannot be held responsible for the charged conduct due to a mental disorder; therefore the criminal charge(s) will be dismissed (although certain security measures may still be applied).[690]

The main requirements the court must satisfy to fulfil the reasoned decision rule are: (1) the verdict must contain a reference to the law on which the punishment or measure imposed is based; (2) the decision regarding the defences raised by the defendant must be reasoned; (3) the decision must contain the factual elements on which evidence of the charge(s) is based, along with a reasoned explanation of the conclusion that the facts prove the case; (4) the sentence imposed must be reasoned.[691]

682 Tak (2003), p. 62.
683 Tak (2003), p. 63.
684 Crijns & Van der Woude (2022), p. 525.
685 Tak (2003), p. 62.
686 Crijns & Van der Woude (2022), p. 526.
687 Tak (2003), p. 62.
688 Crijns & Van der Woude (2022), p. 528-529.
689 Tak (2003), p. 63.
690 Crijns & Van der Woude (2022), p. 529.
691 Crijns & Van der Woude (2022), p. 529.

The Dutch Criminal Code ("DCC") provides a statutory framework for sentencing. The minimum term of imprisonment is one day, and the maximum is thirty years.[692] The code, moreover, provides aggravating circumstances (recidivism, concurrent offences, and committal of an offence in the capacity of civil servant) and mitigating circumstances (tender age, specific reasons for certain offences). The Dutch judicial system is equipped with a broad discretion in sentencing.[693]

The Dutch (adult) sanctioning system has a distinction between penalties and measures; penalties aim for punishment, and measures aim at the security and safety. Determining the hight of the penalty also depends on the proportionality principle based on the seriousness of the offence and blameworthiness of the offender; whereas measures may also be imposed when there is no blameworthiness.[694] The penalties regulated in the Dutch Criminal Code are imprisonment (*gevangenisstraf*), detention (*hechtenis*), community service (*taakstraffen*), and fine (*geldboeten*).[695] Security measures are withdrawal from circulation (Article 36a), confiscation of illegally obtained profits (Article 36e), obligation to pay compensation (Article 36f), TBS-order (Article 37a), and conditional TBS-order (Article 38), ISD-order (Article 38m), freedom-restricting measure (Article 38v), behaviour influencing and freedom-restricting measures (Article 38z), and civil care referral (Article 2.3 of the Wfz).

2.3.1.3 Execution Phase

Execution of the sentences mentioned above is regulated in Book 6 (*Boek 6. Tenuitvoerlegging*) of the DCCP. According to Article 6:1:16, unless otherwise provided, no judgment may be enforced while any ordinary appeal against it remains open and, if it has been appealed, until it has been withdrawn or ruled on. However, some conditional sentences may be declared directly executable, nonetheless.

The regulation on the internal legal position of forensic mental health patients in high security TBS-centres is called *Beginselenwet verpleging ter beschikking gestelden* ("BVT", the Principles Act for TBS Patients) and exists since 1997.[696] The TBS-order itself entered into force in 1928 with the aim of protecting the society from the mentally disordered offenders who had committed a serious crime.[697] TBS literally translates as entrustment (*Terbeschikkingstelling – "TBS"*), and is an internationally well-known security measure of

692 Article 10 of the DCC.

693 Tak (2003), p. 85.

694 *See*. Tak (2003), p. 71-79.

695 Crijns & Van der Woude (2022), p. 531.

696 Van der Wolf, M., Mevis, P., Struijk, S., Van Leeuwen, L., Kleijn, M., & Van Marle, H. (2016). *Op zoek naar nieuw evenwicht, Derde evaluatie van de Beginselenwet verpleging ter beschikking gestelden*. Den Haag: Boom Juridisch, p. 139.

697 De Ruiter, C. (2016). Risk Assessment in the Netherlands. In S. Bjørkly, S. Fazel, & J. P. Singh (Eds.), *International Perspectives on Violence Risk Assessment* (pp. 270-280). Oxford University Press, p. 270.

preventive detention for mentally disordered offenders.[698] Under the *3.3.4.2 TBS-order* subsection, the TBS order will be further examined.

Next to the DCCP and the BVT, the Penitentiary Principles Act ("Pbw", *Penitentiaire beginselenwet*) and the *Wet Forensische Zorg* ("Wfz", Dutch Forensic Care Act) also regulate the execution of sentences that may be applied to mentally disordered offenders. The Pbw regulates that custodial sentence is imprisonment, (substitute) custody, military detention and (substitute) juvenile detention.[699] While maintaining its character, the enforcement of a custodial sentence or measure shall, as far as possible and depending on the behaviour of the person concerned, be made to serve the preparation of return to society.[700] When granting freedoms to detainees, the safety of society and the interests of victims and their relatives shall be taken into account.[701] Persons against whom the enforcement of a custodial sentence or custodial measure takes place shall not be subject to any restrictions other than those necessary for the purpose of the deprivation of liberty or in the interests of maintaining order or security in the establishment.[702]

On 1 January 2020, all regulations of the *Wet Forensische Zorg* ("Wfz", Dutch Forensic Care Act) entered into force, while most of the regulations had already entered into force a year earlier.[703] Article 2.1 of the Wfz regulates that the implementation of the custodial sentence or measure shall be used as much as possible for the recovery of the forensic patient and reduction of the risk of recidivism, for the safety of society. The Act also regulates that forensic care is being provided at the required security level (1-4) or treatment intensity. Forensic care is care provided within a criminal justice context and is therefore paid by the Ministry of Justice and Security. It aims also to provide a necessary connection with regular forms of mental health care.[704] Mainly Article 2.3 Wfz provides the criminal court with the competence to make a civil care referral. The Dutch Compulsory Mental Health Care Act ("Wvggz", *Wet verplichte geestelijke gezondheidszorg*) should then apply, and provides regulations on coercive care. According to Article 2:1, compulsory care can only be considered as a measure of last result, in case there are no possibilities for voluntary care anymore; and in order to prevent compulsory care as much as possible, the care provider and the medical director offer sufficient possibilities for voluntary care.

698 Van der Wolf, M. (2016). Legal Control on Social Control of Sex Offenders in the Community: A European Comparative and Human Rights Perspective, *Erasmus Law Review 9(2)*, 39-54, p. 46.

699 Article 1/r of the Pbw.

700 Article 2/2 of the Pbw.

701 Article 2/2 of the Pbw.

702 Article 2/3 of the Pbw.

703 Van der Vis, C., Struijk, S., & Van der Wolf, M. (2020). Recidivecijfers na forensische zorg: een juridische 'proof of the pudding'. *Ars Aequi*, 321-330, p. 321.

704 However, it was regarded as questionable that the Wfz actually builds the intended bridge between forensic care and regular mental health care. *See*. Post, E. (2023). *De kunst van het straffen? Forensische zorg als premisse*. [PhD-Thesis – Research and graduation internal, Vrije Universiteit Amsterdam], p. 326.

Prisons in the Netherlands are intended for the admission of persons who have been sentenced, whether or not convicted irrevocably, to deprivation of liberty. Persons in pre-trial detention who have been sentenced to some form of detention (including security measures) may remain in a (remand) prison after the end of the custodial sentence, as long as admission to the place designated for them is not possible.[705] The Minister[706] designates the institutions or wards where persons may be accommodated according to their genders and ages.[707] Institutions or wards thereof shall be distinguished and designated according to the degree of security as follows: a. moderately secured (*beperkt beveiligd*), b. normally secured (*normaal beveiligd*), c. enhanced secured (*uitgebreid beveiligd*), d. high security (*extra beveiligd*); and the Minister determines the degree of security for each institution or ward.[708] Institutions or wards thereof may also be designated for the accommodation of detainees in need of special care, which may be related to the age, personality, physical or mental state of health of the detainees, or the medical treatment of the mental state of health.[709]

According to the latest publicly available information, in the Netherlands, here are 52 institutions, and the official capacity for all is 12.098 persons.[710] In 2022, the total prison population in the Netherlands was 11.447,[711] and the average number of TBS-patients was 1.536.[712]

SECTION 3: SUBSTANTIVE CRIMINAL LAW REGULATIONS ON SENTENCING MENTALLY DISORDERED OFFENDERS OF THREE CRIMINAL JUSTICE SYSTEMS

Now that the introductory information on the three criminal justice systems has been given, this section will provide information on their substantive criminal law.

705 Article 10/1 of the Pbw.

706 In the framework of the Pbw, *the Minister* refers the Minister for Legal Protection (Minister voor Rechtsbescherming), according to Article 1/e.

707 Articles 11 and 12 of the Pbw.

708 Article 13 of the Pbw.

709 Article 14 of the Pbw.

710 Last updated 21/11/2022, < https://www.europris.org/agency/department-of-correctional-institutions-dji/> accessed 16 April 2024.

711 *See*. <https://www.prisonstudies.org/country/netherlands> accessed 17 January 2024.

712 Tbs inzichtelijk, <https://www.dji.nl/binaries/dji/documenten/publicaties/2023/06/07/infographic-tbs/Infographic+tbs+2022.pdf> accessed 16 April 2024.

3.1 In Türkiye

In order to provide the legal definition and meaning of the mental disorder within the Turkish criminal justice system, first of all, the notion of "imputability" (*isnat yeteneği*) must be given. As a definition, *imputability* is the whole of the qualifications that belong to humans in order to be able to be punished for the act that is criminalised by law.[713] Article 31/1 and Article 32/1 of the TCC mention *"ability to perceive the legal meaning and consequences of the offence"* and *"capacity to control their actions"*, Article 31/2 refers to *"ability to apprehend the offence"* and *"ability to control their actions"*. Yet, Article 84/4 mentions, *"ability to perceive the meaning and consequences of the executed act"*. Therefore, there is no unity in terminology.

As stated above, the Turkish Criminal Code is acquired from the Italian Criminal Code. In the Turkish doctrine[714], therefore, imputability is defined as a combination of having *"ability to perceive"* (*anlama yeteneği*) and *"ability to will" (isteme yeteneği)* as also provided in Article 85 of the 1930 Italian Criminal Code.[715] The *ability to perceive* is knowing the value of the act for society and the incompatibility with the conditions of living together. It does not mean that the person has to know that the act is against the criminal law.[716] The *ability to will* is having the capacity to want to do the act, in other words, being able to act autonomously. These abilities are also stated as the cognitive and volitional components.[717] In order to be imputable, a person is required to have both; ability to perceive and ability to want. If one of them is missing, that person should be accepted as not imputable.[718]

However, being imputable does not mean that the person can be punished for his/her acts. Moreover, there must be an act as a result of a culpable mind, because the act may have been committed by the effect of a cause that exempts imputability.[719] The roots of imputability lie in the Classical School. One is punished because a human is able to distinguish between the good and the bad. Persons with a mental disorder or mental

713 Toroslu & Toroslu (2018), p. 402.

714 Alacakaptan, U. (1970). *Suçun Unsurları.* Ankara: Sevinç Matbaası, p. 104; Toroslu (2014), p. 368-369.

715 Article 85 of the 1930 Italian Criminal Code regulated that: *"No one shall be punished for an act defined by law as a crime if he was not responsible at the time he committed the act. A person is responsible who has the capacity to intend and to will". See.* Battaglini, G. (1933). The Fascist Reform of the Penal Law in Italy. *Journal of Criminal Law and Criminology, 24(1),* 278-289, p. 282.
Article 85 of the current Italian Criminal Code states: *"No one shall be punished for an act defined by law as a crime, if he was not imputable at the time he committed the act. An imputable person is who has the ability to perceive and to will.".*
"Capacità di intendere e di volere" is also translated as the capacity to intend and capacity to will. *See.* Messina, E., Ferracuti, S., Nicolò, G., Ruggeri, M., Kooijmans, T., & Meynen, G. (2019). Forensic psychiatric evaluations of defendants: Italy and the Netherlands compared. *International Journal of Law and Psychiatry, 66,* 1-8, p. 4.

716 Toroslu & Toroslu (2018), p. 397.

717 Balcıoğlu, Y.H., Öncü, F., & Kennedy, H.G. (2023). Forensic psychiatry in Türkiye. *International Review of Psychiatry*, 1-17, p. 5.

718 Alacakaptan (1970), p. 104-105; Toroslu & Toroslu (2018), p. 397.

719 Alacakaptan (1970), p. 105.

deficiency have no discretion, and thus no punishment is required. If those persons have diminished discretion, then they must receive diminished punishment.[720]

In the 20th century, criminologists also claimed that giving punishment to persons under the age of 18, or to persons with mental disorders, is not accepted by public conscience.[721] The punishment is a sorrow, a suffering; therefore, the public conscience will not accept that persons suffer as a result of their acts over which they have no control. Since there is no condemnation by the public, the crimes they commit are not faulty.[722] However, in the cases where these persons pose a danger to society, security measures shall be applied to protect the rights and the benefits of the public.

3.1.1 Exemptions of Criminal Responsibility

The TCC regulates three categories of persons who do not have the ability to perceive and ability to want: those who are not mentally sufficiently developed, those with mental disorders and those who are under the influence of temporary reasons that exempt imputability. Imputability must be present at the moment of the act constituting an offence, since the importance lies in the moment when the person behaves in a way that is contrary to the criminal law.

The reasons that exempt imputability, which are given in Articles 31, 32, 33, and 34, will be examined in detail under the following subsections. Before doing so, it is noteworthy that the principle of *Actio Libera in Causa* is found in TCC as an exemption. Therefore, persons who voluntarily and deliberately get drunk or use drugs in order to take the courage to commit a crime will be held fully liable for the crime.

a) Minority

Science has proven that at the time of birth, nobody has a psychic existence. Psychic maturity is something to be developed in time, and as a result persons will have the ability to perceive and ability to want.[723] Thus, in the TCC, minority (*yaş küçüklüğü*) is accepted as a reason that exempts or reduces one's imputability.

A division of four stages has been made in the TCC;

1) Children[724] under the age of 12 on the date of crime, have no imputability. Moreover, no criminal prosecution shall be brought against such persons. However, necessary security measures specific to children *may be* applied.

2) Children who are over 12 years of age but have not yet completed the age of 15 on the date of crime will be examined for the ability to perceive and ability to want on the date of crime, for each charge separately. If no ability is developed on the date of the crime, the child has no imputability. However, security measures specific to children *shall then be*

720 Alacakaptan (1970), p. 105; Toroslu & Toroslu (2018), p. 399-400.

721 Alacakaptan (1970), p. 108.

722 Toroslu & Toroslu (2018), p. 401.

723 Toroslu & Toroslu (2018), p. 409.

724 According to Article 6/1(b) of the TCC; In the application of the criminal codes, "child" refers to a person who is not yet eighteen years old.

applied. The difference between the first and the second category is the discretion of the judge, as in the second case the judge has to decide on the security measures. If the abilities are developed, children shall be punished with remission as they have reduced imputability.[725]

3) Children who are over 15 but not yet completed the age of 18 on the date of crime shall be punished with remission as they have reduced imputability. The law has accepted that their development of the ability to perceive and the ability to want are not yet completed.[726]

4) Persons over 18 years of age on the date of the crime in principle have full criminal responsibility and imputability. Thus, if there is no separate reason to exempt or reduce imputability, the person shall be punished as provided by criminal regulations.

b) Deaf Muteness

The TCC accepted being deaf muteness (*sağır ve dilsizlik*) as a reason for exempting or diminishing the imputability. The reason for this is that if a person cannot hear the spoken language, learning or understanding it is delayed and the communication with other persons will be obstructed. Therefore, according to the legislator, mental development is delayed comparing to normal persons. Thus, in regulation, while full criminal responsibility is accepted after completing the age of 18, for deaf-mute persons, it is accepted after the age of 21.

c) Temporary Causes

According to Article 34 of the TCC:

> "*(1) No punishment shall be imposed to a person lacking ability to perceive the legal meaning and consequences of the offence or having considerably lost the capacity to control their actions due temporary reasons or use of alcohol or drugs beyond their own will.*
>
> *(2) The provisions of first paragraph shall not apply to the persons committing an offence with the effect of alcohol and drugs used consciously.*"

The legal meaning and the scope of "*temporary causes*" is not fixed. Therefore, a reason that exempts the abilities to perceive and to control the acts, but that does not fall under the category of mental disorder should be accepted as a temporary reason.[727] Examples include high fever, hypnosis, poisoning, sleepwalking, alcohol or drugs taken involuntarily.[728] In

725 Such a person shall be sentenced to imprisonment from twelve years to fifteen years if the offence requires aggravated life imprisonment; from nine years to eleven years if the offence requires life imprisonment. Half of the other punishments are abated and in other cases, the imprisonment to be imposed for each offence shall not exceed seven years. (TCC art. 31/2)

726 Such a person shall be sentenced to imprisonment from eighteen to twenty-four years if the offence requires aggravated life imprisonment; from twelve to fifteen years if the offence requires life imprisonment. One third of the other punishments is abated and, in this case, the imprisonment to be imposed for each offence shall not exceed twelve years.

727 Artuk, M.E., Gökcen, A., Alşahin, E., Çakır, K. (2021). *Ceza Hukuku Genel Hükümler.* Ankara: Adalet Yayınevi, p. 637.

728 Artuk et al. (2021), p. 638; Toroslu & Toroslu (2018), p. 416.

order to be able to make use of this exemption of imputability, the person should have no fault for causing or having caused the temporary reason.[729]

d) Mental Disorder

As a general rule, persons over 18 years of age bear full criminal responsibility. However, being mentally disordered is one of the exemptions to this rule, just like the exemptions mentioned above. The roots of modern legal responsibility dates back to the 1843 M'Naghten judgment as it was defined as the first judgment to underline that being mentally disordered offender should be regulated.[730] The current TCC regulates this exemption under Article 32, as will be further examined under the following subsection.

3.1.2 Mental Disorder as an Exemption

Mental disorder as an exemption to the imputability is regulated under the "Excusatory and Mitigation Causes" (*Ceza Sorumluluğunu Kaldıran veya Azaltan Nedenler*) section, in the "Essence of Criminal Responsibility" (*Ceza Sorumluluğunun Esasları*) chapter in the "General Provisions" (*Genel Hükümler*) volume of the TCC no. 5237. According to Article 32, titled "*Mental Disorder*":

> "*(1) A person lacking the ability to perceive the legal meaning and consequences of the offence or having considerably lost the capacity to control their actions due to having a mental disorder cannot be subject to any punishment. However, security measures are imposed on such individuals.*
>
> *(2) Even if not to such an extent as stated in the first paragraph, a person lacking ability to control or direct their actions in respect of the offence committed by them is sentenced to twenty-five years imprisonment instead of aggravated life imprisonment and to twenty years imprisonment instead of life imprisonment. In other cases, up to one sixth of the punishment to be imposed may be abated. The entire or part of the penalty imposed may be applied as a security measure specific to mentally disordered persons, provided that the sentence period remains the same.*"

It is worth mentioning the regulations in the obsolete criminal codes as well, in order to provide a broader perspective. Article 46 of the first Turkish Criminal Code of 1926 regulated that a person whose *freedom of action* and *comprehension* is completely absent due to a mental disorder cannot be subject to any punishment, yet could be taken into custody if their release would be dangerous for the society. In 1955, this regulation was amended to regulate that a person whose freedom of action and comprehension is completely absent due to a mental disorder shall be taken under protection and treatment, and the relevant period thereof shall continue until the person is cured. The location, however, was not specified in the Code.

In the preface of the 2003 draft TCC, it is stated that healing is not possible for most mental disorders. Therefore, in retrospect it was wrong to mention 'healing' in the Code,

729 Toroslu & Toroslu (2018), p. 416.

730 Ulutürk, H. (2014). *Türk Ceza Hukukunda Akıl Hastalığı ve Akıl Hastalığının Kusur Yeteneğine Etkisi*. Ankara: Seçkin Yayıncılık, p. 46-47.

and it should be changed to 'ending the state of dangerousness'.[731] Furthermore, in the obsolete criminal codes, a distinction was made between "complete mental disorder" and "partial mental disorder". However, one can be either mentally disordered or not; the disorder cannot be complete or partial. Only criminal responsibility can have degrees such as partial or complete, depending on the impact of the mental disorder on the acts.[732] Therefore, the new and still effective code distinguishes the ability of the person, yet it does not regulate degrees of the mental disorder.

In the criminal justice system, a mental disorder is the mental state of a person who lacks the ability to perceive the legal meaning and consequences of the offence having considerably lost the capacity to control their actions due to having a mental disorder. The TCC provides no further information on neither definition of a mental disorder nor its criteria. Criminal courts are, therefore, always in need of the discipline of psychology, as it is explained above.

A mental disorder can be any situation accepted by the discipline of psychiatry as a mental disorder.[733] The definition of the World Health Organization ("WHO") also plays a key role. According to the WHO:*"Mental disorders comprise a broad range of problems, with different symptoms. They are generally characterized, however, by some combination of disturbed thoughts, emotions, behaviour and relationships with others."*.[734] Although a definite classification for mental disorders may never be done, the Diagnostic and Statistical Manual of Mental Disorders ("DSM") of the American Psychiatric Association and the International Classification of Diseases ("ICD") of the WHO are accepted in Türkiye and in use for diagnosis. It should be noted that these classifications are not immutable, and that changes are made to them over time. In order to use a global rather than a national system, a scholar in Türkiye supported the use of the ICD, only.[735]

The ICD-10 Version:2019, has twenty-two chapters of which the fifth one is called *"Mental and behavioural disorders"* with the subtitles:

"F00-F09 Organic, including symptomatic, mental disorders
F10-F19 Mental and behavioural disorders due to psychoactive substance use
F20-F29 Schizophrenia, schizotypal and delusional disorders
F30-F39 Mood [affective] disorders
F40-F48 Neurotic, stress-related and somatoform disorders
F50-F59 Behavioural syndromes associated with physiological disturbances and physical factors
F60-F69 Disorders of adult personality and behaviour

731 *See.* <https://www5.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d22/c059/tbmm22059119ss0664.pdf> accessed 17 August 2023, p. 40.

732 Artuk, M.E., Gökcen, A., & Yenidünya, A. (2013). *Ceza Hukuku Genel Hükümler.* Ankara: Adalet Yayınevi, p. 508.

733 Toroslu & Toroslu (2018), p. 412.

734 See. < https://www.euro.who.int/en/health-topics/noncommunicable-diseases/mental-health/data-and-resources/key-terms-and-definitions-in-mental-health#mental > accessed 18 May 2021.

735 Ulutürk (2014), p. 80.

F70-F79 Mental retardation
F80-F89 Disorders of psychological development
F90-F98 Behavioural and emotional disorders with onset usually occurring in childhood and adolescence
F99-F99 Unspecified mental disorder"

As it is listed above, and also accepted in the Turkish criminal justice system, substance abuse is a mental disorder, as well.[736] Using alcohol or substances, which may or may not have been medically prescribed, should be an addiction. Being in a withdrawal state is also accepted as a part of addiction, therefore also as a part of the mental disorder.[737] One-time or non-addictive use is not accepted as a mental disorder, because the voluntary use of alcohol and drugs is not a reason that exempts imputability; persons are still responsible for their acts.

Epilepsy is listed as "*epileptic psychosis*" in the ICD-10 under the heading "*Other specified mental disorders due to brain damage and dysfunction and to physical disease*". However, it caused a great debate among Turkish scholars. Almost every substantial criminal law book discusses epilepsy, yet there is no commonly accepted approach. As a definition, epilepsy is a chronic noncommunicable brain disease that causes recurring seizures.[738] According to a study[739], it is shown that persons with epilepsy relates to committing murder, attempting murder, or injury. From 77 examined case of offenders with epilepsy diagnosis in Türkiye between 1991-1995, 66 cases committed murder or attempt murder. 31 cases committed the crime out of their epileptic seizure periods, therefore they were found guilty (fully imputable); 27 cases were found not imputable due to their disorder; 13 cases were in confusion period before or after the seizure.[740] The confusion period is also accepted as a reason that exempts imputability.

The lust and obsession are topics discussed by scholars, since they are accepted as aggravating factors for crime of murder. However, in itself they are not accepted as mental disorders, until they reach the level of a disorder.[741] Sleepwalking and hypnosis are also topics of debate. According to one perspective, they should be considered as mental disorders, while the person is unconscious.[742] Nevertheless, as mentioned above, epileptic

736 According to a decision by the Yargıtay, if the defence mentions that defendant was in treatment for drug addiction, the competent court is obliged to ask for evidence and to place the defendant under observation for a medical report. Without the official report on the mental state, there has been a violation in the judgment of the court of first instance, and the case must be reffered back for review. (Yargıtay 1. Ceza Dairesi, E. 5850, K. 2008/1398, T. 27/02/2008).

737 Dinçmen, K. (2005). *Psikiyatri/Psikomatik Tıp.* İstanbul: Pan Yayıncılık, p. 76.

738 *See.* < https://www.who.int/news-room/fact-sheets/detail/epilepsy > accessed 28 May 2021.

739 Kökrek, Z., Cansunar, N., Ortaköylü, L., & Balcıoğlu, İ. (1996). Epilepsi ve Suç. *Süleyman Demirel Üniversitesi Tıp Fakültesi Dergisi, 3*(4), 77-80.

740 Kökrek et al. (1996), p. 80.

741 Demirbaş, T. (2017). *Ceza Hukuku Genel Hükümler.* Ankara: Seçkin Yayıncılık, p. 359.

742 Demirbaş (2017), p. 359.

seizures, sleepwalking and acts under hypnosis must be considered as "temporary reasons" that lifts criminal responsibility, if they cannot be diagnosed as mental disorders.[743]

3.1.3 Intent versus Criminal Responsibility

It is traditional to divide crimes into two elements:, *actus reus* and *mens rea,* which means *an act is not necessarily a guilty act unless the accused has the necessary state of mind required for that offence*.[744] They are stated in the maxim *actus non facit reum nisi mens sit rea*.[745] *Actus reus* is Latin for guilty act,[746] and *mens rea*[747] is Latin for guilty mind.[748]

In Türkiye, criminal law is the compendium of legal norms that prescribe unlawful acts (crimes) that are prohibited with penal consequences that may vary according to the individual personality of the offender.[749] The concept of *crime* (*suç*) has three constituent pillars:[750] actus reus – material element or objective element (*maddi unsur*); mens rea – moral element or subjective element (*manevi unsur*); unlawfulness (*hukuka aykırılık*).[751] The material element requires the existence of a human behaviour,[752] and the moral element requires that the human behaviour in question is the result of the will[753] of the perpetrator. Unlawfulness is the non-existence of lawfulness reasons – justifications and

743 Artuk et al. (2021), p. 638; Toroslu & Toroslu (2018), p. 412.

744 Padfield (2016), p. 21.

745 *See*. A Dictionary of Law, Oxford University Press: <https://www.oxfordreference.com/display/10.1093/acref/9780198802525.001.0001/acref-9780198802525-e-80> accessed 25 April 2024.

746 *"Actus reus means more than just 'guilty acts'. It also includes a range of other behaviour requirements, defined in each criminal offence."*, Cross, N. (2010). *Criminal Law and Criminal Justice: An Introduction.* London: Sage, p. 16.

747 *"Mens rea is a collection of subjective offence elements and principles that regulate the application of these elements."* Blomsma, J. H. (2012). *Mens rea and defences in European criminal law*. [Doctoral Thesis, Maastricht University]. Maastricht University, p. 43.

748 Padfield (2016), p. 21.

749 Toroslu & Toroslu (2018), p. 17.

750 Due to its nature, this issue cannot be regulated by the legislative provisions, hence it is discussed in academia. It is generally accepted that the offence consists of three elements: the material element, the moral element and the unlawfulness. However, different ideas exist in academia about the elements of the offence and what they are. Some scholars claim that the crime has only two constituent elements: material (objective) and moral (subjective). *See.* Toroslu & Toroslu (2018), p. 128. Some scholars claim that the crime has four constituent elements: material and moral elements, unlawfulness and illegality. Illegality, here, refers to the fact that the act must be explicitly defined as a crime in the law. *See*. Centel, N., Zafer, H., & Çakmut, Ö. (2011). *Türk Ceza Hukukuna Giriş*, İstanbul: Beta Yayınevi, p.205-206.

751 Hafızoğulları & Özen (2010), p. 193-326.

752 For the existence of an unlawful behaviour (offence), there must be a human behaviour in the form of doing or not doing. The behaviour may be in the form of doing (act) or not doing (omission).

753 According to Articles 21 and 22 of the TCC; the existence of the crime depends on the existence of intent, acts committed by negligence are punishable in cases where the law clearly regulates so.

excuses–.[754] Hence, criminal courts are obliged to analyse the actus reus and mens rea, and to check the existence of lawfulness reasons to decide on whether the accused is guilty or not.

However, imputability (*isnat edilebilirlik*) is a separate issue from *mens rea*.[755,756] Imputability is about being able to distinguish good from bad, to determine themselves, and to act in accordance with their intentions.[757] The roots of imputability lies in the free will.[758] Since punishment is retribution, the act committed by a person must be the product of a conscious and free will.[759] In cases where this does not exist, one cannot be punished.[760] Hence, in certain cases although a person may commit an offence willingly and knowingly, however in certain cases they cannot be punished for their act; for instance, persons who are not mentally sufficiently developed and persons with mental disorders are exempt from imputability.[761] Hence the establishment of the crime and its punishment are separated. To summarise it briefly, imputability is a quality that must be present in the offender in order to be made the addressee of the criminal sanction; therefore, the absence of imputability is only a personal reason for exemption from the criminal sanction.[762]

Article 223 of the TCCP regulates six final verdicts that concludes the main hearing;[763] "acquittal", "decision of no need for imposing punishment", "conviction", "decision related to a security measure", "decision of inadmissibility", and "decision of dismissal. The explanations of these notions are provided in Article 223, as well.[764] These will be explained under subsection *4.1.3 Verdict* below. However, it can be stated here that in cases where the offender has no imputability due to the mental disorder, they should receive the

754 Justifications and excuses are: 1) compliance with the provision of the law or executing an order of an authorised authority (TCC, Article 24), 2) self defence (TCC, Article 25/1), necessity (TCC Article 25/2), exercising a right (TCC, Article 26/1), consent of the right owner (TCC, Article 26/2)

755 Artuk et al. (2021), p. 392.

756 Centel et al. on the other hand, stated that the moral element *(mens rea)* includes being capable of culpability (*kusur yeteneği*). It is stated that persons with mental disorders are not capable of culpability. Centel et al. (2011), p. 351-353.
Özbek, et al.(2017) also states that mens rea the commission of an act constituting an offence knowingly and willingly (intentionally) or at least knowingly (negligently) by a person capable of culpability. The capacity to culpability is a subjective quality that must be present in the offender and the capacity to culpability is a prerequisite for holding the offender responsible for the consequence. *See.* Özbek, V. Ö., Doğan, K., Bacaksız, P., & Tepe, İ. (2017). *Türk Ceza Hukuku Genel Hükümler.* Ankara: Seçkin, p. 339.

757 Hafızoğulları & Özen (2010), p. 404.

758 Hafızoğulları & Özen (2010), p. 404.

759 Hafızoğulları & Özen (2010), p. 404.

760 Hence, imputability is not a prerequisite of the offence, but requirement for punishability. *See.* Toroslu & Toroslu (2018), p. 129.

761 *See.* 3.1.1 Exemptions of Criminal Responsibility subsection.

762 Hafızoğulları & Özen (2010), p. 409.

763 *See. 4.1.3 Verdict* subsection.

764 The translation of the article can be found at ANNEX 3 – Relevant Articles of the Turkish Code of Criminal Procedure.

verdict of *not imposing a punishment*. Moreover, the "decision related to a security measure" shall be given, according to Article 32 of the TCC. Consequently, mentally disordered offenders who have no imputability receive a security measure, as a verdict; hence, they cannot be acquitted.

In Türkiye, criminal courts are obliged to analyse the *actus reus* and *mens rea* to decide when somebody is guilty or not. In cases where the person is not guilty, or the act committed does not fall under the criminal regulations, the person shall be acquitted. Even though it is discussed in academia on whether the mental disorder could affect the intent and therefore the *mens rea*,[765] the majority thinks and the courts decide that the criminal responsibility of the person is a *punishability criterion*,[766] and hence it does not change the fact that the person is guilty of charge. As given under the previous subsection, epilepsy seizures, lust, obsession, sleepwalking, and hypnosis are topics of great debate among Turkish scholars, yet there is no commonly accepted approach. Nevertheless, as mentioned above, epileptic seizures, sleepwalking and acts under hypnosis must be considered as "temporary reasons" and not as "mental disorders".[767]

Consequently, it can be stated that *mens rea* is different than criminal responsibility in the Turkish criminal justice system; the former is related to the constitution of the crime, while the latter is a criterion of *punishability*.

3.1.4 Diminished Responsibility as a Partial Excuse

Article 32 of the TCC provides two degrees of effect of having a mental disorder. The distinction rises on the effect of the mental disorder on the abilities of the person. If the mental disorder is not such an extension of Article 32/1, but falls under Article 32/2, it is called diminished responsibility.

According to the regulation, a mentally disordered person, who has diminished responsibility, shall be sentenced to twenty-five years imprisonment instead of *aggravated life imprisonment* and to twenty years imprisonment instead of life imprisonment. In other cases, up to one sixth of the punishment to be imposed may be abated. The entire or a part of the penalty imposed may be applied as a security measure specific to mentally disordered persons, provided that the sentence period remains the same. Thus, in cases of a diminished responsibility, the court has the discretion to choose two things: remission or not and applying imprisonment or partially or fully security measures.

For the cases where the security measures are chosen by the Court instead of imprisonment, Article 57/6 should be applied. According to this regulation: "*The imprisonment of a person whose ability to control his actions is reduced due to a mental disorder may be applied, partially or entirely, as a security measure specific to mentally disordered persons, by a Court judgment, on the basis of the commission's report issued by the highly secured health*

765 According to Alacakaptan's opinion, the imputabilitu is a condition of wrongfulness, and therefore Alacakaptan studied it under the *mens rea* (subjective element). Alacakaptan (1970), p. 117-119

766 Toroslu & Toroslu (2018), p. 129; Hafızoğulları & Özen (2010), p. 403-404.

767 Artuk et al. (2013), p. 514; Toroslu & Toroslu (2018), p. 412.

institution where the mentally disordered person is sheltered according to the provisions of the paragraphs 1 and 2 of this Article; however, the conviction period shall remain the same.". Thus, imprisonment may be applied as a security measure, either partly or entirely, while the period remains the same.

This regulation is criticised because of the "*partially or entirely*" part.[768] A person is either mentally disordered or not; therefore, the person should be either accepted as criminally imputable and punished due to their acts, or accepted as not imputable and taken under protection and treatment. Even though there can be a classification of degrees of mental disorders, there should not be such big difference between the results: prison or highly secured health institution.

The situation is explained by means of an example: If a person whose ability to control their actions is reduced commits a crime and is placed first in a prison and then in a health institution, the duration of treatment and rehabilitation will be longer and harder; if a person is first placed in a health institution and prison after, their treatment is found to be worthless as the entire benefit would be lost due to conditions in prison.[769]

3.1.5 Sanction Types

Article 223 of the TCCP regulates six final verdicts that concludes the main hearing; "acquittal", "decision of no need for imposing punishment", "conviction", "decision related to a security measure", "decision of inadmissibility", and "decision of dismissal". The explanations of these notions are given in Article 223. These will be explained under subsection *4.1.3 Verdict* below. Here, it can be stated that there are two types of main outcome imposable to mentally disordered offenders: imprisonment and security measures. Below, these concepts will be further explained.

3.1.5.1 Imprisonment

According to Article 45 of the TCC, there are two types of penalties: imprisonment and judicial fine. Imprisonment affects the person's liberty, while the judicial fine is directed against the person's property.[770]

Article 46 of the TCC regulates the types of imprisonment: a) aggravated life imprisonment, b) life imprisonment, and c) imprisonment for a fixed term. An aggravated life imprisonment requires the prisoner to stay in a cell for one-person in a high-security prison. After the death penalty was abolished in 2002, "aggravated" life imprisonment has been introduced in order to fill the gap. For these sentenced offenders the right to call and the right to have a visitor are limited compared to persons sentenced to life imprisonment. They also miss out on the possibility to have any social activity or the right to see any other prisoner, except two preselected prisoners for one hour per day. In addition,

768 Ulutürk (2014), p. 160.

769 Ulutürk (2014), p. 160-161.

770 Yenidünya, A. (2006). 5237 Sayılı Türk Ceza Kanununda Adli Para Cezası ve İnfazı. *Atatürk Üniversitesi Erzincan Hukuk Fakültesi Dergisi, X*(1-2), 121-154, p. 121.

conditional release (release on probation) could be applied after 30 years for aggravated life imprisonment, yet 24 years for life imprisonment.

Life imprisonment lasts for the life of the convicted person, and aggravated life imprisonment lasts for the life of the convicted person and shall be served according to the strict security regime. Unless otherwise provided by law, a term of imprisonment shall not be less than one month and not more than twenty years.[771] Imprisonment of one year or less may be converted into alternative sanctions, such as a judicial fine, voluntary work for public benefit or compensation for the damage caused, depending on the personality, social and economic situation of the offender, his/her remorse during the trial process and the circumstances of the commission of the offence.[772] The penalty of a person convicted to imprisonment for a period of two years or less for an offence committed may be deferred. However, in order for a deferment decision to be made, the person must not have been sentenced to imprisonment for more than three months for an intentional offence before, and the court must have the impression that the person will not commit the offence again due to the remorse they showed during the trial process after committing the offence.[773]

In determining the judicial fine, the 'day' system has been adopted. In cases of non-payment of a judicial fine, it will be directly converted into imprisonment.[774] A judicial fine is the payment by the convicted person to the State Treasury of the amount calculated by multiplying the number of full days determined to be not less than five days and not more than seven hundred and thirty days in cases where the law does not otherwise provide.[775]

As discussed under the substantive criminal law section, Article 32 regulates the provision on mentally disordered offenders. There is a great difference between Article 32/1 and 32/2, since Article 32/1 regulates the persons whose ability to perceive the legal meaning and consequences of the offence or having considerably lost the capacity to control their actions due to having a mental disorder; and 32/2 regulates the cases which is not to such an extent as stated in the first paragraph, but still lacking the ability to control or direct their actions, namely persons with diminished imputability.

According to the regulation, a person whose case falls under Article 32/1 cannot be subject to any punishment; security measures shall be imposed. However, if Article 32/2 applies, the court has the discretion to choose for remission of prison sentence or security measures as was already explained in the subsection *3.1.4 Diminished Responsibility as a Partial Excuse*.

Persons with diminished responsibility may receive this sentence reduction, regardless of what the crime is, and whether the crime was committed intentionally or negligently.

771 Article 49 of the TCC.
772 Article 50 of the TCC.
773 Article 51 of the TCC.
774 Yenidünya (2006), p. 152.
775 Article 52 of the TCC.

3.1.5.2 Security Measures in General

Security measures are remedies that supplement the penal system in cases where punishment cannot be applied, or even if it is applied when it is insufficient or when it cannot prevent the commission of new crimes.[776] It is, therefore, argued that they are not a consequence of a violation of a criminal rule, and this makes the security measures different from penalties.[777]

Security measures were technically entered into the Turkish criminal justice system in 2005 with the new TCC no. 5237. Just like sentences, security measures are also means of criminal law that harm the legal values and interests of persons to whom they are applied, since they interfere with fundamental rights. Therefore, the justification should be well determined. It cannot be due to the fault or the factor of imputability of the person; they are applied according to the degree of danger and the need for treatment. Even though the compensation for fault and the prevention of danger are two completely different aims, they both are legitimate duties of the criminal law.[778]

When the prosecution is of a penalty nature, the main aim is to reach the factual truth and punish the offender; however, the prosecution of security measures is about rehabilitation and social reintegration.[779] Since the characteristics of penalties and security measures are different, they can be applied separately or simultaneously. This does not constitute a violation of '*non bis in idem*' rule.[780] The common ground is that the court shall provide its reasoning to rule a penalty and/or security measure.[781] Since the ruling on security measures is defined as a '*verdict*' in Article 223 of the TCCP, legal remedies can be applied.

According to Article 3 of the TCC, the person who commits a crime is sentenced to punishment and security measures proportional to the gravity of the act committed. Therefore, security measures shall be applied according to the '*principle of proportionality*'. This principle is based on the idea that a security measure that restricts freedoms can be justified only if such interference can be expected in the face of the *principle of the supreme public interest*, even if the offender does not have imputability. It can be, therefore, stated that the principle of proportionality constitutes the reason for the legitimacy of security measures.[782] For sentences, the principle of proportionality is applied on the basis of the violation, namely the crime itself, and for security measures, on the basis of the

776 Hafızoğulları (1973), p. 233-273.
777 Toroslu & Toroslu (2018), p. 463.
778 Gödekli, M. (2020). *Ceza Hukukunda Güvenlik Tedbirleri ve Muhakeme Usulü*. Ankara: Ankara Üniversitesi Sosyal Bilimler Enstitüsü. Retrieved September 07, 2021, from https://tez.yok.gov.tr/, p. 134.
779 Bayındır, S. (2018). *Türk Ceza Hukukunda Akıl Hastalığı*. İstanbul: On İki Levha Yayıncılık, p. 132.
780 Nuhoğlu, A. (1997). *Ceza Hukukunda Emniyet Tedbirleri*. Ankara: Adil Yayınevi, p. 143.
781 Bayındır, p. 132.
782 Gödekli (2020), p. 134.

dangerousness of the offender. Thus, the principle applies to both, [783] yet with a different scope.

The security measures regulated in the TCC are; deprivation of certain rights (Article 53), confiscation of goods (Article 54), confiscation of earnings (Article 55), security measures specific to children (Article 56), security measures specific to persons with mental disorders (Article 57), deportation (Article 59), and security measures specific to legal persons (Article 60). Article 57 will be further explained below.

3.1.5.2.1 Security Measure Specific to the Mentally Disordered Offenders

As it is the case for all types of sanctions regulated in criminal law, in order for a security measure specific to the mentally disordered offenders to be imposed, there must be an unlawful act, that is a violation of a criminal law, committed by a mentally disordered offender. In order for security measures to be applied, they must be regulated in a criminal norm and must be ruled by a judge or a court.[784]

According to Article 57; *"Security measures are imposed when it concerns a person who was suffering from a mental disorder at the time the offence was committed for the purposes of protection and treatment. Persons with mental disorders on whom security measures have been imposed shall be placed under protection and treatment in the highly secured health institutions."*.[785] Persons who commit a crime whilst addicted to drugs or to alcohol are subject to treatment, as a security measure, in the health institutions that specialise in treating drug or alcohol addicts. The therapy continues until these persons are no longer using alcohol or drugs.

It can be said that dangerousness of the offender is the main criterion to apply security measures, especially in relation to the commission of prospective crimes.[786] The dangerousness, as a term, has been used in criminal justice to describe persons who run a high risk to physically, psychologically, or morally harm themselves or others. Thus, the dangerousness focuses on the future, instead of the past. [787] Purposes in dealing with dangerous persons are; to protect society, to provide reprisal for offence, to discourage future offences, to treat mental disorders, to rehabilitate persons, and to compensate victims and their families.[788] Due to the ubiquity character of security measures, courts

783 Hafızoğulları, Z. (1991). Emniyet Tedbirleri. *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, 46*(3-4), p. 46; Gödekli (2020), p. 166.

784 Artuk, M.E. & Alan Akcan, E. (2016). Mukayeseli Hukuk ve Türk Ceza Hukukunda Güvenlik Tedbirleri. *İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi, 3*(2), 5-37, p. 9-16.

785 *See.* ANNEX 2 – Relevant Articles of the Turkish Criminal Code.

786 Gödekli (2020), p. 180.

787 Petrunik, M. (1994). *Models of Dangerousness: A Cross Jurisdictional Review of Dangerousness Legislation and Practice*. Retrieved September 2021, from Ministry of the Solicitor General of Canada: https://www.publicsafety.gc.ca/lbrr/archives/k%205165%20p4%201994-eng.pdf, p. 9.

788 Petrunik (1994), p. 11.

and lawyers need to pay more attention to how and why to justify these deprivations of liberty based on dangerousness.[789]

In order to render a verdict on security measures specific to a mentally disordered offender, the competent court must first ascertain that the crime is committed, and it is committed by the mentally disordered person. Therefore, a case must be opened to investigate the crime. If the committal of the crime is not certain, the accused should benefit from the "*in dubio pro reo*" principle, and be acquitted. [790]

According to the definition provided by the Constitutional Court, security measure is a type of sanction that is, in essence, a response to a crime and to a criminal by the public, and is also a result imposed in proportion to the dangerousness of the offender.[791] It is accepted that, in criminal law, there are three types of security measures: 1- security measures restricting liberty, 2- security measures depriving some of rights (political rights, prohibition of the practice of a profession or art), and 3- other security measures. The security measures that is applicable to the mentally disordered suspect or accused generally fall into the first type. They restrict liberty in order to provide treatment and protection. Significant regulations on security measures are stated under Article 57 of the TCC.

As stated above, persons whose case falls under Article 32/1 cannot be subject to any punishment; security measures shall be imposed. If the mental disorder is not such an extension of Article 32/1, but falls in Article 32/2, then the court has the discretion to choose for remission or security measures. The remission option is explained above. When the option of security measures is chosen by the Court instead of imprisonment, Article 57/6 should apply: "*The imprisonment of a person whose ability to control his actions is reduced due to a mental disorder may be applied, partially or entirely, as a security measure specific to mentally disordered persons, by a Court judgment, on the basis of the commission's report issued by the highly secured health institution where the mentally disordered person is sheltered according to the provisions of the paragraphs 1 and 2 of this Article; however, the conviction period shall remain the same*". Therefore, persons who are not imputable shall stay in high security hospitals until the institution prepares a report stating that either their release carries no risk to community, or the risk is considerably diminished;[792] however, for persons with diminished imputability, the competent court shall decide on the period and persons

789 Slobogin, C. (2003). A Jurisprudence of Dangerousness. *Northwestern University Law Review*, 1-62. Retrieved 2021 September, from https://www.researchgate.net/publication/228261956_A_Jurisprudence_of_Dangerousness, p. 62.

790 Akbulut, B. (2017). *Ceza Hukuku Genel Hükümler*. Ankara: Adalet Yayınevi, p. 834.

791 Anayasa Mahkemesi, E. 1970/42, K. 1971/30, T. 09/03/1971.

792 According to Article 57/2 of the TCC; "*A mentally disordered person on whom security precautions have been imposed, may be discharged from the health institution where they are receiving treatment under the court's or judge's decision if the report prepared by the health commission of the institution states that their release carries is no risk to the community, or if there is a risk that it be considerably diminished*".

cannot leave the institution before this set *conviction* period is completed. In the same regard, they shall be discharged when their period is over, even though their dangerousness remains the same. This situation will be further discussed under the *5.1.2.3 Prolongation and Termination of the Measures and Discharge* subsection.

A specific Constitutional Court case about dangerousness is important to mention here. In 2019[793], the Turkish Constitutional Court assessed an annulment application by a criminal court of first instance, for Article 31/1 and 57/1-2-3-4-5 of the TCC, on the grounds that these articles are against the Constitution. In summary, the plea is based on the claim that the persons who are unable to perceive the legal meaning and consequences of the offence, or who, as a result of mental disorder, have considerably lost the capacity to control their actions, shall not be punished; and that they shall be taken under protection and treatment in a high-security health institution by means of security measures. However, in this present case, due to some reasons arising from the application, the persons are discharged, by a judge or court decision, from the institutions before a sufficient period of time has been completed. It is claimed that this causes a violation of Article 5, 10, 11, 17, 19, and 20 of the Constitution, since it is dangerous for society and against the victim rights and the commonweal. The Constitutional Court reiterated that the security measures are accepted as a sanction, which can be an adjunct or a substitution to the punishment, and thus have a special and private place in the criminal law field.[794] The Turkish Constitutional Court reached a unanimous decision that no violation had occurred. This was on the grounds that health institutions draw up reports in accordance with the law and that the court or judge decides on the discharge of a mentally disordered offender in accordance with the law. Moreover, if the dangerousness of the mentally disordered offenders increases after the release, they can be taken under protection and treatment again. In its decision, however, the Constitutional Court did not examine the application of the rule or problems of the implementation. The Court examined only whether the articles are unconstitutional, not whether the real-life applications in practice correspond to the regulations of the Constitution.

3.1.5.5.2 Security Measure Applicable to Offenders with Drug or Alcohol Addiction

For the cases of alcohol or drug addicts, Article 57/7 reads as follows: "*Persons who have committed a crime while addicted to alcohol or drugs or other stimulants shall be treated in the health institutions rendering therapy in this field. The therapy continues until these persons are rescued from using alcohol or drugs. Upon completion of therapy, they may be discharged from the health institution on the basis of the report to be prepared by the health commission under the court's or judge's decision.*"

The ability to perceive should be significantly reduced or the capacity to control the acts should be considerably lost as a result of being addicted. Only in these cases, no

793 Anayasa Mahkemesi, E. 2019/37, K. 2019/87, T. 14/11/2019.
794 Anayasa Mahkemesi, E. 1970/42, K. 1971/30, T. 09/03/1971.

punishment can be given, just security measures can be applied. In other words, solely being an addict does not automatically exempt one's imputability.[795]

3.1.6 Dangerousness

In the Turkish criminal justice system, security measures are criminal law sanctions regulated to protect the society against dangerous ("*tehlikeli*") offenders.[796] The application of security measures to a person depends on the existence of four conditions: a) the offence shall constitute a dangerous situation for the society; b) the security measure shall be imposed after the offence has been committed; c) the security measure must be regulated by the law; and (d) the security measure shall be ordered by the judge or court.[797] The first criterion, constituting a dangerous situation, indicates the possibility of committing new crimes.[798] However, there is no definition of the term *dangerous*, it is, thus, reserved to the experts to decide. It should also be noted that the application of security measures requires recognition of the offender's personality, to the extent possible, through expertise in forensic psychology, criminalistics, forensic medicine, criminology, etc.[799] Having a mental disorder does not automatically mean that the person is dangerous.[800]

As mentioned, the regulation that mentions 'healing' in the 2003 draft TCC was changed to *'ending the state of dangerousness'*.[801] According to the current Article 57/2 of the TCC, in order to terminate the security measure applied to the mentally disordered offender, the person must no longer be a danger to society, or the dangerousness must have decreased significantly.

3.2 In England and Wales

3.2.1 Exemptions of Criminal Responsibility

In England and Wales, there are three incapacitating circumstances: a) childhood: under the age of 10, b) *insanity*, and c) intoxication. Persons under 10 years of age are exempt from criminal liability, for not being *morally responsible* and *lacking blameworthiness*.[802] Persons under the age of 10 who commit a criminal offence cannot be arrested or charged; however, they can be subjected to a *local child curfew* or a *child safety order*. Above the age

795 Akbulut (2017), p. 836.
796 Artuk, M. E. (2008). Güvenlik Tedbirleri. *Gazi Üniversitesi Hukuk Fakültesi Dergisi, XII*(1-2), 461-492, p. 461.
797 Artuk (2008), p. 466.
798 Artuk (2008), p. 467.
799 Artuk (2008), p. 471.
800 Yücel, M. T. (2004). *Kriminoloji*. İstanbul: Umut Vakfı, p. 73.
801 *See.* <https://www5.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d22/c059/tbmm22059119ss0664.pdf> accessed 17 August 2023, p. 40.
802 Arthur, R. (2016). Exploring childhood, criminal responsibility and the evolving capacities of the child: the age of criminal responsibility in England and Wales. *Northern Ireland Legal Quarterly 67/3*, 269-282, p. 269.

of 10, children can be arrested and charged, they might be brought before the youth court.[803] The youth court shall assess the mental capacity, competence, and maturity of each child to assess criminally culpability for their behaviour.[804]

In England and Wales, the criminal law regulates a *defence* for persons who, due to their mental condition, should not be held responsible for conducting what would be otherwise be a criminal offence.[805] As a result of having mental disorder, courts may find the person *unfit to plead, not guilty* due to being *legally insane* at the time of crime committed, or -only for murder charges- may convict the person of manslaughter instead due to diminished responsibility. These possible outcomes will be explained further, below.

3.2.2 Mental Disorder as an Exemption – *M'Naghten Rules*

In England and Wales, the definition of mental disorder was provided in the Mental Health Act 1983 in a complex way: *"mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind"*, and the categories of 'severe mental impairment', 'mental impairment' and 'psychopathic disorder' had their own definitions. The definition has been widened by the Mental Health Act 2007 by omitting the categorization and exclusions, and by leaving the core part; *"any disorder or disability of mind"*. It is worth mentioning that the fundamental aim of mental health legislation has not been changed by the 2007 Act.

The 1983 Act excluded persons from being dealt with under the Act *"by reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs"*. The 2007 amended Act contains an exclusion only by virtue of *"dependence on alcohol or drugs"*.

In England and Wales, the capacity of a mentally disordered offender is relevant in two different stages: for the fitness to stand trial and for the insanity defence at trial. Fitness to stand trial will be explained under the criminal procedure part below, however it is important to mention it here first, to underline the difference. The concept of mental disorder within the fitness to stand trial can be found in R v M(John)[806] case. It entails a six-point test asking whether the defendant is capable of: *(1) understanding the charges; (2) deciding whether to plead guilty or not; (3) exercising his right to challenge jurors; (4) instructing solicitors and counsel; (5) following the course of the proceedings; (6) giving evidence in his own defence.*[807] Without one or more of these abilities, a conventional trial should not proceed.[808]

The insanity defence, however, is different from assessment of the fitness to plead or fitness to stand trial because it relates to the capacity of the defendant at the time of committing the offence. *Capacity* is often not constant, and may fluctuate over time,

803 *See.* <https://www.gov.uk/age-of-criminal-responsibility > accessed 10 April 2023.
804 Arthur (2016), p. 281.
805 *See.* <https://www.lawcom.gov.uk/app/uploads/2015/06/insanity_discussion.pdf> accessed 10 April 2023.
806 *R v M(John) [2003] EWCA Crim 3452.*
807 *R v M(John) [2003] EWCA Crim 3452.*
808 *R v Padola [1960] 1 QB 325.*

depending upon the nature of the illness or disability, treatment, or environmental factors.[809] Therefore, although the person may not bear criminal responsibility at the time of the offence, they could still be fit to stand trial. Moreover, the required capacities differ for the two doctrines.

As stated earlier, there are three incapacitating conditions regulated in England and Wales: a) childhood: under the age of 10, b) *insanity,* and c) intoxication. Neither childhood nor insanity is properly described as a '*defence*', it is a status which prevents persons being guilty of an offence.[810] Insanity in English criminal law is "fault free" in the sense that "the law takes no notice of the cause of insanity".[811] The insanity defence is, however, seldom used,[812] due to two causes: it is so narrow to be accepted as irrelevant and also, there is a "*stigma*" attached to this label and persons tend to avoid it.[813]

Historically, the insanity rules are derived from the case of *R v M'Naghten* (1843). The 1883 Trial of Lunatics Act changed the verdict from "not guilty by reason of insanity" to "guilty but insane".[814] Afterwards, the Homicide Act 1957, Mental Health Act 1959, Butler Committee (1974-75), Mental Health Act 1983, and Mental Health Act 2007 developed these rules. They will be explained respectively.

As stated, the rules on insanity are derived from the prominent case of *M'Naghten* (1843). Daniel M'Naghten, who was in a delusional state, shot and killed Edward Drummond, the private secretary to the prime minister. At his hearing, he successfully raised the insanity defence. After M'Naghten's acquittal by the jury, a panel of Judges attended the House of Lords and had a series of hypothetical questions on insanity put before them, such as: *What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?*[815] The judges were asked to formulate rules for the guidance of juries, and as a result, the Judges formulated the *M'Naghten Rule*. According to these Rules; "*...jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; and that to establish a defence on the ground of insanity,*

809 Mental Capacity Act Code of Practice 2007, Para 4.26.
810 Padfield (2016), p. 76.
811 *DPP v Beard* [1920] A.C. 479.
812 The Law Commission (2013), p. 3.
813 Padfield (2016), p. 88.
814 *See.* <https://publications.parliament.uk/pa/cm199899/cmbills/088/en/99088x--.htm> accessed 14 March 2024.
815 Her Majesty Commissioners. (1846). *Second Report for Revising and Consolidation the Criminal Law*, London: W. Clowes and Sons, p. 11.

it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong".[816]

Later the "*M'Naghten Rules*" were pronounced in the House of Lords in 1843: "*to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong*". This determination is considered a legal question rather than a medical one.[817] The "*M'Naghten Rules*" have quickly become the leading test for insanity defence in England, and also in derived jurisdictions.[818] Although the test is outdated, it has been modernised through case law. The *"disease of the mind"* must cause impairment of the faculties of reason, memory and understanding. The disease can be a mental or physical condition but must be internal to the individual.

The insanity defence was used only in cases where the accused suffered from what would now be considered serious mental illness. In the case of Roderick Edward Maclean for the attempted assassination of Queen Victoria which resulted in acquittal on the grounds of insanity in 1882, the classification was changed to that of *"guilty but insane"*.[819] Even in this case, there was no suggestion that labelling the legally insane accused as "guilty" should result in punishment, rather than hospitalisation.[820]

The *M'Naghten Rules* only covers the "knowing" element and does not include the element of "control over actions". Hence, cognitive capacity is highly valued while volitional capacity is omitted.[821] In 1910, in *R v Jones (Victor)*[822] it was mentioned that the loss of self-control due to mental disorder might be a possible ground for excuse, and left this question open for the future consideration.[823] In 1922, the Court of Appeal examined this issue in *R v True* case.[824] All four medical experts evidence demonstrated that the defendant was *insane*, however in the case, it was claimed that the medical science had advanced since *M'Naghten Rules* were drawn up. The Court of Appeal cited the book A

816 *R v M'Naghten* (1843) 10 Cl & F 200, 210; [1843–60] All ER Rep 229, 233.

817 *R v Sullivan* [1984] AC 156.

818 Moore, M. (1984). *Law and Psychiatry*. Cambridge: Cambridge University Press, p. 219.

819 Trial of Lunatics Act 1883 s.2(1).

820 Mackay, R. & Hughes, D. (2022). Insanity and Blaming the Mentally Ill – a Critique of the Prior Fault Principle in The Law Commission's Discussion Paper. *The Criminal Law Review*, *1*, 21-40, p. 28.

821 Please note that the cognitive capacity is also called "C-insanity" and volitional capacity "V-insanity". V-insanity recognises that a mental disorder can make self-control impossible. *See.* Bastani, A., & Gavaghan, C. (2016). Challenges to "a Most Dangerous Doctrine" or a "Fantastic Theory" of Volitional Insanity. *Victoria University of Wellington Law Review*, *47*, 545-584, p. 545.

822 *R v Jones (Victor)* (1910) 4 Cr App R 207.

823 *See.* Claydon, L., & Catley, P. (2016). Abolishing the Insanity Verdict in the United Kingdom. In S. Moratti, & D. Patterson, *Legal Insanity and the Brain* (pp. 207-238). Croydon: Hart Publishing, p. 216.

824 *R v True* (1922) 16 Cr App R 164.

Digest of the Criminal Law[825], where "controlling his own conduct" was mentioned as an element of crime, next to knowing the nature and quality of their act and knowing that the act is wrong, however the court found it *doubtful*.[826] After *R v True* case, a Committee chaired by Lord Justice Atkin was appointed to review possible changes in the existing law of insanity.[827] As a result, the Committee came up with a number of suggestions, including the doctrine of irresistible impulse. According to the recommendation: "*It should be recognised that a person charged criminally with an offence is irresponsible for the act when the act is committed under an impulse which the prisoner is, by mental disease, in substance deprived of any power to resist*".[828] However, this recommendation was rejected by the twelve High Court Judges.[829]

Over the years, there have been developments in the law regarding mental health and criminal responsibility. Recommendations of the Royal Commission on Capital Punishment 1953 made a great impact and it introduced the partial defence of diminished responsibility[830] to cover not only for the murder cases.[831] The Homicide Act 1957 however introduced the partial defence of diminished responsibility only for murder cases. The Mental Health Act 1959 introduced the hospital order as a 'sentencing option' for individuals with mental disorders. In 1963, the Third Report of the Criminal Law Remission Committee focused on the procedures and advised that the verdict should be an acquittal in the form of 'not guilty by reason of insanity'.[832] The Butler Committee in 1974-75 wrote a comprehensive review of mental responsibility defences in criminal law,[833] recommended changes to secure hospitals and the replacement of the insanity defence with a verdict of "*not guilty on evidence of mental disorder*". The Mental Health Acts of 1983 and 2007, as mentioned earlier in this subsection, changed the definition of mental disorder.

It is claimed in academia that since criminal responsibility depends on the idea of voluntary act, volitional capacity should also exist.[834] Even though the M'Naghten rules do not specifically mention the volitional capacity, the diminished responsibility criteria regulated under Section 2 of the Homicide Act 1957 do mention both cognitive and volitional capacities. The Sentencing Council's guideline also underlines that a

825 *See.* Stephen, J. (1904). *A Digest of Criminal Law (Crimes and Punishments)*, London: Macmillan &Co.

826 *R v True*, para. 165, *See.* Claydon & Catley (2016), p. 216.

827 Harding-Barlow, M. M. (1949). The need for new conception of insanity in its relation to crime. *South African Law Journal, 66*(4), 389-403, p. 396.

828 *See.* Harding-Barlow (1949), p. 396.

829 Ten of the twelve Judges were against this recommendation. *See.* Harding-Barlow (1949), p. 397.

830 It is evident that an offender's "diminished responsibility" due to a mental disorder, i.e. their culpability, serves as a significant mitigating factor in all criminal cases.

831 Ormerod, D., & Dsouza, M. (2022). Reforming the Insanity Defence in England and Wales. In R. Mackay, & W. Brookbanks, The Insanity Defence (pp. 45-71). Oxford: Oxford University Press, p. 47.

832 Command Paper, Cmnd 2149, the third report: Criminal procedure (Insanity), §5.

833 *Ibid.*

834 Pickard, H. (2015). Choice, deliberation, violence: Mental capacity and criminal responsibility in personality disorder. *International Journal of Law and Psychiatry, 40*, 15-24, p. 17.

manslaughter conviction by the reason of diminished responsibility means that the person's ability to *understand the nature of the conduct*, ability to *form a rational judgment*, and/or ability to *exercise self-control* was significantly impaired.[835] Hence, volitional capacity, the ability to exercise self-control, is only relevant for the diminished responsibility (which only applies to murder), and not for the general insanity defence, even though the Law Commission has suggested to add the capacity "*to control his or her physical acts in relation to the relevant conduct or circumstances*" to the insanity defence.[836]

The insanity defence, in general, is found to be *too narrow as to be seen as irrelevant*.[837] There has also been also criticism on the current legal test of insanity. It is found *dreadful* that in England and Wales the legal test of insanity is *still* governed by the answers given by judges in 1843 to five abstract questions of law posed by the House of Lords.[838]

Proposals for reforming the law were included in a Discussion Paper issued by the Law Commission in 2013.[839] Other commitments have since prevented the commission from returning to this project, so reform has fallen off the radar.[840] The Commission proposed to replace the insanity defence and amending it to a defence and verdict of '*not criminally responsible by reason of a recognised medical condition*' available in all courts.[841] Unlike the current insanity defence, it would not be available if suspect's '*total lack of a relevant capacity at the time of the commission of the alleged offence has arisen from his or her prior fault*'.[842]

The Rules were criticized, also, for being too narrow, strictly interpreted, and not matching the current medical thinking.[843] Despite receiving the constant criticism, since 1843, the *M'Naghten Rules* have remained unchanged as the common law test for criminal responsibility.[844]

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835 Sentencing Council, The Guideline on Manslaughter by reason of diminished responsibility, *See.* <https://www.sentencingcouncil.org.uk/offences/crown-court/item/manslaughter-by-reason-of-diminished-responsibility/> accessed 08 May 2024.

836 The Law Commission (2013), para. 4.161.
It was also suggested to have a '*sophisticated capacity test*' to look beyond the cognitive capacity to address the cognition (knowing), emotion(evaluating), and volition (acting). *See.* Heginbotham, C., & Kinton, M. (2007). Developing a capacity test for compulsion in mental health law. *Journal of Mental Health Law*, *15*, p. 72-84.

837 Padfield (2016), p. 88.

838 Mackay & Hughes (2022), p. 21.

839 The Law Commission (2013).

840 Mackay & Hughes (2022), p. 22.

841 The Law Commission (2013), paras. 4.159 and 10.7.

842 The Law Commission (2013), para. 6.58.

843 Mackay, R. (2022). The Insanity Defence in English Law. In R. Mackay, & W. Brookbanks, *The Insanity Defence: International and Comparative Perspectives* (pp. 21-44). Oxford: Oxford University Press, p. 23.

844 Mackay (2022), p. 23.

In 2022, the Court of Appeal in *R v Keal*,[845] repeated the M'Naghten Rules again and went further by stating that *to show that he did not know that his act was 'wrong', the defendant would have had to establish both (a) that he did not know that his act was unlawful (ie contrary to law) and (b) that he did not know that his act was 'morally' wrong (by reference to the standards of ordinary people).* This judgment is found to be *obiter dicta,* since there is no known case where the court actually has had to rule on whether the defendant has to prove that they did not know that their actions were both legally and morally wrong.[846]

In the *Sullivan (1984)* case[847], the judge ruled that his epileptic seizure amounted to *disease of the mind*. The Appeal Court also agreed with the trial judge's opinion, as epilepsy is not caused by external influences, but rather is an internal illness; and therefore, it falls under the definition of M'Naghten.

However, for diabetes, there is an established distinction between *hypoglycaemia* and *hyperglycaemia* seizures. The Court of Appeal in *Quick (1973)*[848] stated that even though the diabetes is an internal factor, his *hypoglycaemic* episode, where he was violent and then could not remember it, was caused by his insulin intake and failing to eat afterwards, thus it was regarded as an external factor. However, in *Hennesy (1989)*, the Court of Appeal accepted that his crimes committed during the *hyperglycaemia* seizure, after failing to take insulin for three days, amounted to insanity. Hence, in cases where the underlying condition of diabetes causes the crime, then it is accepted as a *disease of the mind,* yet in cases where the person fails to eat after the insulin intake, it is not.

Consequently, in England and Wales, persons who commit a crime and fall within the terms of the M'Naghten Rules are found *not guilty by reason of insanity*. Even though they may well have committed the crime, they are found 'not guilty', due to the fact that they are accepted to have no *mens rea* or guilty mind while committing the crime.[849,850] The rationale behind this *not guilty* verdict can be summarised as that the *mentally abnormal criminal defendants* do not *deserve to be blamed and punished for their criminal conduct*.[851]

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845 *R v Keal* [2022] EWCA Crim 341.

846 Ormerod & Dsouza (2022), p. 70-71.

847 *R v Sullivan* [1984] AC 156.

848 *R v Quick* [1973] QB 910.

849 Peay, J. (2011). *Mental Health and Crime*. Oxon: Routledge, p. 3.

850 Moore (1984, p. 65) states that: "*Very crazy human beings are not enough like us in one of our essential attributes, rationality, to be considered persons to whom moral and legal norms are addressed. Crazy people are "excused" from responsibility for the harm they cause for the same reason that young children, animals, stones, and perhaps corporations are excused: None of them has the status of being a person, the only kind of entity obligated by moral and legal norms.*".
However, this opinion is extremely outdated since it suggests that the persons with no criminal responsibility do not carry the 'person' status.

851 Emphasis added, Morse, S. (2016). Legal Insanity in the Age of Neuroscience. In S. Moratti, & D. Patterson, *Legal Insanity and the Brain* (pp. 239-276). Croydon: Hart Publishing, p. 239.

3.2.3 Intent versus Criminal Responsibility

As stated under the Turkish law, it is traditional that the constituting of an offence requires two elements, *actus reus* and *mens rea,* which means *an act is not necessarily a guilty act unless the accused has the necessary state of mind required for that offence*.[852] They are derived from the maxim *actus non facit reum nisi mens sit rea.*[853] *Actus reus* is Latin for bad or guilty act,[854] and *mens rea*[855] is Latin for guilty mind.[856] It shall be noted that the distinction between these two elements is not absolute and strict.[857] For each crime, therefore, both actus reus (also known as objective element) and mens rea (also known as subjective element) have to be established.[858] *Generally*, the actus reus of an offence consists of *conduct, consequences,* and *circumstances.*[859] The mens rea element consist of variations of fault: direct intent, indirect intent, dolus eventualis, recklessness, conscious negligence, and unconscious negligence.[860] These variations reflect the culpability of the offender.

In a common law system, mens rea can be understood in a descriptive sense (different variations of fault) and in a normative meaning (being legally capable of committing an offence[861]).[862] The latter requires crucial attention, because in this sense, the mens rea includes culpability and blameworthiness.[863] In common law, criminal law only punishes the guilty, and being guilty is linked to *being morally blamed for wrongdoing*.[864] Therefore, the principle of punishing the guilty provides a perspective on criminal liability: no one can be guilty in the moral sense, if they are not legally capable of committing an offence.[865] In England and Wales, the insanity defence excludes guilt, and thus the *mens rea* element cannot be met.[866] As well known, in case of insanity, the verdict would be *not guilty by reason of insanity*.

852 Padfield (2016), p. 21.

853 *See*. A Dictionary of Law, Oxford Univeristy Press: <https://www.oxfordreference.com/display/10.1093/acref/9780198802525.001.0001/acref-9780198802525-e-80> accessed 25 April 2024.

854 *"Actus reus means more than just 'guilty acts'. It also includes a range of other behaviour requirements, defined in each criminal offence."*, Cross (2010), p. 16.

855 *"Mens rea is a collection of subjective offence elements and principles that regulate the application of these elements."* Blomsma (2012), p. 43.

856 Padfield (2016), p. 21.

857 Keiler, J. (2019). Actus Reus and Mens Rea: The Elements of Crime and the Framework of Criminal Liability. In J. Keiler, & D. Roef, *Comparative Concepts of Criminal Law* (pp. 107-120). Cambridge: Intersentia, p. 108.

858 Keiler (2019), p. 108.

859 Keiler (2019), p. 109.

860 Keiler (2019), p. 112.

861 Fletcher, G. (1998). *Basic Concepts of Criminal Law*. Oxford: Oxford University Press, p. 99.

862 Keiler (2019), p. 113.

863 Keiler (2019), p. 114.

864 Fletcher (1998), p. 99.

865 Fletcher (1998), p. 99.

866 Peay (2011), p. 3.

There is a discussion in case law, however, to determine the intent in the diminished responsibility defence. The Homicide Act mentions 'the *'abnormality of mental functioning'* arising from a 'recognised medical condition'. *R v Wood*[867] and *R v Steward*[868] judgments were important in defining the relationship between chronic alcoholism and *'abnormality of mental functioning'* or *'substantially impairing'* criminal responsibility. In *R v Steward* case, the court decided that diagnosing the accused with alcohol dependency syndrome solely is not enough to automatically establish an abnormality of mind for diminished responsibility. The judge stated in his direction to the jury that: *"...the disease relied upon here is alcoholism, or its technical expression ...alcohol dependency syndrome. Crucial, you may think critical, to that particular issue is whether the defendant had the capacity to resist the impulse to consume alcohol: whether the defendant had the capacity to resist the impulse to consume alcohol. In other words, was his consumption of alcohol totally involuntary."*,[869] hence the jury rejected the defence and convicted him of murder.

3.2.4 Diminished Responsibility as a Partial Excuse

In England and Wales, the concept of *diminished responsibility* is a partial defence only available to murder. The Homicide Act 1957 introduced three "*partial defences*" related to murder.[870] S.2(1) of the Homicide Act 1957 bears the title *"persons suffering from diminished responsibility"*, and regulates that a person who kills or is a party to the killing of another *is not to be convicted of murder* (and to the subsequent mandatory life sentence) if they were suffering from an *abnormality of mental functioning* which

1). arose from a recognised medical condition,
2). substantially impaired their ability to do one or more of the following
    a). understanding the nature of their conduct;
    b). forming a rational judgment;
    c). exercising self-control, and
3). provides an explanation for their acts and omissions in doing or being a party to the killing.

In other words, the accused must prove that they suffer from an *'abnormality of mental functioning'* arising from a *'recognised medical condition'* that substantially impairs their cognitive and/or volitional capacities, and this medical condition has causal link to the murder.

It should be noted that *'abnormality of mind'* –which was the accepted terminology of the original Homicide Act– has been criticised, even though it has been amended to the *'abnormality of mental functioning'* arising from a 'recognised medical condition', it is still considered unclear.[871]

867 *R v Wood* [2008] EWCA Crim 1305.
868 *R v Stewart* [2009] 1 WLR 2507.
869 *See*. < http://www.e-lawresources.co.uk/cases/R-v-Stewart-%5B2009%5D.php> accessed 06 May 2024.
870 Padfield (2016), p. 220.
871 *See*. Padfield (2016), p. 221.

R v Steward[872] judgment is important in defining the relationship in between chronic alcoholism and *'abnormality of mental functioning'* and *'substantially impairing'* the criminal responsibility. In *R v Steward* case, the accused, who had been diagnosed with alcohol dependency syndrome, killed the victim in a drunken fight while heavily intoxicated. The court decided that diagnosing the accused with alcohol dependency syndrome solely is not enough to automatically establish an abnormality of mind for diminished responsibility. Hence, the jury rejected the defence and convicted him of murder.

On a murder charge, it is for the defence to prove that the person charged is not liable for conviction of murder under this regulation.[873] This person shall be convicted of manslaughter, instead.[874] The term *"voluntary manslaughter"* means an offence that would be murder without the existence of a partial defence. [875] Therefore, it aids to avoid the mandatory life sentence for murder. It should be noted that diminished responsibility in England and Wales is regulated only for murder and not for all intentional crimes.

When the accused in a trial for murder contends that at the time of the alleged offence they were insane so as not to be responsible for their actions; or that at that time they had diminished responsibility, the court shall allow the prosecution to adduce or elicit evidence tending to prove the other of those contentions, and may give directions as to the stage of the proceedings at which the prosecution may adduce such evidence.[876]

Apart from the "diminished responsibility", which exists as a partial excuse for murder only; judges have developed a concept of "partial culpability" to guide their choice of sentence in cases where a person is eligible for an MHA 1983 order or a custodial sentence alone.[877] This concept stems from the *Birch* case by the Court of Appeal. [878] However, the Court's choice of phrase *"diminished but not wholly extinguished"*[879] was found to be *unfortunate*.[880]

In the *Graciano* case, the Court of Appeal held that the culpability of the offender was not *"entirely extinguished by his mental disorder such as would be the case with a finding of insanity"*.[881] Despite the psychiatric evidence indicating that the mental disorder of the appellant constituted a *"significant contributory factor and even an explanation"* for the killing,[882] the

872 R v Stewart [2009] 1 WLR 2507.
873 S.2(2) of the Homicide Act 1957.
874 S.2(3) of the Homicide Act 1957.
875 Padfield (2016), p. 220.
876 S.6 of the Criminal Procedure (Insanity) Act 1964 titled *Evidence by prosecution of insanity or diminished responsibility.*
877 Peay, J. (2015). *Sentencing Mentally Disordered Offenders: Conflicting Objectives, Perilous Decisions and Cognitive Insights.* LSE Law Society Economy Working Papers, p.12.
878 *Birch, (1989) 11 Cr App R (S) 202; (1990) 90 Cr App R 78.*
879 *Birch, (1989) 11 Cr App R (S) 202; (1990) 90 Cr App R 78,* [64].
880 Emphasis added. O'Loughlin (2024), p. 178.
881 *Graciano, [2015] EWCA Crim 980,* [21].
882 *Graciano, [2015] EWCA Crim 980,* [22].

Court of Appeal upheld the life sentence. It was thus asserted that the court seemed to draw an automatic conclusion of culpability based on the failure of the insanity defence.[883]

It is evident that further reforms are required in order to address the inconsistent application of mental incapacity doctrines and assessments of culpability at sentencing.[884] In consequence, diminished *culpability* reform could potentially replace that of diminished responsibility, and make it applicable to all criminal charges. As it could be understood from the name, partial *culpability* is a plea, and not a partial excuse as *diminished responsibility*. In cases where an individual was found to be lacking one or more of the capacities outlined by the Law Commission, they could be deemed not criminally responsible. Should the same capacities be substantially impaired but not entirely absent, the individual, then, could plead diminished *culpability* at trial.[885] Furthermore, this plea could be submitted at sentencing to facilitate a more fundamental and systematic evaluation of culpability, based on psychiatric evidence.[886]

3.2.5 Sanction Types

There are a large number of sentences that a judge or magistrate can issue, such as discharge, fine, community sentence, and custodial sentence.[887] S.224 of the SA 2020 directs that a magistrates' court does not have jurisdiction to impose a sentence of imprisonment, or detention in a young offender institution, for longer than 6 months in respect of any one offence.

According to S.52 of the SA 2020, while a court passing sentence on an offender, the court shall state in open court, in ordinary language, the court's reasoning for deciding on the sentence. The court shall also explain the intended effect of the sentence and the effects of non-compliance with any order to the offender in ordinary language.

If the insanity defence is accepted, in magistrates' courts the defendant is acquitted. In the Crown Court, a special verdict is pronounced that they are not guilty by reason of insanity. If the individual is found not to be legally responsible for the offending, on grounds of mental disability, then there can be no punishment, only a health-based disposal. In case of a hospital order the court does not determine the hospital. This is determined by the defendant's place of residence and the psychiatrists' opinion on the level of security required.[888]

It is worth mentioning that the SA 2020, Third Group of Parts, Part 1, Chapter 1 Section 232 regulates additional requirements in case of the offender suffering from a mental

883 O'Loughlin (2024), p. 178.
884 O'Loughlin (2024), p. 206.
885 O'Loughlin (2024), p. 206.
886 O'Loughlin (2024), p. 207.
887 <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/> accessed 20 December 2023.
888 European Commission Health & Consumer Protection Directorate – General. (2005). *Placement and Treatment of Mentally Ill Offenders – Legislation and Practice in EU Member States, European Commission Final Report*. Retrieved 2024 August, from https://ec.europa.eu/health/ph_projects/2002/promotion/fp_promotion_2002_frep_15_en.pdf, p. 122.

disorder. This section, however, only applies where *(a) the offender is or appears to be suffering from a mental disorder, and (b) the court passes a custodial sentence other than one fixed by law ("the sentence")*. Prior to passing the sentence, the court must obtain and consider a medical report unless it determines, considering the circumstances of the case, that it is unnecessary to obtain a medical report. Here, "mental disorder" has the same meaning as in the Mental Health Act 1983.

According to s.57 of the SA 2020 (SA 2020), any court sentencing an adult offender must regard to the following purposes of sentencing: "*(a) the punishment of offenders, (b) the reduction of crime (including its reduction by deterrence), (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences*". Furthermore, s. 52 of the SA 2020 imposes duties to a court passing sentence on an offender. The court must give reasons for the sentence in an ordinary language, explain the effect of the sentence and the effects of the non-compliance with any order.

3.2.5.1 Disposals vs Sentencing

Disposals are the Court's options when a person is found to be unfit or found to meet the insanity test, and the facts are proven; and *sentencing* is for the cases where the defendant is fit to plead and to stand trial and either pleads guilty or is found guilty.[889]

Pursuant to s.5 of the Criminal Procedure (Insanity) Act 1964, in the Crown Court the available disposals for an unfit or legally insane individual, are: a) hospital order (with or without a restriction order), b) guardianship order (supervision order), c) absolute discharge. According to s.5(3A) of the Criminal Procedure (Insanity) Act 1964, the court has the competence to make an order for absolute discharge, if it considers that such an order would be most appropriate given all the circumstances of the case. These disposals will be explained under *Section 5* on the execution.

3.2.5.2 Sentencing

When a person with a mental disorder is convicted, the court must consider the appropriate sentence for their conduct.

Section 59(1) of the Sentencing Code 2020 regulates *that "Every court – (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so*". The Sentencing Council issues definitive guidelines in accordance with s.120 of the Coroners and Justice Act 2009. Hence, in this dissertation these guidelines will be often be cited.

In England and Wales, there has been a long-standing policy of diverting mentally disordered offenders away from the criminal justice system and of keeping them away

889 Justice, p. 87.

from imprisonment.[890] Early identification and diversion from prison at all stages of the criminal proceedings, including sentencing, are also recommended by the Bradley Review.[891] The sentencing court may impose a custodial sentence if an order under the MHA 1983 is not available or is not considered appropriate, or if available, a community sentence with a mental health treatment requirement attached. The court may also combine a prison sentence with a hospital and limitation direction *(hybrid order)* under s.45A of the MHA 1983, in which the person concerned is first sent to hospital, but the Justice Secretary is given the power to transfer them to prison, at a later stage. Hence, after the MHA 2007, courts no longer face a stark choice between a prison sentence and a purely therapeutic hospital order, instead, can pass a prison sentence and attach a hospital and limitation direction *(hybrid order)* in order to send the person to hospital immediately. There is, however, a risk that a patient on such a hospital order will later be transferred to prison, and hence their human rights might be jeopardised.[892]

These different hospital orders that can be applicable to mentally disordered offenders differ considerably in their consequences. The discharge or release, care and supervision of the person will be greatly affected by the disposal decision made by the court. Some disposals divert the person into the mental health system and keep them out of the criminal justice system entirely; while other orders give decisive powers regarding detention and release to both health and criminal justice agencies.[893]

Nevertheless, the use of court orders under the MHA 1983, which has been the long-lasting policy, has declined over the long term. According to a study, the use of hospital orders with or without restrictions fell by 49%, between 1984 and 2016. During the same time frame, the numbers of transfers from prison to hospital rose by 710%.[894] These figures, unfortunately, suggest that mentally disordered offenders are not properly being filtered out at trial or sentencing.[895]

The Court of Appeal (Criminal Division) provided guidance on sentencing mentally disordered offenders in the *PS (2019)* case, by stating that there was no overarching principles guideline, yet.[896] The court held that mental health conditions may be relevant to sentencing in a number of ways:

1). the offender's culpability in committing the crime in question, by reference to the offender's mental health at the time of the offence;

890 O'Loughlin, A. (2022). *Mental Disorder, Disability and Sentencing: A review of policy, law and research*. London: Sentencing Academy, p. 6.

891 Ministry of Justice. (2009), p. 21.

892 O'Loughlin, A. (2021). Sentencing Mentally Disordered Offenders in England and Wales: Towards a Rights-Based Approach. *Criminal Law Review(2)*, 98-112, p. 102.

893 O'Loughlin (2022), p. 9.

894 Keown, P., McKenna, D., Murphy, H., & McKinnon, I. (2019). Offenders with mental disorders in prison and the courts: Links to rates of civil detentions and the number of psychiatric beds in England – longitudinal data from 1984 to 2016. BJPsych Open, 5(6), E93. doi:10.1192/bjo.2019.73, p. 2.

895 O'Loughlin (2022), p. 9.

896 *PS [2019] EWCA Crim 2286; [2020] 4 W.L.R. 13*, para. 12.

2). the decision about the type of sentence to be imposed, in particular, the disposals available under the Mental Health Act 1983 – to be assessed by reference to the offender's mental health at sentencing; and
3). whether or not the offender is to be considered to be dangerous under the Criminal Justice Act 2003; and
4). the effect of the court's sentence is to be clearly understood by the offender; to ensure that the offender can comply with the requirements of a community order or a supplementary order. [897]

In accordance with s.120 of the Coroners and Justice Act 2009 (CJA 2009), the Sentencing Council has issued a definitive sentencing guideline for the sentencing of offenders aged 18 and older with mental health disorders, developmental disorders or neurological impairments.[898] The new guideline applies to all offenders sentenced on or after 1 October 2020, regardless of the date of the offence. It provides general guidance on assessing culpability, determining the sentence, criteria for disposals, and release provisions of such offenders. This guideline applies only to the sentencing of convicted offenders; thus, it does not address issues for those found unfit to plead.

Chapter 4 of the Equal Treatment Bench Book regulates for persons with a mental disability, the identification of an individual's needs, adjustment for case preparation, adjustment for the hearing, remote hearings, and so forth. According to the Book, Courts should always ensure that the offenders can understand their sentence and what will happen if they reoffend or breach their terms of supervision. Therefore, courts must be clear and straightforward during the entire proceedings, especially in sentencing.

It is important to note that before passing a custodial sentence, the court shall obtain a medical report at the date of sentencing, in any case where an offender suffers from a mental disorder or appears to have one. If there is reliable, and up to date information available, however, obtaining a report may not be necessary. While issuing a custodial sentence, the court should forward the psychological, psychiatrical, or other medical reports, and other information regarding the person's physical and mental health to the prison in accordance with r.28.9 of the Criminal Procedure Rules.

It must be lastly highlighted that, the sentencer should make an assessment of culpability, during the sentencing phase. Since the sentencer is in the possession of all relevant information and reports, they are in the best position to decide on the culpability. While making their decisions, sentencers are not bound by the expert report or expert opinion when there are compelling circumstances.[899] The regulations set forth in CrimPR, r.28.8 and r.28.9 pertain to the issuance of medical reports for the purpose of sentencing. In accordance with the regulation, when a court mandates a medical examination or a

897 *PS [2019] EWCA Crim 2286; [2020] 4 W.L.R. 13*, para. 8-10.
898 https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/
899 Archbold. (2022). *Sentencing Guidelines*, Thomson Reuters, London, p. 907, s. 40.5.

report on the defendant, the court is first obliged to identify the issue and justify the necessity for an expert medical opinion. Subsequently, the court must specify the nature of the expertise, identify the relevant parties, establish a timetable, and, if available, provide instructions for the commission of the expert report, including the alleged offence, and the payment.[900] Furthermore, the report must include information regarding potential arrangements for the defendant in cases where the court is considering a hospital order or a guardianship order.

The appropriate sentence will, surely, depend on the crime, but certain sentences can reflect the need to address the vulnerability that the individual may have. The interim hospital order, hospital orders with or without restrictions, hybrid orders, custodial sentences, guardianship orders, community orders with or without mental health treatment requirement attached, and suspended sentences are available upon conviction will be explained respectively under the following subsections. Lastly, the sentence of imprisonment for public protection ("IPP") will be briefly explained.

3.2.5.2.1 Interim Hospital Order (s.38)

According to s.38 of the MHA 1983; if an offender that suffers from a mental disorder is convicted; the court may, before making a hospital order or dealing with him in some other way, make *"an interim hospital order"* authorising their admission to such a hospital as may be specified in the order and their detention there. In other words, an interim hospital order is made when the court has convicted but has yet not decided on the sentence. An interim hospital order can only be made only if the court is satisfied on the written or oral evidence of the *approved clinician* who would have overall responsibility for their case or of some other person representing the managers of the hospital. That hospital which is to be specified in the order must have employed at least one of the registered medical practitioners whose evidence is taken into account. The arrangements for the admission to that hospital shall be made within the period of 28 days beginning with the date of the order. If the court considers it necessary, it may order the person concerned to be detained in a place of safety.

Such orders are temporary measures, any detention for longer than 12 weeks requires a renewal by the court, on written or oral evidence of the responsible clinician. The renewal may not be for more than 28 days, and an offender cannot be subject to an interim order for longer than 12 months in total. Unless there is clear evidence that an interim hospital order is necessary, the judge should hesitate to make such an order.[901]

900 CrimPR, rr. 28.8 and 28.9.

901 *R v. Vowles and others* [2015] EWCA Crim 45; [2015] 2 Cr. App. R. (S.) 6, §50.

3.2.5.2.2 Hospital Order (s.37)

S.37 of the MHA 1983 regulates the powers of courts to order a hospital admission.[902] A hospital order is an order with or without a restriction order by which an individual is detained in a secure hospital.

Orders under the MHA 1983 require specific medical criteria to be met. A hospital order may be made by a Crown Court under s.37 MHA 1983 in respect of an offender convicted of an imprisonable offence. To impose such an order, the first condition is that the court must be satisfied, *on the written or oral evidence of two registered medical practitioners*, that the offender is suffering from the mental disorder that is *of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder or mental impairment, that such treatment is likely to alleviate or prevent a deterioration of his condition*.[903] At least one of two registered medical practitioners must be a psychiatrist.[904] The second condition is that the court must consider the most suitable method of disposing of the case is by means of an order under this section, taking into account all the circumstances including the nature of the offence, the character and antecedents of the offender, and to the other available modalities of dealing with them.[905]

S.37 MHA 1983 hospital orders are available when a Crown Court or a Magistrates' Court is sentencing an offender convicted of any imprisonable offence other than murder. According to s.37(1), where a person is convicted before the Crown Court of an offence punishable with imprisonment *other than* an offence the sentence for which is *fixed by law*, the court may by order authorise their admission to and detention in such a hospital. The only sentence fixed by law is the mandatory life sentence for murder.[906]

It is important to underline that the MHA 1983 made a distinction between mental illness, mental impairment, and psychopathic disorder, and deliberately differentiated the mental disorders on whether they were treatable when deciding to admit a patient to hospital.[907] This requirement is discussed as the *treatability criteria*[908]. The Court of Appeal

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902 According to MHA 1983 s.37(1); "*Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law, or falls to be imposed under section 2(2) of the Crime Sentences) Act 1997, or is convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment, and the conditions mentioned in subsection (2) below are satisfied, the court may by order authorise his admission to and detention in such hospital as may be specified in the order or, as the case may be, place him under the guardianship of a local social services authority or of such other person approved by a local social services authority as may be so specified*".

903 MHA 1983 s.37(2)(a).

904 James, D. (2010). Diversion of mentally disordered people from the criminal justice system in England. *International Journal of Law and Psychiatry, 33*, 241–248, p. 242.

905 MHA 1983 s.37(2)(b).

906 *See.* S.1 of the Murder (Abolition of Death Penalty) Act 1965, and s.275 of the Sentencing Act 2020.

907 Brown, P. (2019, July). Unfitness to plead in England and Wales: Historical development and contemporary dilemmas. *Medicine, Science and the Law, 59*(3), 187-196, p. 192.

908 It is also known as 'treatability test'. *See.* Pickersgill, M. (2013). How personality became treatable: The mutual constitution of clinical knowledge and mental health law. *Social Stududies of Science, 43(1)*, 30-53, p. 33.

in *Vowles*[909] indicated that judges should consider the offender's 'treatability' when determining an appropriate sentence.[910]

In cases where a person is charged before a Magistrates' court, instead of a Crown Court, and the court would have power on convicting the person of that offence with s.37(1), then the Magistrates' court may make such an order without convicting the accused, if the it is satisfied that the accused did the act or made the omission charged and if it deems them fit.[911]

There is little statutory guidance to aid judges in deciding between disposals, despite the significance of this decision.[912] Judges rely on the case law of the Court of Appeal (Criminal Division) and the Guideline on *Sentencing Offenders with Mental Disorders, Developmental Disorders, or Neurological Impairments*.[913]

A hospital order may be made even though there is no causal connection between the disorder and the offence.[914] This rule is not followed in *Nafei*; the court did not follow the recommendation for a hospital order and instead, imposed 12-year imprisonment.[915] Since there was no causal connection between the offending and the mental disorder; the court focused primarily but not solely on the offence. This is justified only in part because the mentally disordered person can be treated in prison, and there are procedures in place to transfer them to a hospital if necessary.[916] In *Khelifi*, the court reiterated the approach taken in *Nafei* and stated that the fulfilment of the requirements in s.37(2) cannot create a presumption that a hospital order will be made.[917] The court must assess this decision in the light of the seriousness of the offence, although the wellbeing of the offender is an important issue to be taken into account.[918]

The Supreme Court of Judicature Court of Appeal (Criminal Division) rules that it should not be assumed that a hospital order would provide significantly less protection to the

909 R v Vowles [2015] EWCA Crim 45; [2015] EWCA Civ 56; [2015] WLR (D) 52, at [54(iii)].

910 O'Loughlin (2024), p. 183.

911 MHA 1983 s.37(3).

912 O'Loughlin (2024), p. 169.

913 It was published by the Sentencing Council in 2020. Can be found at: <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/> accessed 21 April 2024.

914 *R v McBride [1972] Crim. L.R. 322.*

915 *R v Nafei [2004] EWCA Crim 3238; [2005] 2 Cr. App. R. (S) 127 (24).*

916 *"It is also to be borne in mind in this context that treatment is, or at least ought to be, ordinarily available to mentally affected offenders when in prison. Further, powers (for example under section 47 or section 49 of the 1983 Act) are available so that their transfer to hospital can be arranged as appropriate.", Nafei [2004],* para. 16.

917 *Khelifi [2008] EWCA Crim 770; [2006] 2 Cr. App. R. (S) 100,* para. 11.

918 *"The need to assess the personal circumstances of the offender in the light of the seriousness of the offence is a feature of all sentencing and it will not only be in cases of drug crime that it may be necessary to sentence ill patients to a prison term.", Khelifi [2008],* para. 11.

public compared to imprisonment.[919] When it comes to the safety of the public, it is assumed that a discretionary life sentence provides the highest level of security, however the hospital order regime was also designed to and is able to offer great protection.[920] In cases where it is found necessary, the hospital order can be indefinitely, as well.

Alternatively, Crown Courts have discretion to order a hospital order with restriction order (under s.37/41), and hybrid order (s.45A). The court may decide to impose an imprisonment sentence, leaving it to the Minister of Justice to potentially transfer the prisoner to hospital under s.47. All of these options will be elaborated on further below.

3.2.5.2.3 Hospital Order with Restriction Order (s.37/41)

Crown Courts can issue hospital orders with a restriction under s.37/41 of the MHA 1983. According to the s.43, if a person aged 14 or over who is convicted by a magistrates' court of an offence punishable on a summary conviction with imprisonment, and the conditions which under s.37(1) are required to be met for the making of a hospital order are satisfied; but it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of their committing further offences if set at large, that if a hospital order is made, a restriction order should also be made. Instead of making a hospital order or dealing with them in any other manner, the court may commit the person in custody to the Crown Court to be tried for the offence.

Hence, if it appears to the court to be necessary for the public protection from serious harm when a hospital order is made, the Crown Court may subject special restrictions, which is known as "a restriction order".[921] Such cases must be scrutinised and the court must consider various available orders.[922] In order for a restriction order to be made, at least one of the registered medical practitioners, whose evidence is taken into account by the court under s.37(2)(a), shall give evidence orally before the court. However, the restriction order can be made even if the medical witness recommends that no restriction order should be made.[923] While a court is considering using its discretion to issue a restriction order, it must consider whether the offender poses a risk of serious harm to the public, not whether they posed a serious or significant risk of such harm[924]; and the court was not required to determine that issue by reference to the nature of any past violence.[925]

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919 *"Accordingly, judges are not required to ignore, but should, on the contrary, give some appropriate weight to, such differences as there are between the regime of custody for life, with the Parole Board's role after the expiry of the minimum period, and the regime of a hospital order with indefinite restriction, with the Mental Health Review Tribunal's role under s.73 of the 1983 Act. This does not mean assuming that the latter regime, which has the advantage of guaranteeing hospital treatment, will in any particular case necessarily afford significantly less protection to the public than the former.", R v IA [2005] EWCA Crim 2077; [2006] 1 Cr. App. R (S) 91.*

920 Archbold. *Criminal Pleading Evidence and Practice*, §5A-1399.

921 MHA 1983, s.41(1).

922 Archbold. *Criminal Pleading Evidence and Practice*, §5A-1409.

923 *Royse (1981) 3 Cr. App. R.(S) 58, CA.*

924 *Birch (1990) 90 Cr. App. R. 78, CA.*

925 *R. (Jones) v Isleworth Crown Court [2005] EWHC 662 (QB): Golding [2006] EWCA Crim 1965; [2007] 1 Cr. App. R.(S.) 79.*

In the *Birch* case, it was further pointed out that the responsibility for assessing the risk rests with the court, which was not obliged to follow the advice of the medical witnesses, that harm was not limited to personal injury, and that a court should not impose a restriction order to indicate the seriousness of the offence if it is not necessary.[926] Therefore, it can be said that, here, dangerousness plays a role. When an offence is suitable for a hospital order, however the court considers that the offender poses a great risk to the public and therefore the release and detention of the offender must be subject to the additional restrictions of s.41(3); the court may also impose these restrictions on the offender. Restrictions regulated at section 41(3) cannot be chosen, if an order is made, all of the restrictions shall apply.[927]

During the restriction period, the responsible clinician shall examine the person subject to the restriction order and report to the Secretary of State, at intervals not exceeding one year. Each report shall contain such information as the Secretary of State may require.[928] Since 2007, hospital orders with a restriction are indefinite orders that do not have any time limitation, thus there is no requirement for renewals.[929] The responsible clinician decides on discharge and the Ministry of Justice approves this discharge decision.[930] The discharge may be conditional or absolute discharge.

During the first three months of the hospital order with restriction, coerced medication can be applied without consent. Unless there is an emergency, this coerced treatment can continue only if a 'Second Opinion Appointed Doctor' approves it, after three months.

It shall be lastly noted that courts may also render a restriction order, according to s. 43 of the MHA 1983. According to the regulation, the court may order to direct the person to be admitted to a hospital and to be detained there until the case is disposed of by the Crown Court instead of committing the offender in custody. The court may, also, give directions as it thinks fit for the person to be transferred from the hospital to attend the Crown Court by where their case is to be heard. Until the offender's case is disposed of by the Crown Court, an order under s.43 will have the same effect as an order for admission to a hospital together with a restriction order.

3.2.5.2.4 Hybrid Order: Imprisonment with Hospital Direction and Limitation Direction (s.45A)

R v. Drew states that it is a principle of law that the fact that someone has a mental disorder does not mean that a punishment, such as imprisonment, is not appropriate.[931] In issuing a hospital order, however, the court cannot pass a sentence of imprisonment, a

926 *Birch (1990) 90 Cr. App. R. 78, CA.*
927 Archbold. *Criminal Pleading Evidence and Practice*, §5A-1405.
928 MHA 1983, s.41(6).
929 MHA 1983, s.41(3)(a).
930 The Justice Secretary can discharge under s42(2), either absolutely or conditionally.
931 *R v Drew [2003] 2 Crim App R 371.*

community order, or impose a fine.[932] According to s.37 of the Sentencing Guide,[933] when the offender, who is 21 years old or older, has been convicted by the Crown Court, before issuing a hospital order – with or without a restraining order, the court should consider whether it would be more appropriate to issue imprisonment with a hospital order and a restriction order under s.45A. S.45A of the MHA 1983 is therefore called a *hybrid order*[934] that allows for convicted mentally disordered offenders to receive a sentence of imprisonment, and at the same time be transferred to a hospital for psychiatric treatment. Hence, if the Crown Court it decides that an appropriate sentence is imprisonment but considers that it is necessary to immediately divert the person to hospital for receiving treatment.[935] This *hybrid order* (s.45A) was inserted into the MHA 1983 by the Crime (Sentences) Act 1997.

Each year, only a small number of offenders are found not guilty by reason of insanity[936], even though sentencing courts have a range of options available to divert vulnerable convicts from harmful prisons. It is also known that the prison system can easily pose an exceptional risk of harm to prisoners with mental disorders.[937] Nevertheless, the Court of Appeal in *Vowles amd others*[938] in 2015 advised judges that a *hybrid order* is the "*usual course*" and should be considered *first* when deciding on the mental health disposal options for a mentally disordered offender convicted of an imprisonable offence.[939]

The *Vowles* judgment set the hybrid order criteria as well. These four criteria must be addressed when considering the appropriate disposal for a mentally disordered offender: *(1) the extent to which the offender needs treatment for the mental disorder from which the offender suffers, (2) the extent to which the offending is attributable to the mental disorder, (3) the extent to which punishment is required and (4) the protection of the public including the regime for deciding release and the regime after release.*

In 2018, however, *R v Edwards*[940] ruled that the decision in *Vowles* does not establish a default setting of imprisonment in these cases. The case, in the first place, must be appropriate for a hospital order, with or without a restriction order; and it would apply

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932 *Annex C – Sentencing disposals: criteria and release provisions* of the Sentencing Offenders with Mental Disorders, Development Disorders, or Neurological Impairments Guideline by the Sentencing Council.

933 S.37 of the Sentencing Offenders with Mental Disorders, Development Disorders, or Neurological Impairments Guideline by the Sentencing Council.

934 For further information, *see.* Whyte, S., & Gupta, J. (2007, February). Widening the scope of the hybrid order. *Medicine, Science, and the Law*, *47*(1), 1-4. DOI: 10.1258/rsmmsl.47.1.41

935 HM Prison and Probation Service. (2020, September). *Guidance on Mentally disordered offenders – the restricted patient system.* Retrieved from https://www.gov.uk/government/publications/mentally-disordered-offenders-the-restricted-patient-system, p. 5.

936 There are no published annual statistics of not guilty by reason of insanity (NGRI) findings. The latest figures are from 2012, when 30 people were found NGRI. RD Mackay, "The Insanity Defence in Operation" [2014] 65 NILQ 153.

937 O'Loughlin (2021), p. 98.

938 *R v Vowles and others* [2015] EWCA Crim 45, [2015] 1 W.L.R. 5131, [2015] 2 WLUK 161.

939 *Vowles* [2015], §51.

940 *R v Edwards* [2018] EWCA Crim 595.

only in cases where neither a mere hospital order nor a mere imprisonment sentence were found suitable.

In *R v Nelson*[941] the Court of Appeal further explained in 2020 that s.45A hybrid orders were appropriate when *(i) notwithstanding the existence of the mental disorder, the sentence required a penal element and (ii) the offender had a mental disorder but there were real doubts that the treatment requirements would be complied with in hospital, so that the hospital would be left looking after an offender who might be dangerous and who was not being treated.*

The *"hybrid order"* is regulated within the legislation itself as a *"hospital direction"*. According to s.45A(3), the court may give both a *hospital direction* and *limitation direction* for offenders to be subject to the special restrictions set out in s.41 of the MHA 1983. Therefore, the limitation direction has the same effect as a restriction order under s.41. In *Poole*[942], the court decided that in relation to s.45A(3), a hospital direction may not be issued without giving a limitation direction, and that a hospital and limitation direction can be given without the court finding that the conditions for issuing a restriction order under s.41 were met.

The effect of hospital and limitation directions is regulated in s.45B. According to this section, a hospital direction shall have effect as a transfer direction, and a *limitation direction* shall have effect as a *restriction direction*. Hospital and limitation directions regulated in s.45A of the MHA 1983 also include the power to specify the hospital unit, as stated in the C(S)A 1997 s.47.

The conditions for the admission to a hospital order are that the court must be convinced based on the written or oral evidence of two registered medical practitioners, that the offender has a mental disorder and that this mental disorder is of a nature or degree that makes it appropriate for him to be detained in a hospital, for a possible appropriate medical treatment.[943] The court must also be satisfied that the arrangements for admission have been made and that it will take place within the period of 28 days beginning with the day of giving such directions.

It is argued that the modest increase in the use of the hybrid order was related to the 2007 amendments to the MHA – which actually expanded its potential use from just the legal category of psychopathic disorder to all categories of mental disorders.[944] However this changed with the aforementioned *Vowles*[945] case by the Court of Appeal in 2015.[946] It was also noted by the HM Prison and Probation Service that s.45A hybrid orders are made relatively rarely in comparison to s.37/41 hospital orders with restriction, yet in recent

941 *R v Nelson* [2020] EWCA Crim 1615.

942 *Poole [2014] EWCA Crim 1641; [2015] 1 Cr. App. R. (S) 2.*

943 MHA 1983, s. 45(A)(2).

944 Beech, V., Marshall, C., Exworthy, T., Peay, J., Blackwood, N. (2019). Forty-five revolutions per minute: a qualitative study of Hybrid Order use in forensic psychiatric practice. *The Journal of Forensic Psychiatry & Psychology, 30,* 1-19, p. 2.

945 *Vowles* [2015].

946 Beech et al. (2019), p. 2.

years the numbers have increased.[947] The Ministry of Justice statistics[948] demonstrate that there were 11 detainees under *hospital and limitation direction* admissions in 2003, it has been gradually increased to 60 in 2015, and to 86 in 2021. Considering the fact that the total number of detainees under all admission categories was 3,118 in 2003, increased to 4,679 in 2015, and was 4,600 in 2021,[949] the ratio of persons admitted under s.45A to all admitted patients was 1.2% in 2015 and in 2021 it was 1.8%. Hence, the figures do not show a drastic change after the *Vowles* judgment.

3.2.5.2.5 Guardianship Order (Supervision Order) (s.37)

The guardianship order is available after conviction, under s.37 of the MHA 1983. S.37(2) regulates that in order to impose a guardianship order, the court must be *satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment and that … the mental disorder is of a nature or degree which warrants his reception into guardianship under this Act; and the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section".*

The order places the offender under the guardianship of the local social services authority, or a person approved by the local authority.[950] The guardian has the power to determine where these persons resides, to require them to attend places for the purpose of medical treatment, work, education, or training; and to require that mental health professionals visit them at where they reside.[951]

An order placing an offender under the guardianship of a local authority or of any other person shall not be made unless the court is satisfied that that authority or person is willing to receive the offender into guardianship.[952] The guardianship order ends and the person is discharged from guardianship at any time by the local authority, the responsible clinician authorised by the local authority, or the patient's nearest relative.[953] Where a court is considering the guardianship order, according to the s.39A of the MHA 1983, it may request the local social services authority to inform the court whether any person is

947 HM Prison and Probation Service (2020), p. 6.

948 Table 4 of the *Restricted Patient Statistics: 2021* demonstrates the *Restricted patients detained in hospital in England and Wales by admission category as at 31 December, 2003-2021. See.* The Offender Management Statistics Quarterly publication by the Ministry of Justice.(2022). *Restricted Patients 2021: England and Wales*. <https://assets.publishing.service.gov.uk/media/6269526dd3bf7f0e7947f33b/Restricted_Patients_2021.ods> accessed 07 May 2024.

949 *Ibid.*

950 MHA 1983, s.37(1).

951 MHA 1983, s.40 and s8(1)(a),(b),(c).

952 MHA 1983, s.37(6).

953 Department of Health. (2015). *Mental Health Act 1983 Code of Practice.* TSO: Norwich, para. 30.17.

willing to receive the offender into guardianship. The authority shall comply with any such request.[954]

The guardianship order, however, has rarely been used. According to the latest NHS publication on the use of Guardianship orders, 75 new cases were opened in 2018-2019, 55 in 2019-2020, and again 55 in 2020-2021.[955]

3.2.5.2.6 Custodial Sentences

According to the Sentencing Council, imprisonment is the most severe sentence available to the courts.[956] According to s.230(2) of the SA 2020, the court must not pass a custodial sentence unless it is of the opinion that the offence was so *serious that neither a fine alone nor a community sentence can be justified.* Imposition of a custodial sentence is possible if the court considers it necessary to protect the public. The length of the sentence depends on the severity of the crime and the maximum sentence allowed by law for the offence. Types of custodial sentences are suspended sentences, determinate sentences, extended sentences, and life sentences. Life sentence is the sentence that lasts for life, however when it is passed, the court must specify the minimum term to be spent in prison before becoming eligible for parole – also known as tariff.[957] Schedule 21 to the Sentencing Code 2020 should be used to determine the minimum term in relation to mandatory life sentence for murder. A '*whole life order*' may be imposed for the most serious cases of murder; and it means that these persons will never be released from prison.[958]

The Guideline on reduction in sentence for a guilty plea by the Sentencing Council states that the Guideline is to encourage defendants to plead guilty, as early as possible.[959] Although a guilty person is entitled not to admit their guilt, an acceptance of guilt *normally reduces the impact of the crime upon victims, saves victims and witnesses from having to testify, and is in the public interest in that it saves public time and money on investigations and trials.*[960] Determining the sentence, the court shall consider whether the defendant

954 MHA 1983, s.39A.

955 *See.* NHS Digital, (XLSX document titled Guardianship under the Mental Health Act 1983, England 2018-19, 2019-20 and 2020-21): https://digital.nhs.uk/data-and-information/publications/statistical/guardianship-under-the-mental-health-act-1983/1983-2018-19-2019-20--2020-21

956 Sentencing Council: < https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/custodial-sentences/> accessed 07 May 2024.

957 Sentencing Council, *see.* < https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/life-sentences/> accessed 07 May 2024.

958 *Ibid.*

959 Sentencing Council, The Guideline on reduction in sentence for a guilty plea, B. Key principles. *See.* <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/reduction-in-sentence-for-a-guilty-plea-first-hearing-on-or-after-1-june-2017/> accessed 07 May 2024.

960 *Ibid.*

pleads guilty and deduct any credit for a guilty plea.[961] A guilty plea yields more benefits the earlier the plea is entered.[962]

Mentally disordered offenders can also be sentenced to imprisonment. When an order under the MHA 1983 is not available or not appropriate, the sentencing court may choose to impose a prison sentence. In these cases, there is no power to apply coercive treatment to mentally disordered offenders in prisons.[963] As stated earlier, s.230(2) of the SA 2020 regulates that the court must not pass a custodial sentence unless it is of the opinion that the offence was so *serious that neither a fine alone nor a community sentence can be justified*. This is called the *custody threshold*.[964] Exceeding this custody threshold, however does not mean that a custodial sentence should be considered inevitable. According to the Sentencing Council, when community service can sufficiently restrict the offender's freedom while aiming at rehabilitating the offender to prevent reoffending, imprisonment should not be imposed.[965]

The Mental Capacity Act 2005 permits treatment of persons who lack the capacity to decide on behalf of themselves, however in cases where treatment is not available in the prison environment, the person should be transferred to hospital. The Secretary of State has the power to transfer a sentenced offender to hospital for treatment under s.47 of the MHA 1983. This transfer will be explained under *Section 5* on the execution.

According to the Sentencing Council's guideline, a manslaughter conviction by the reason of diminished responsibility means that the person's ability to *understand the nature of the conduct*, ability to *form a rational judgment*, and/or ability to *exercise self-control* was significantly impaired.[966] The court should determine what level of responsibility was

961 Section 73 of the Sentencing Code 2020 provides the reduction in sentence for a guilty plea. *The court must take into account the following matters— (a) the stage in the proceedings for the offence at which the offender indicated the intention to plead guilty, and (b) the circumstances in which the indication was given.*

962 Sentencing Council, The Guideline on reduction in sentence for a guilty plea, B. Key principles. *See.* <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/reduction-in-sentence-for-a-guilty-plea-first-hearing-on-or-after-1-june-2017/> accessed 07 May 2024.

963 O'Loughlin (2022), p. 17.

964 Sentencing Council, The Guideline on Manslaughter by reason of diminished responsibility, *See.* <https://www.sentencingcouncil.org.uk/offences/crown-court/item/manslaughter-by-reason-of-diminished-responsibility/> accessed 08 May 2024.

965 Sentencing Council, The Guideline on Manslaughter by reason of diminished responsibility, *See.* <https://www.sentencingcouncil.org.uk/offences/crown-court/item/manslaughter-by-reason-of-diminished-responsibility/> accessed 08 May 2024.

966 Sentencing Council, The Guideline on Manslaughter by reason of diminished responsibility, *See.* <https://www.sentencingcouncil.org.uk/offences/crown-court/item/manslaughter-by-reason-of-diminished-responsibility/> accessed 08 May 2024.

retained: high, medium, or lower. The court shall, then, determine the sentence by using the relevant starting point but by staying within the category range:[967]

Level of responsibility retained

High	Medium	Lower
Starting point 24 years' custody	**Starting point** 15 years' custody	**Starting point** 7 years' custody
Category range 15 - 40 years' custody	**Category range** 10 - 25 years' custody	**Category range** 3 - 12 years' custody

While determining the sentence, the court should also take aggravating and mitigating factors into account. It is remarkable that the guidelines on sentencing cases of manslaughter by reason of diminished responsibility has enormous breadth.

3.2.5.2.7 Community Order

When there is no appropriate or available order under the MHA 1983, judges may issue a community order. A community order shall only be made where the offender is aged 18 or over when convicted, and committed an imprisonable offence.[968]

Community orders of up to three years and suspended sentences can be accompanied with specific requirements, such as a mental health treatment requirement, a drug rehabilitation requirement or an alcohol treatment requirement. These can be ordered pursuant to section 177 of the Criminal Justice Act 2003 ("CJA") for community sentences. A treatment requirement accompanying a suspended sentence cannot last longer than two years or exceed the time for which the sentence is suspended.

Magistrates or judges may issue a community order under the CJA 2003, by choosing from one or more of 12 requirements. This flexibility is intended to find the most appropriate and proportionate sentence to the offence and the needs of the offender. The Mental Health Treatment Requirement ("MHTR") is one of the twelve options available, which was introduced in 2005. MHTRs are for convicted offenders whose offences are below the prison sentence threshold for a prison sentence and who have mental health needs that do not require treatment in a secure hospital setting. The MHTR provides access to the appropriate treatment. Unfortunately, regardless of efforts, the number of MHTRs issued as part of community orders is found surprisingly low.[969]

967 Sentencing Council, The Guideline on Manslaughter by reason of diminished responsibility, *See.* <https://www.sentencingcouncil.org.uk/offences/crown-court/item/manslaughter-by-reason-of-diminished-responsibility/> accessed 08 May 2024.
The starting point applies to all offenders irrespective of plea or previous convictions.

968 *See.* SA 2020, s.202.

969 *See.* Criminal Justice Alliance. (December 2012). *The Mental Health Treatment Requirement* at <https://www.criminaljusticealliance.org/wp-content/uploads/Mental-Health-Treatent-Requirement.pdf> accessed 11 September 2022, p. 2-6.

The court must obtain a written or oral report from a s.12 of the MHA approved doctor for any of these orders. The report should indicate whether the person is to be admitted to hospital, or attend as a non-resident patient, and the registered medical practitioner or chartered psychologist by whom or under whose direction treatment is to be provided. s.39 MHA also states that the Primary Care Trust in England/the Local Health Board in Wales should also provide the court with information about the availability of facilities for hospital treatment in the area in which the defendant last lived. This role can be conducted by the L&D team.

L&D practitioners also have a key role in preparing recommendations for the court on appropriate sentences and what treatment provision is realistic and available in the person's local area. The L&D specification aims to improve the effectiveness of these orders by including support for persons to attend their appointments.

3.2.5.2.8 Suspended Sentence Orders and Fines

According to the SA 2020 s. 277, a suspended sentence can only be available when a court passes a sentence of imprisonment, if the term of the sentence of imprisonment is between 14 days and two years. When an offence is not sufficiently serious to warrant a community order or suspended sentence, the court may decide on a fine, or a conditional or absolute discharge.

In 2020, 76% of convicted offenders sentenced were given a fine,[970] and in 2021 fines remained the most common sentence with 77% of all sentences.[971] Suspended sentences were only made up 4% in 2020 and 5% in 2021.[972]

3.2.5.2.9 Imprisonment for Public Protection (IPP)

The indeterminate sentence of Imprisonment for Public Protection ("IPP")[973] was introduced by the Criminal Justice Act 2003, in England and Wales, and it has been abolished by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The sentence is no longer applicable; however, this does not affect those who were already subject to it. The IPP was a legal option available to the courts with the objective of

970 *See.* Ministry of Justice, Criminal Justice Statistics quarterly, England and Wales, year ending December 2020 (annual), p. 10, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/ attachment_data/file/987892/criminal-justice-statistics-dec-2020.pdf> accessed 08 September 2022.

971 *See.* Ministry of Justice, Criminal Justice Statistics quarterly, England and Wales, year ending December 2021 (annual), p. 7, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/ attachment_data/file/1076569/cjs-bulletin-december-2021.pdf>accessed 08 September 2022.

972 *See.* Ministry of Justice, (XLSX document titled Outcomes by Offence data tool), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1076459/outcomes-by-offence-tool-2021-v2.xlsx> accessed 08 September 2022.

973 Annison, H., & O'Loughlin, (2019). *Fundamental Rights and Indeterminate Sentencing in England and Wales: The Value and Limits of a Right to Rehabilitation.* In S. Meijer, H. Annison, A. O'Loughlin (ed.), Fundamental Rights and Legal Consequences of Criminal Conviction. Hart Publishing: Oxford (p. 169-188), p. 169.

detaining offenders who posed a significant risk of causing further serious harm to the public through further serious offences, until such time that they no longer posed such an imminent risk.[974] IPP sentences were indeterminate, with a minimum term called a *tariff*. Upon release, an individual serving an IPP sentence remains on licence, subject to the conditions thereof. In the event of a breach of the conditions of the licence, the individual may be recalled to prison. Following such a recall, the individual must remain in prison until the Parole Board is satisfied that custody is no longer necessary for the protection of the public.[975]

Due to harsh criticisms,[976] the Government initially introduced a higher threshold in 2008[977] and then abolished the sentence of IPP in 2012.[978] Nevertheless, the impact of the IPP sentence remains for those who have already been sentenced and are unable to be released from the system. This detention will be discussed in *Chapter 4*.

3.2.6 Dangerousness

Since 1890, *danger* has been inherent in the wording of mental health legislation. S.11(1) Lunacy Act 1890 reads *"for the welfare of a person … or for the public safety"*. The mental Health Act 1959 s.25 also had a similar frame: *"in the interests of his own health and safety, or with a view to the protection of other persons"*. MHA 1983 also refers to harm to self or others, yet there is no definition provided.

However, danger or risk is a problematic concept.[979] The persons who are labelled as *'dangerous'* present a moral dilemma: how serious must the expected harm be to justify preventive measures and how drastic should the measures be?[980]

The court *may* take the expert report on dangerousness into account. Section 308 of the SA 2020 provides that in making the assessment of dangerousness, the court:

> *"(a) must take into account all such information as is available to it about the nature and circumstances of the offence,*
> *(b) may take into account all such information as is available to it about the nature and circumstances of any other offences of which the offender has been convicted by a court anywhere in the world,*
> *(c) may take into account any information which is before it about any pattern of behaviour of which any of the offences mentioned in paragraph (a) or (aa) forms part, and*
> *(d) may take into account any information about the offender which is before it".*

974 Beard, J. (2023, April 24). *Sentences of Imprisonment for Public Protection.* Retrieved September 2024, from House of Commons Library: https://researchbriefings.files.parliament.uk/documents/SN06086/SN06086.pdf, p. 4.
975 Beard (2023), p. 6.
976 *See.* Beard (2023), p. 4.
977 Beard (2023), p. 10.
978 Hence, this sentence was not mentioned in Chapter 3.
979 Bouic (2021), p. 201.
980 Walker, N. (1996). Ethical and other problems. In N. Walker, *Dangerous People* (pp. 1-12). London: Blackstone Press Limited, p. 1.

Even though the dangerousness assessment does not require a professional expert to give evidence in England and Wales, forensic psychologists still play an essential part in sentencing as advisors to the court to determine the likelihood to be a danger to the society. The concept of dangerousness is not easy to grasp, and this is partly due to the confusion between the legal concept and its medical definition.[981] Forensic psychiatrists take a range of factors into account in their assessment of dangerousness: *current offence, nature of current offence, criminal record, history of criminality, family background, social background, childhood experiences and any oddities*.[982]

As described earlier, dangerousness also plays a role as a criterion for hospital orders, as well. When an offence is suitable for a hospital order, the court may impose restrictions on the offender. The further restrictions of s.41(3) MHA 1983[983] may be ordered if the court considers that the offender poses a great risk to the public and therefore the release and detention of the offender must be subject to restrictions. Section 41(3) restrictions cannot be chosen; if an order is made, all of the restrictions shall apply.[984]

3.3 In the Netherlands

The Dutch substantive criminal law related to mentally disordered offenders traditionally focuses on the concept of criminal responsibility (*toerekeningsvatbaarheid*). It plays a role

981 Taylor, S. (2019). *Forensic Psychology: The Basics.* New York: Routledge, p. 69.

982 Taylor (2019), p. 86.

983 *41. Power of higher courts to restrict discharge from hospital*
(3) The special restrictions applicable to a patient in respect of whom a restriction order is in force are as follows—
(a) none of the provisions of Part II of this Act relating to the duration, renewal and expiration of authority for the detention of patients shall apply, and the patient shall continue to be liable to be detained by virtue of the relevant hospital order until he is duly discharged under the said Part II or absolutely discharged under section 42, 73, 74 or 75 below;
(aa) none of the provisions of Part II of this Act relating to community treatment orders and community patients shall apply;
(b)no application shall be made to the appropriate tribunal in respect of a patient under section 66 or 69(1) below;
(c) the following powers shall be exercisable only with the consent of the Secretary of State, namely—
(i)power to grant leave of absence to the patient under section 17 above;
(ii)power to transfer the patient in pursuance of regulations under section 19 above or in pursuance of subsection 3 of that section; and
(iii)power to order the discharge of the patient under section 23 above;
and if leave of absence is granted under the said section 17 power to recall the patient under that section shall vest in the Secretary of State as well as the responsible clinician; and
(d) the power of the Secretary of State to recall the patient under the said section 17 and power to take the patient into custody and return him under section 18 above may be exercised at any time;
and in relation to any such patient section 40(4) above shall have effect as if it referred to Part II of Schedule 1 to this Act instead of Part I of that Schedule.

984 Archbold. *Criminal Pleading Evidence and Practice*, §5A-1405.

in constituting a criminal offence, as there are four requirements: 1- there must be a certain act done by the defendant -can be commission or omission- 2- the act must correspond to the offence laid down in written regulation, 3- the act must be unlawful, 4- the perpetrator must be found guilty or blameworthy.[985] In the Dutch criminal justice system, two forms of mens rea may be part of the offence description: intent (*opzet*) and negligence (*schuld*). Intent includes acting *willingly and knowingly*, also acting in the awareness of a high degree of probability that harm will occur (conditional intent).[986] When an act does not fall under the concept of intent, it may fall (in case of not accepting any harmful consequences despite awareness of its probability) under the concept of negligence; conscious and unconscious *culpa*.[987]

3.3.1 Exemptions of Criminal Responsibility

Age is one of the exemptions of criminal responsibility in the Netherlands. The minimum age of criminal responsibility is 12. Below this age, it is not possible to be prosecuted for criminal offences. Between the ages 12 and 16, the juvenile criminal law applies. From 16 to 18, juvenile criminal law is also applicable in principle, however the juvenile court may decide to apply adult criminal law instead, when the gravity of the offence requires so. Vice versa, this applies to persons between the ages of 18 and 21, who can be tried according to juvenile criminal law.[988] The Netherlands has made a reservation to Article 37(c) the United Nations Convention on the Rights of the Child in order to make it possible for minors aged 16 and 17 to be tried under adult criminal law.[989]

The DCC contains a number of provisions that form *defences*, without distinguishing them as a *justification* or an *excuse*, negating the unlawfulness of the act and the culpability/blameworthiness of the defendant respectively, however this distinction exists in criminal law doctrine.[990] Written grounds for justifications are state of necessity (Article 40), self defence (Article 41), the performance of a public duty (Article 42), obeying the official order of competent authority (Article 43). The justification defences are being not responsible due to mental disorder (*ontoerekeningsvatbaarheid*) (Article 39), duress (Article 40), excessive self defence (Article 41/2) and obeying an order issued without authority (Article 43/2). Article 39 will be further elaborated below.

3.3.2 Mental Disorder as an Exemption

The basic principle in Dutch criminal law is that any offender can be held responsible for the offence committed; in principle, an offence can, therefore, be attributed to the

985 Crijns & Van der Woude (2022), p. 514.
986 Tak (2003), p. 41.
987 Crijns & Van der Woude (2022), p. 515.
988 Tak (2003), p. 41.
989 *"The Kingdom of the Netherlands accepts the provisions of article 37 (c) of the Convention with the reservation that these provisions shall not prevent the application of adult penal law to children of sixteen years and older, provided that certain criteria laid down by law have been met.", See.* <https://verdragenbank.overheid.nl/en/Treaty/Details/003908_b> accessed 29 December 2023.
990 Tak (2003), p. 41.

accused.[991] However, there is an exception to this. Article 39 of the DCC, as stated above, regulates that not punishable is the person who commits an offence which cannot be attributed to them by reason of mental disorder (*psychische stoornis*), psychogeriatric disorder (*psychogeriatrische aandoening*), or intellectual disability (*verstandelijke handicap*). Inculpability, thus, is an exception to the principle that a person who is guilty of an offence can be sentenced for it.

Until 1 January 2020, there were two core concepts of Article 39 of the DCC: pathological disorder and defective development of the mental faculties; however, the repealed Article 39 of the DCC provided no (legal) definition of these concepts.[992] As a result of section 14:25 of the Dutch Compulsory Mental Health Care Act ("Wvggz", *Wet verplichte geestelijke gezondheidszorg*), the old criterion (defective development or pathological disorder of the mental faculties) was abolished in Article 39 of the DCC on 1 January 2020, and a new criterion was introduced: mental disorder, psychogeriatric disorder or intellectual disability.[993] The Explanatory Memorandum to the Wvggz states that one of the aims of adapting the conceptual framework was to modernise the use of language; and by choosing the term mental disorder, alignment was sought with a behavioural conceptual framework as used in the DSM-IV.[994].[995] In also using psychogeriatric disorder or intellectual disability alignment was sought with new civil legislation for coerced care, which is not only possible on the basis of the Wvggz but also for the sectors of psychogeriatrics and intellectual disability care on the basis of the Care and Coercion of Psychogeriatric and Mentally Disordered Patients Act (*Wet zorg en dwang psychogeriatrische en verstandelijk gehandicapte cliënten*, "Wzd").

There is, however, no standard for (no) criminal responsibility in the Dutch legislation. Hence, Dutch scholars have suggested control (volitional) and understanding (cognitive) as components in their criminal responsibility standards.[996] In 2017, the Court of Appeal in the Hague delivered a judgment, and under the *Criminal liability of the accused* (*Strafbaarheid van de verdachte*) title, the legal framework (*wettelijk kader*) is further

991 Hoge Raad, 17-10-2023, ECLI:NL:HR:2023:1295, *Thijs H. case*, §3.2.

992 Van Oploo, L. (2021). *Culture overwegingen in pro justitia-rapportages: Een empirische en juridische studie naar de plaats en betekenis van etnische en culturele factoren in gedragskundige rapportages.* Den Haag: Boom juridisch, p. 54.

993 Article 14:25 of the Wvggz states that:
The Dutch Criminal Code shall be amended as follows: In Articles 13(1), 15d(1)(a) and 39, "defective development or pathological disorder of the mental faculties" shall be replaced each time by: mental disorder (*psychische stoornis*), psychogeriatric disorder (*psychogeriatrische aandoening*), or intellectual disability (*verstandelijke handicap*). (<https://zoek.officielebekendmakingen.nl/stb-2018-37.html>, accessed 23/01/2024).

994 Van Oploo (2021), p. 55.

995 Van Oploo (2021), p. 55.

996 Meynen (2022), p. 285; Meynen, G. (2016). Legal insanity and neurolaw in the Netherlands: Developments and debates. In S. Moratti, & D. Patterson, *Legal Insanity and the Brain: Science, Law and European Courts* (pp. 137-168). Portland: Hart, p. 143; *See also.* Meynen, G. (2013). Een juridische standaard voor ontoerekeningsvatbaarheid? *Nederlands Juristenblad, 2013(21)*, 1384-1390.

elaborated on.[997] According to the judgement, in order to form an opinion on the criminal responsibility of the accused, it is important to determine: 1) whether, at the time of the proven crime committed, the accused was suffering from a defective development or mental disorder; 2) if so, whether there is a causal link (*causaal v*erband) between that development or mental disorder and the proven facts; 3) if so, whether the accused was able to comprehend the unlawfulness (*wederrechtelijkheid*) of their actions; 4) if so, whether the development or mental disorder of at the time of the proven facts fully determined the actions of the accused, in the sense that the accused was not able to or insufficiently able to act in accordance with their understanding of the unlawfulness of the facts.

Recently, in the prominent Thijs H. case, the *Hoge Raad* has actually set the jurisprudential standard for non-responsibility that includes a cognitive capacity (*begrip,* understanding the unlawfulness) and the volitional capacity (in Dutch literature described as *controle*, control instead of will and phrased by the *Hoge Raad* as 'to act in accordance with that understanding'). The *Hoge Raad* further explains that the *cognitive element* distinguishes between understanding and being able to understand, while the nature of the act involves both the qualifications of impermissible and unlawful. The *act-element* –also incorporates a *will element*, as at its core, performing the act always concerns a limitation of the suspect in their estimation capacity and steering ability in relation to the criminal behaviour.[998] The *Hoge Raad* then summarises these elements by stating that the justification for holding the defendant not responsible for their conduct is inability to form their understanding (*begrip*) and control (*controle*), regardless of the cause.[999] The cognitive and/or volitional inability of the suspect, therefore, is at the core of criminal responsibility. Consequently, according to the *Hoge Raad*, what is ultimately most relevant for answering the question of the degree of criminal responsibility is not so much the disorder itself, but the degree of impairment, and more specifically the degree of their inability.[1000] This explanation matches Turkish regulations precisely.

It is, however, criticised in academia that it is not clear from the judgment why the *Hoge Raad* opted for a legal view of unlawfulness (*wederrechtelijkheid*), rather than a moral approach to wrongfulness; as one might know that their behaviour is prohibited by law and a punishable conduct, but they do not believe that it is morally wrongful in their state of mind.[1001] As mentioned earlier, in the Turkish criminal justice system the *ability to perceive* is knowing the value of the act for the society and the incompatibility with the conditions of living together; however, it does not mean that the person has to know that the act is against the criminal law. Another approach stated that the assessment of criminal responsibility under the *unlawfulness* criterion must examine not only whether the accused had an insight into the unlawfulness of their actions in general, but also

997 Gerechtshof Den Haag, 16-03-2017, ECLI:NL:GHDHA:2017:684.

998 *Thijs H. case,* para. 3.6.

999 *Thijs H. case,* para. 3.6.

1000 *Thijs H. case,* para. 3.6.

1001 Ligthart, S., Kooijmans, T., & Meynen, G. (2018). Een juridisch criterium voor de ontoerekeningsvatbaarheid: Een uitspraak van het gerechtshof Den Haag geanalyseerd. *Delikt en Delinkwent, 1(9),* 101-110, p. 108.

whether they could understand in concrete terms that their conduct was unlawful.[1002] It was also stated that if this unlawfulness criterion is going to be interpreted broadly, there will be no need to fall back on a moral wrongfulness criterion.[1003] It could be suggested to the experts to advice on both issues.

The judgment of the Court of Appeal in the Hague[1004], furthermore, brought the causal link (*causaal v*erband) between the mental disorder and the crime. It was criticized that this requirement set by the Court of Appeal – if taken literally – is too strict.[1005] It was also claimed that the Appeal Court set a requirement that the law does not recognise.[1006] However, it is only logical to lift the criminal responsibility when the committed crime is causally linked to the crime committed, as the criminal responsibility is assessed separately for every crime committed. In the Turkish criminal justice system, this is explained using the most frequently given example, which has also been mentioned before: when a person who has been diagnosed with kleptomania commits a murder.[1007] Due to the fact that there is no causal link that exists between the crime and the mental disorder, the person should be accepted as being criminal responsible for this crime. In these cases, coerced care would be possible through the civil law regulations, when necessary. It is important to mention that a causal link does not imply that the disorder should be the *sole* factor causing the offence behaviour.[1008]

To summarise, criminal responsibility criteria include the cognitive and volitional capacities in the Netherlands, as they were added through the case law. For purposes of clarity, it would also be beneficial to amend the Dutch legislation to include these capacities.

Although the behavioural scientific assessment helps in finding the answer, the question of criminal responsibility (*toerekenbaarheid*) is a legal question.[1009] It is a matter of establishing a ground for sentencing, and determining whether the conditions for this have been met is a legal judgment reserved for the criminal court.[1010] This is without prejudice to the fact that the criminal judge may use advice from behavioural experts in answering that question; however, the criminal court has its own responsibility and is not

1002 Bijlsma, J. (2019). Wederrechtelijkheid of morele ongeoorloofdheid: welk inzicht moet de ontoerekenbare verdachte ontberen? *Delikt en Delinkwent, 61*, 801-814, p. 809.

1003 Bijlsma (2019), p. 814.

1004 Gerechtshof Den Haag, 16-03-2017, ECLI:NL:GHDHA:2017:684

1005 Ligthart, Kooijmans & Meynen (2018), p. 105.

1006 Ligthart, Kooijmans & Meynen (2018), p. 105.

1007 Another example was given by Van der Wolf & Hummelen (2020), p. 277: when someone with post-traumatic stress disorder needs a new television and steals it, the mental disorder has no casual relationship to the offence.

1008 Van der Wolf & Hummelen (2020), p. 278.

1009 Mooij, A. (2007). The Background to Forensic Psychiatry in a Residential Setting. In F. Koenraadt, A. Mooij, & J. van Mulbregt, *The Mental Condition in Criminal Law* (pp. 5-11). Amsterdam: Dutch University Press, p. 5.

1010 *Thijs H. case,* §3.2.

bound by the advice given by experts.[1011] The Hoge Raad also states that it is up to the court to determine whether the defendant had a mental disorder as referred to in Articles 37a and 39 of the DCC at the time of the commission of the offence.[1012] The court has its own responsibility in this and is not bound by the advice issued by experts.[1013] In the prominent *Thijs H.* case the court of appeal ruled that the accused was suffering from a mental disorder at the time of the commission of the offences, yet the court did not establish a specific disorder.[1014] In that context, the court further ruled that neither the law nor case law requires that the disorder be classified according to the DSM-5; the court should determine whether there is a disorder in the legal sense.[1015] This issue will be further examined in Chapter 4 by analysing the ECtHR case on the matter.

The way in which criminal law doctrine thinks about criminal responsibility has changed over the years.[1016] One of the main criticisms remains the fact that a disorder during the time of the offence has to be diagnosed retrospectively.[1017] In practice, the issue of criminal responsibility mainly arises in more serious cases; for instance in 2010, only a little more than 10% of the cases discussed *toerekeningsvatbaarheid*.[1018]

3.3.3 Intent versus Criminal Responsibility

According to Article 350 of the DCCP, the criminal court shall ask four questions before sentencing: 1) whether it has been proven that the offence was committed by the accused, and if so, 2) which offence the proven conduct constitutes under the law, –and if it is considered that the offence is proved and punishable, the court shall then deliberate on–, 3) whether the offender has the criminal responsibility, and 4) the imposition of punishment or measure determined by law. If the court finds the offence charged proven to be a punishable offence and the accused therefore criminally responsible, it shall impose the penalty or measure required for the offence.[1019] If the court does not find that the accused has committed the offence they have been charged with, the court shall acquit the accused.[1020] In case the court finds the offence proven, but not an offence or the

1011 *Thijs H. case,* §3.2.
1012 *Thijs H. case,* para. 5.4.1.
1013 *Thijs H. case,* para. 5.4.1.
1014 *Thijs H. case,* para. 5.7.1.
1015 *Thijs H. case,* para. 5.7.1.
1016 Buruma, Y. (2011). Hoofdstuk 4 – Toerekeningsvatbaarheid en strafrecht. In T. Oei, & G. Meynen, *Toerekeningsvatbaarheid: Over vrije wil, wetenschap en recht* (pp. 43-56). Nijmegen: Wolf Legal Publishers, p. 46.
1017 Mooij (2020), p. 83.
1018 Criminal cases published on www.rechtspraak.nl from 1 January 2010 to 21 November 2010 were examined, and it is found out that in 463 of the total 4599 published judgments the terminology *toerekeningsvatbaar* (criminal responsibility) was mentioned, and in 547 of them mentioned *psychiater* (psychiatrist). *See.* Buruma (2011), p. 44.
1019 Article 351 of the DCCP; *See*. ANNEX 5: Relevant Articles of the Dutch Code of Criminal Procedure.
1020 Article 352/1 of the DCCP.

accused not punishable for it, the court shall, also, dismiss all the charges; however, in cases as referred to in Article 39 of the DCC, the court may also impose a measure as provided for in Article 37, 37a, 37b or 77s of the DCC, when the statutory conditions have been met.[1021] A civil care referral by the criminal court on the basis of Article 2.3 Wfz is possible in all instances.

The discussion arose on when the court could consider the intent in cases of no criminal responsibility,[1022] as criminal responsibility and intent both relate to the human psyche.[1023] Normally, a mental disorder should not be discussed under *intent*, however there is an exemption for *extreme* cases. That such an exceptional situation need not be readily assumed is already evident from the judgment itself.[1024] If the offender is so severely mentally disturbed that it has to be assumed that they are deprived of any insight into the scope of their behaviour and its possible consequences, then there can be no intent.

The *Hoge Raad*[1025] first mentioned the rule that if a person suffers from a defective development or pathological disorder of their mental faculties, that does not in itself prevent them from committing an offence intentionally (and with premeditation).[1026] In the prominent *Tolbert* case, the defence claimed that the intent was not present, because the defendant's cognitive faculties at the time of the commission of the offence were so limited due to a developing amphetamine psychosis that the person was *unable to have had intent* to commit any conduct.[1027] However, the court was of the opinion that conditional intent could be proven, because by using amphetamine, the defendant put himself in a situation whereby he accepted the considerable chance that he could end up in a psychosis and become violent from that state. Hence, due to *culpa in causa,* the intent can be proven.[1028] The *Hoge Raad* concluded that a finding of a lack of criminal responsibility due to psychosis does not rule out the possibility of intent to act, by reiterating the previous case law. The offender was, eventually, sentenced to 18 years of imprisonment followed by compulsory TBS-treatment. The *Hoge Raad,* while explaining how an intentional act relates to the mental state that influence the person's behaviour, gives an example provided by an academic study:[1029] a psychotic person who kills their neighbour because they believe God has ordered them to do so. Here a rational irrationality is involved, as it is a rational, deliberate execution of their irrational, delusion-based plan.[1030] The *Hoge Raad* also approved this approach by stating that in this example, there is a

1021 Article 352/2 of the DCCP.

1022 *Oordeel van de rechterlijke macht over bewezen opzet bij volledige ontoerekeningsvatbaarheid.*

1023 Van Dijk, A. (2008). *Strafrechtelijke aansprakelijkheid heroverwogen: Over opzet, schuld, schuld-uitsluitingsgronden en straf*. Apeldoorn: Maklu-Uitgevers, p. 299.

1024 Lindenberg, K., & Wolswijk, H. (2021). *Het materiële strafrecht*. Deventer: Wolters Kluwer, p. 130.

1025 Hoge Raad, 22-07-1963, NJ 1968, 217, m. nt. Enschede.

1026 Parket bij de Hoge Raad, 22-03-2005, ECLI:NL:PHR:2005:AS5874, para. 8; Hoge Raad, 05-02-2008, ECLI:NL:HR:2008:BB4959; Hoge Raad, 09-12-2008, ECLI:NL:HR:2008:BD2775 (*Tolbertzaak*).

1027 *Tolbertzaak*, para. 8.

1028 *Tolbertzaak*, para. 8.

1029 Van Dijk (2008), p. 299.

1030 Van Dijk (2008), p. 299.

deliberate deprivation of life by an offender who is lacking criminal responsibility.[1031] The TBS legislation is also shaped with this approach; the imposition of TBS for an offence presupposes a proven intent.[1032] However, as mentioned, in exceptional cases, the possibility of acquittal due to a lack of intent is also recognised by the *Hoge Raad*.[1033]

The intent was also discussed in the prominent *Thijs H.* case, in 2023.[1034] It is stated that even if it had to be assumed that the accused's intention to kill random persons was entirely the result of the mental disorder, this did not appear to have interfered with his planned course of action to carry out that intention. Even though the accused acted under the influence of a mental disorder, he was found to be acting intentionally even in this state, due to the fact that he was very aware of the real consequences of his actions, namely the death of his three victims. Hence, the criminal court ruled similar as in the aforementioned *Tolbert* case. The fact that this aim possibly arose from the mental disorder is only relevant in light of answering the question regarding the accused's criminal responsibility.[1035]

Hence, lifting the intent on the basis of mental disorder is highly exceptional in the Dutch case law; in only few cases it was declared. Even in a case where the offender had brain tumour and neurocognitive disorder, the court ruled that the person had no criminal responsibility, however the intent was proven, hence a TBS-order was imposed.[1036] An example of a case where the court established no intent is a sleepwalking case from 2002.[1037] According to the facts of this case, the victim (the best friend of the offender) was severely assaulted at 4am while the offender was in a state of sleepwalking. The offender did not wake up until the violent crime was already completed and she could not remember her committed acts. The experts of the case concluded that – if the diagnosis of 'sleep disorder not otherwise described' is confirmed – the accused should be held to have no criminal responsibility for the act of violence in question in a sleeping state. On the basis of the findings of the experts and the statements made by the offender to the reporting officers and at the hearing that she did not wake up until after the injuries were inflicted, the court ruled that the offender committed the charged offence in her sleep under the influence of a sleep disorder. When it comes to the intent, the court ruled that there is no degree of intent [knowingly and willingly (*willens en wetens*)] can be established and hence the offender is found to have no intent due to being unconscious in the state of deep sleep. The court, therefore, considered the intentional nature of the acts not proven, so the accused was acquitted of the entire charge.

Another example case concerns a person who was unaware of what they were doing due to dissociative disorder, and had no recollection of their act, in which they carried out a

1031 *Tolbertzaak*, para. 14.
1032 Van Dijk (2008), p. 299.
1033 Parket bij de Hoge Raad, 22-07-1963, ECLI:NL:PHR:1963:AB5623.
1034 *Thijs H. case*, para. 1.3.2.
1035 *Thijs H. case*, para. 1.3.2.
1036 Rechtbank Amsterdam, 04-07-2019, ECLI:NL:RBAMS:2019:4908.
1037 Rechtbank Utrecht, 17-12-2002, ECLI:NL:RBUTR:2002:AF2058.

killing attempt.[1038] In another case, a woman killed her tyrannical husband with a bread knife, and it was found out that the psychological stress caused a short-circuit reaction in which actions were reflexive and in which the possibility of critical reflection and detachment was eliminated and there was no longer any free will.[1039] A last example case is regarding a woman with borderline personality disorder, who was also terrorised by her (ex-)partner, and acted in a state of unconsciousness when she stabbed to death her ex who was threatening her, to death.[1040]

The insight criterion (*inzichtcriterium*) leaves open the possibility of acquitting someone on the grounds of lack of intent.[1041] After this case law, it was stated that courts are reluctant to acquit on grounds of mental disorder, because then they can no longer impose a measure.[1042] It is also stated that the insight criterion has been rarely referred to in verdicts; other terms are used to express the lack of intent, such as no cognitive control, no rational decision making, no free will, or no volition.[1043] Hence no terminological unity has been achieved neither by expert reports nor by judges.[1044]

To conclude, it can be said that mental disorder, in the Netherlands does not normally affect the intent; however, in some extreme cases where the mind and act are disconnected and thus the accused has no insight into the scope and possible consequences of their actions –for instance dissociation disorder or sleep-walking–, the accused is accepted to have no intent.[1045] As the judgments do not include the most common mental disorders, this insight criterion gives the behavioural expert a significant but at the same time limited advisory role.[1046]

3.3.4 Diminished Responsibility as a Partial Excuse

In 1928, the Psychopath Acts (*Psychopathenwetten*) regulated the TBS; yet, at that time the term 'psychopath' had a different connotation representing diminished responsibility: a border between 'normality' and 'insanity' (*krankzinnigheid*).[1047] The TBS measure was initially intended for the offender with diminished responsibility, because it was considered problematic that someone who, on the basis of their mental status, is more likely to reoffend however is held diminished responsible and thus receives a lower sentence.[1048] It is worth

1038 Hoge Raad, 01-02-1971, ECLI:NL:HR:1971:AB4227.
1039 Rechtbank Assen, 12-06-2002, ECLI:NL:RBASS:2002:AE3911.
1040 Gerechtshof Leeuwarden, 20-06-2008, ECLI:NL:GHLEE:2008:BD4917..
1041 Van Dijk (2008), p. 300.
1042 Knigge, G. (1993). *Strafuitsluitingsgronden en de structuur van het strafbare feit*, Vereniging voor de Vergelijkende Studie van het Recht van België en Nederland, p.21-22.
1043 Stevens, L., & Prinsen, M. M. (2009). Afwezigheid van opzet bij de geestelijk gestoorde verdachte. Het gedragskundig oordeel vanuit juridisch perspectief. *Expertise en Recht*, *5*(6), 113-118, p. 116.
1044 Stevens & Prinsen (2009), p. 116.
1045 Stevens & Prinsen (2009), p. 117-118.
1046 Stevens & Prinsen (2009), p. 117-118.
1047 Van der Wolf, M., Reef, J., & Wams, A. (2020). *Wie zijn geschiedenis niet kent... Een overzichtelijke tijdlijn van de stelselwijzigingen in de forensische zorg sinds 1988.* Instituut voor Strafrecht en Criminologie, Universiteit Leiden, p. 13.
1048 Van der Wolf et al. (2020), p. 13.

noting that the terminology *'diminished responsibility'* never found its way into a legal regulation in the Netherlands.[1049] Even though it is not included in the DCC, in practice it has played a major role for a long time,[1050] and may be used as a mitigating factor.[1051]

Currently, the court specifically asks the psychiatrist and psychologist about their opinion with regard to the criminal responsibility of the offender.[1052] Now that there is a formal standard for no criminal responsibility, that does not necessarily mean that it also applies to diminished responsibility. So even after the establishment of the test, the finding that as a result of the ambiguity of the criteria, in practice, each behaviourist can create his/her own framework,[1053] still holds true. The assessment will be further explained under the *4.3.2.1 Forensic Psychiatric Assessment* subsection below.

In the past, there was a five degrees grading system for forensic assessment: full criminal responsibility (*toerekeningsvatbaar*), slightly diminished responsibility (*enigszins verminderd toerekeningsvatbaar*), diminished responsibility (*verminderd toerekeningsvatbaar*), severely diminished responsibility (*sterk verminderd toerekeningsvatbaar*) and no criminal responsibility (*ontoerekeningsvatbaar*).[1054] Therefore, the answer to standard question 4c for behavioural experts would be different in the past.

The Dutch Association for Psychiatry ("NVvP", *Nederlandse Vereniging voor Psychiatrie*) published the Guideline on Psychiatric Examination and Reporting in Criminal Cases (*Richtlijn Psychiatrisch Onderzoek en Rapportage in Strafzaken*)[1055] in 2012 and reduced the number of criminal responsibility grades to three: (1) capable of responsibility, (2) diminished responsibility, and (3) not responsible. There was no formal test to establish the criminal responsibility level (then), so each expert could create an own frame of reference.[1056]

In Dutch academia, this change and its consequences were thoroughly discussed,[1057] under the main question of "*Minder gradaties, minder problemen?*" (Fewer degrees, fewer problems?).[1058] There was an expectation that the new 3-degree division would lead to

1049 Van der Wolf et al. (2020), p. 13.

1050 Mebius, L., Prinsen, M., Kempes, M., & Van der Wolf, M. (2023). Maar hoe verminderd toerekeningsvatbaar bent u dan precies? *Boom Strafblad, 5*, 216-225, p. 216.

1051 Van der Wolf, Van Marle & Roza (2022), p. 208.

1052 Van der Wolf et al. (2020), p. 2.

1053 Van der Wolf et al. (2020), p. 3.

1054 For more information, *see*. Nederlandse Vereniging voor Psychiatrie. (2012). *Richtlijn Psychiatrisch Onderzoek en Rapportage in Strafzaken*. Utrecht: De Tijdstroom, Hoofdstuk 5, §10, p. 65; also *see*. De Ruiter, p. 271.

1055 Nederlandse Vereniging voor Psychiatrie (2012).

1056 Kooijmans & Meynen (2017), p. 3.

1057 *See.* Dalhuisen, L. (2013). *Gradaties in toerekeningsvatbaarheid*. Oisterwijk: Wolf Legal Publishers; Van der Wolf, M., & Hummelen, J. (2020). Toerekeningsvatbaarheid en toerekenen. In H. Van Marle, P. Mevis, & M. Van der Wolf, *Gedragskundige rapportage in het strafrecht* (pp. 269-286). Deventer: Kluwer, p. 279; Hummelen, J., & Aben, D. (2015). Functionele diagnostiek in plaats van een advies aangaande toerekeningsvatbaarheid. *Expertise en Recht 5*, 165-173.

1058 *See.* Mebius et al. (2023b).

more TBS-orders because of the disappearance of the slightly diminished responsibility.[1059] In addition, it was feared that this new system would send ambiguous signal to the *pro Justitia* reporters in the sense that 3-degree division could be an incentive to pay insufficient attention.[1060] Moreover, expected that there would be more cases in which no responsibility would be advised due to the disappearance of the severely diminished responsibility.[1061] This was actually in contrast with the ideas of the NVvP, who had intended to actually create more clarity for the courts.[1062]

In 2015 it was stated that the experts were using both scales side by side, and it was increasing the ambiguity.[1063] Later, an empirical study was conducted to observe the consequences of the transition from 5-scale to 3-scale in practice, by analysing expert reports (*pro Justitia*) from the year 2021.[1064] It revealed that in 2021, most *pro Justitia* reporters used 3 gradations.[1065] An average of 43% of *pro Justitia* reports recommended that the defendant be deemed to be diminished responsibility, compared to 12% in which the advice was reached to not criminally responsible.[1066] It was concluded in the end of the study that the use of fewer degrees produces a better degree of agreement in certain cases (although not all), but that the elimination of specification and nuance was detrimental to the offender and seems to be in line with broader developments in criminal law and communication between courts and experts.[1067] It is, thus, stated that fewer degrees do not automatically lead to fewer problems.[1068]

It must be a foreseen challenge for the experts to face difficulties in transitioning to 3-degrees, after knowing the 5-degree system and work with it for years.[1069] It is acceptable to have confusion as 'severely' and 'somewhat' grades were abolished, hence the experts experience difficulties to draw the boundaries in between the 3-degrees as well. This was also observed by the aforementioned study: 4% the experts in 2021 explicitly still wrote their report in the 5-degree assessment scale.[1070]

1059 Bakker, E. (2009). De gedragskundige en de toerekeningsvatbaarheid. In J. Harte, T. Verhagen, & B. Raes, *Most probably the best professor of forensic psychiatry. Liber amicorum prof. dr. Dick Raes* (pp. 333-347). Nijmegen: Wolf Legal Publishers, p. 346.

1060 Van Mulbregt, J. (2009). Over toerekenen en afrekenen. In F. Koenraadt, & I. Weijers, *Vrijheid en verlangen. Liber amicorum prof. dr. Antoine Mooij* (pp. 273-292). Den Haag: Boom Juridische Uitgevers, p. 283.

1061 Van Mulbregt (2009), p. 283-284.

1062 Nederlandse Vereniging voor Psychiatrie (2012), p. 66.

1063 Hummelen & Aben (2015), p. 6.

1064 *See.* Mebius et al. (2023a).

1065 Mebius et al. (2023a), p. 194.

1066 Mebius et al. (2023b), p. 216; Mebius et al. (2023a), p. 193.

1067 Mebius et al. (2023a), p. 196.

1068 Mebius et al. (2023a), p. 197.

1069 There are also scholars who supports having the 5-degree system, as it provides more nuance and offers individual justice. *See.* Dalhuisen (2013), p. 64; Van Mulbregt (2009), p. 283-284.

1070 Mebius et al. (2023a), p. 194.

To conclude these discussions, the NVvP published a new guideline for the advice of forensic experts on 31-01-2024. Related to diminished responsibility it is advised that the experts can make use of the old terminology in their reports if desired.[1071]

3.3.5 Sanction Types

In the Netherlands, there is a dualistic sanctioning system that includes punitive sanctioning and (security) measures.[1072] Punitive sanctioning is for those offenders who are considered guilty and criminally responsible; and measures are for the offenders that are found guilty but considered high risk and not fully criminally responsible.[1073]

The penalties regulated in the Dutch Criminal Code are imprisonment (*gevangenisstraf*), detention (*hechtenis*), community service (*taakstraffen*), and fine (*geldboete*). Measures are withdrawal from circulation (Article 36a), confiscation of illegally obtained profits (Article 36e), obligation to pay compensation (Article 36f), TBS-order order (Article 37a), and out-patient hospital order (Article 38), ISD-order (Article 38m), freedom-restricting measure (Article 38v), behaviour influencing and freedom-restricting measure (Article 38z), and the civil care referral or hospital order (Article 2.3 of the Wfz) may qualify as a measure for certain purposes as well (as it replaced the former Article 37, which was a security measure).

The former Article 37 of the DCC, which regulated the psychiatric hospital order (*maatregel van plaatsing in een psychiatrisch ziekenhuis*) has been abolished. Before 2020, Article 37 regulated that criminal courts could order placement in a psychiatric hospital for one year maximum to a person who had no criminal responsibility due to a mental disorder. This order could be made only if the person was dangerous to themselves, to others, or to the general safety of persons or property. This placement regulated under Article 37 of the DCC has been replaced with Article 2.3 of the Wfz and it provides the court more options.[1074] Since 1 January 2020, Article 2.3 of the Wfz establishes that the criminal court itself can issue a civil law care – according to Wvggz – a new option to the *arsenal* to realise care for those involved in criminal justice.[1075] This new measure will be explained under the subsection *3.3.5.5 Article 2.3 Wfz – Civil Care Referral* below.

Preliminary to an imposition decision, a decision has to be made on the criminal responsibility of the offender.[1076] Security measures are independent of a sentence, yet

1071 *"Aanbeveling-6: Indien passend kan gebruik gemaakt worden van eerdere terminologie, zoals enigszins en sterk verminderd, zonder hiermee een exact natuurwetenschappelijke benadering te beogen.", See.* https://richtlijnendatabase.nl/richtlijn/psychiatrisch_onderzoek_en_rapportage_in_strafzaken/het_advies_over_toerekenen.html, accessed 11 June 2024.

1072 De Ruiter (2016), p. 271.

1073 De Ruiter (2016), p. 271.

1074 Van der Wolf et al. (2020), p. 70.

1075 *Emphasis added. See.* Oosterhuis, V., Burger, A., Van der Wolf, M., & De Kogel, K. (2023). Pionieren tussen straf en zorg: De overweging en toepassing van artikel 2.3 Wet forensische zorg bij geweldsdelicten. *Tijdschrift voor Forensische Psychiatrie en Psychologie 1*, 33-52, p. 33.

1076 Van der Wolf, Van Marle & Roza (2022), p. 208.

may be related to the duration of a conditional release or remission measure, which is linked to the duration of the sentence.[1077] The measure can also be stand alone, without reference to a particular sentence.[1078]

For punishment, a decision must be made on the height of the sentence within the statutory maximum. The Dutch Supreme Court, *Hoge Raad*, allowed that the gravity of punishment is not tailored only to the degree of guilt any longer, but can also be personalised to the degree of dangerousness.[1079] Thus, dangerousness, either or not based on a mental disorder may be used as an aggravating factor; while diminished responsibility due to mental disorder may be used as a mitigating factor.[1080]

When the court decides on imposing a (partly) *suspended/conditional sentence*, it has to make a decision on the type of conditions.[1081] Conditions may entail treatment or even voluntary commitment. The courts rely on the probation service's advice reports extensively in such cases. Most of the *suspended/conditional sentences* or freedom-restricting security measures can be declared immediately enforceable, which means that appeals against the sentence do not suspend the execution.[1082]

There are five main sanction types that shall be elaborated on as most relevant for mentally disordered offenders: imprisonment, TBS-order, combination sentence, the ISD-order, and civil care referral or hospital order.

3.3.5.1 Imprisonment

The main penalties in the Dutch sentencing arsenal are the prison sentence, the community service, and the fine.[1083] Under this subsection, solely the prison sentence will be discussed.

Imprisonment (*gevangenisstraf*) is regulated under Article 10 of the DCC. The term of imprisonment is either life or temporary; temporary imprisonment shall not be less than one day and not more than 25 years. In some cases, at the discretion of the court, the imprisonment may be up to 30 years, yet in no case may it exceed 30 years. Imprisonment may be a life sentence for certain exclusive categories of offences.[1084]

In the Netherlands there are different types of prisons. Persons being held in pre-trial detention are placed in a remand centre, and those who have been convicted by a court

1077 Van der Wolf, M.J.F. & Herzog-Evans, M. (2014) Mandatory measures: 'safety measures'. Supervision and detention of dangerous offenders in France and the Netherlands: a comparative and Human rights' perspective. In: M. Herzog-Evans (Ed.), *Offender Release and supervision: the role of courts and the use of discretion* (pp. 193-234). Oisterwijk: Wolf Legal Publishers, p. 193.
1078 Van der Wolf & Herzog-Evans (2014), p. 193.
1079 SC 10-09-1957, *NJ* 1958, 5; *See*. Van der Wolf & Herzog-Evans (2014), p. 198-199.
1080 Van der Wolf, Van Marle & Roza (2022), p. 208.
1081 Van der Wolf, Van Marle & Roza (2022), p. 208.
1082 Van der Wolf, Van Marle & Roza (2022), p. 208.
1083 Van der Wolf, Van Marle & Roza (2022), p. 204.
1084 Van der Wolf, Van Marle & Roza (2022), p. 205.

are detained in a prison.[1085] The Custodial Institutions Agency ("DJI", *Dienst Justitiële Inrichtingen*) carries out the sentences as part of the Ministry of Justice and Security.

The relatively new Book 6 of the Dutch Code of Criminal Procedure regulates the external legal position and execution of sentences.[1086] According to Article 6:2:8, a person sentenced to imprisonment who fits the criteria because of a mental disorder, psychogeriatric disorder, or intellectual disability may be placed in a TBS-clinic. The placement shall take place in accordance with the Wfz. According to the second paragraph of Article 6:2:8 of the DCCP, if a convicted person sentenced to imprisonment is also subject to the measure of placement with a compulsory TBS-order, it shall be assessed at regular intervals whether the convicted person should be placed in an institution for the nursing of persons who have been placed under TBS-order. Both these options are hardly used in practice.

When there is no other possibility to protect the society from the danger emanating from the convict, then TBS-measure is applicable.[1087] This measure will be further examined below. Another combination of a measure with imprisonment is the behaviour influencing or freedom-restricting measure, which can be imposed in addition to a prison sentence and/or a TBS-order and means to ensure that no dangerous offender returns to society without supervision. No mental disorder is required for that measure.

3.3.5.2 TBS-order

As introduced earlier, the eminent TBS (literally translating as entrustment) system is unique to the Netherlands. It requires, therefore, a brief historical introduction. The history of the TBS measure begins with its enactment in 1928, with the name TBR-order (*terbeschikkingstelling van de regering*, entrusment -at the government's pleasure-); and it was renamed to the TBS-order in 1988.[1088] In 1992, the Committee on the Sentencing and Punishment of Mentally Disordered Offenders[1089] was established, and one year later it issued its final report on "Tailor-made Sanctions".[1090] In 1995 the Parliament decided to make amendments to the DCC and the DCCP regarding the placement and application of sanctions to mentally disordered offenders.[1091] In 1997 the Act governing the internal legal position of TBS patients, called *Beginselenwet verpleging ter beschikking gestelden* ("BVT"), was enacted.[1092]

1085 <https://www.government.nl/topics/sentences-and-non-punitive-orders/custodial-sentences> accessed 19 March 2024.

1086 *See.* ANNEX 5: Relevant Articles of the Dutch Code of Criminal Procedure.

1087 Prinsen, M. (2021). Het deskundigenonderzoek. In B. Blansjaar, W. Van Kordelaar, & M. Prinsen, *Stoornis en delict* (pp. 33-50). Amsterdam: Boom, p. 44.

1088 https://tbsnederland.nl/over-ons/geschiedenis-van-tbs/, accessed 18 October 2023.

1089 De commissie TBS en Sanctie toepassing Geestelijk Gestoorde Delinquenten.

1090 *See.* <https://zoek.officielebekendmakingen.nl/kst-24256-3.html>, accessed 18 October 2023.

1091 *Ibid.*

1092 "*...the act under Dutch criminal law providing regulations (and rights) for the detention of forensic mental health patients in high security services called 'tbs-facilities'.*", *See.* Van der Wolf et al. (2016), p. 139.

Those sentenced to a TBS-order meet the criteria of committing a severe offence, having a mental disorder and are considered (very) dangerous.[1093] The TBS-measure is imposed, therefore, only if there is no other possibility to protect the society from the danger emanating from the convict.[1094] Hence, the TBS-order is reserved for offenders who committed serious, and almost always violent crimes.[1095] It can be imposed on non-criminally responsible offenders and on diminished responsible offenders, in the latter case possibly in addition to a prison sentence. A formal requirement is the presence of a multidisciplinary advice, from a psychiatrist and generally a psychologist, which does not have to be followed by the court.

There are two types of TBS-order: TBS-order with compulsory care (*Tbs met dwangverpleging*, Article 37b) and TBS-order with conditions (*Tbs met voorwaarden*, Article 38). Which type of TBS the court imposes depends on the crime and the likelihood of re-offending.

The conditional TBS-order (*Tbs met dwangverpleging)* is the form of TBS, in which the offender is obliged to comply with certain conditions, such as not using drugs or alcohol for a certain period of time, getting psychiatric treatment, or adhering to the instructions of the probation. The conditional TBS-order is generally executed in part in an addiction clinic or a forensic psychiatric clinic (FPK). The total term cannot exceed 9 years, although it can be converted to the unconditional variant of compulsory care when conditions are breached, or risk otherwise requires it. Article 38e regulates that a TBS-order with compulsory care cannot exceed a period of 4 years, unless this order has been imposed for a serious offence against or endangering the physical integrity of one or more persons.[1096] So these two determinate variants are often combined with a supervision order, to ensure a safe return to society.

The TBS-order with compulsory care always terminates on probation, hence the offender must comply with agreements with the probation service, after the measure. Article 38j states that in the case of conditional termination of the compulsory care, the entrustment order may be extended for a period of one year or two years each time. Therefore, the probational termination of TBS has no maximum term.[1097]

The TBS-order with compulsory care is the *ultimum remedium*, thus can be imposed by court when the crime committed requires prison sentence of four years or more,[1098] and if the risk of recidivism is high. The TBS-order with compulsory care is aimed at motivating the patient to participate in the treatment plan of the hospital,[1099] and is executed in a specialised high security forensic psychiatry hospital (FPC or FPK). This TBS-measure is for 2 years, and after 2 years, the TBS-measure can be extended by the court with 1 or 2

1093 Van der Wolf, Van Marle & Roza (2022), p. 204.
1094 Prinsen (2021), p. 44.
1095 De Kogel et al. (2006), p. 319.
1096 Article 38e/2 of the DCC.
1097 *See.* <https://www.rijksoverheid.nl/onderwerpen/tbs-en-overige-forensische-zorg/tbs/soorten-tbs> accessed 04 May 2024.
1098 Prinsen (2021), p. 44.
1099 De Ruiter, p. 271.

years, each time.[1100] When deciding on extension, the court is advised by the forensic clinic and/or the probation service, and sometimes by independent experts. After 4 years, 2 independent experts must advise on a possible extension. In practice, the measure can last for life.[1101] Termination is only possible once the measure has been terminated conditionally for at least 1 year.[1102] A detained person only returns to society when the judge is of the opinion that the risk of recidivism has been reduced to an acceptable level and the safety of others or the general safety of persons or property no longer demands it. When the court finds that a patient continues to be a danger to society despite treatment, the patient is transferred to a (formerly literally called) long stay facility, now called longterm forensic psychiatric care (*Langdurige Forensisch Psychiatrische Zorg, LFPZ*). The long stay will be explained further under the execution law section below.

In principle, treatment and resocialisation within the TBS-order take place in phases and are accompanied by leave modalities that expand per phase: accompanied leave, unaccompanied leave, transmural leave, probation leave and conditional termination. These options will be discussed under *Section 5* on the execution.

A TBS-order may also be imposed in combination with punishment in cases of diminished responsibility, which will be examined below.

3.3.5.3 Combination Sentence: Imprisonment and TBS-Order

It is also possible for mentally disordered offenders who have diminished responsibility to be sentenced to a combination sentence of imprisonment and TBS-order with compulsory care at the same time. A combination with a conditional TBS-order is also possible with a maximum prison term of five years. The combination sentence is called a double lock on the door (*dubbel slot op de deur*), as it is to ensure that the person is removed from society for as long as possible.[1103] Currently, long prison sentences are combined with the TBS-order.[1104] The relevant discussion on which sanction should be executed first will be held in *Section 6*, under the integral analysis subsection.

Lastly, it is noteworthy that an increasing problem observed over the last decade is the refusal of some offenders to cooperate with the evaluation.[1105] It was assumed that the refusal often stems from fear of the TBS-measure; and offenders assume that if no disorder can be established during the evaluation, they will not receive the TBS-order.[1106] However, as explained earlier, the court can still rule that the offender has a mental disorder, possibly without being diminished responsible and order a combination sentence with potentially an extra lengthy prison sentence.

1100 Article 38d of the DCC.

1101 Raad voor Strafrechtstoepassing en Jeugdbescherming. (2020). *Langdurig in de tbs: Stagnatie in de door- en uitstroom van ter beschikking gestelden*. Den Haag, p. 6.

1102 Article 6:2:17/1 of the DCCP.

1103 Empasis added, Knoester, J., & Bokse, J. (2020). Zorgen rondom het strafrecht: TBS. *Boom Strafblad, 5*, 241-250, p. 246.

1104 Meynen (2022), p. 278.

1105 Meynen (2022), p. 279.

1106 Meynen (2022), p. 279.

3.3.5.4 ISD-Order

The ISD-measure (*inrichting stelselmatige daders*) was introduced in 2004 as a new freedom-depriving measure.[1107] It focuses on the systematic offenders who cause serious social nuisance due to their frequent and persistent recidivism and does not concern mentally disordered offenders. The ISD-measure does not stand alone, but is part of a broader and ongoing development of the criminal justice sanction system to combat recidivism and criminal nuisance.[1108]

This new type of sanction, the ISD-order, is based first and foremost on the (expected and/or assumed) social dangerousness of the offender (*maatschappijgevaarlijkheid*).[1109] Article 38m/2 of the DCC states that the measure serves to secure society and to stop the suspect's recidivism. The fourth paragraph of this article underlines the need of reasoned, dated, and signed advice on the appropriateness of or need for the measure by the probation service. The ISD-measure shall not exceed two years from the day on which the court order imposing it became final.[1110]

The OSD can also be imposed conditionally. To protect the safety of persons or property, the judge shall impose conditions concerning the convicted person's behaviour.[1111] These conditions may involve the convicted person receiving outpatient or intramural treatment; admission to an institution cannot exceed two years.[1112] These conditions shall be imposed only if the convicted person has declared their willingness to undergo treatment.[1113] The Minister of Justice and Security may terminate the measure at any time.[1114]

The criteria for imposition of the ISD-measure are a) there must be a crime for which pre-trial detention has been allowed (Art. 38m/1/1°), b) the defendant must have been irrevocably sentenced at least three times for an offence within 5 years (Art. 38m/1/2°), c) the new offence must be committed after the enforcement of the aforementioned sanctions (Art. 38m/1/2°), d) it must be assumed that the defendant will commit a crime again (Art. 38m/1/2°), e) the safety of persons or property must require the imposition of the measure (Art. 38m/1/3°), f) the defendant should be at least in part be criminally responsible (within the meaning of Art. 39), and g) there must be a demand from the public prosecution (Art. 38m/1).

In cases where the defendant is an addict or has other specific problems with which the commission of criminal offences is connected, the measure also serves to contribute

1107 Struijk, S. (2011). *De ISD in perspectief: Een studie naar de ISD-maatregel in het licht van het Nederlands strafrechtelijk sanctiestelsel ter bestrijding van recidive en criminele overlast*. Nijmegen: Wolf Legal Publishers, p. 1.
1108 Struijk (2011), p. 577.
1109 Struijk (2011), p. 42.
1110 Article 38n/1 of the DCC.
1111 Article 38p/4 of the DCC.
1112 Article 38p/5 of the DCC.
1113 Article 38p/5 of the DCC.
1114 Article 38u of the DCC.

to solving their addiction problems or those other problems.[1115] The *Hoge Raad* has ruled that the imposition of a custodial sentence in combination with an ISD measure is not possible.[1116] Hence, the ISD-measure cannot be combined with prison sentence nor with a TBS-measure.

3.3.5.5 Article 2.3 Wfz – Civil Care Referral[1117]

1). Since 2020, with the introduction of Article 2.3 of the Wfz[1118], a type of diversion has become available.[1119] According to this unique concept in the Dutch criminal justice, a criminal court can issue a civil care referral (*civielrechtelijke machtiging*), literally translated as care authorisation.[1120] Article 2.3 Wfz enables the criminal court to issue an authorization for compulsory care within regular (civil) health care, by forming a link between the Dutch Compulsory Mental Health Care Act (Wvggz) and the Dutch

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1115 Article 38m/3 of the DCC.

1116 The combination of ISD with punishments is not possible. *See*. Hoge Raad, 21-03-2006, ECLI:NL:PHR:2006:AV1161.

1117 Article 2.3 of the Wfz regulates *civielrechtelijke machtiging,* which was translated into English by the WODC as "care authorization", however the criminal courts do not empower or permit this civil care. With Article 2.3 of the Wfz, criminal courts *refer* the person to civil care during the pre-trial, trial, or post-trial phase. To better reflect the concept in English, it would therefore be more appropriate to translate the terminology of the "*civielrechtelijke machtiging*" as the "civil care referral".
(*See*. WODC. (2021). *Artikel 2.3 Wet forensische zorg in de praktijk: Toepassing en ervaringen van ketenpartners in de eerste anderhalf jaar na inwerkingtreding – English Summary*. Retrieved July 2024, from https://repository.wodc.nl/bitstream/handle/20.500.12832/3131/Cahier%202021-29-volledige-tekst-nw.pdf?sequence=7&isAllowed=y, p. 3.)

1118 *See*. ANNEX 6 – Relevant Articles of the Dutch Forensic Care Act.
According to Article 2.3 of the Wfz: This power may be applied in the context of criminal law enforcement by separate decision:
1°. at the time of the court ruling convicting a person for a criminal offense;
2°. at the time of the court ruling in accordance with Article 9a of the Criminal Code that no penalty is imposed;
3°. to the judicial decision in which the accused is acquitted;
4°. by the judicial decision dismissing the accused from all legal proceedings;
5°. at the request of the public prosecutor;
6°. if the judge does not renew the measure of placing on remand;
7°. if the judge does not renew the conditional termination of the state mental health treatment;
8°. if the judge does not renew the placement in an institution for juveniles;
9°. if the judge does not renew the conditional termination of the measure placement in an institution for juveniles;
10°. in the case of a judicial decision, at the request of the public prosecutor, to convert the measure placement in an institution for juveniles into the measure of placement at the institution for juveniles;
11°. if the conditions referred to in Article 2.4 of the Wfz have expired.

1119 Van der Wolf & Mevis (2022), p. 377.

1120 Oosterhuis, et. al. (2023), p. 33.

Care and Coercion of Psychogeriatric and Mentally Disordered Patients Act (Wzd).[1121] It aims to boost the flow from the criminal justice system to the mental health care system.[1122]

The court may issue this care referral under civil law at any point in the criminal process. This case referral is for offenders that are not considered as dangerous as TBS patients.[1123] When the criminal court intends to apply Article 2.3 Wfz, it must check whether the conditions regulated under these civil laws are met. If this is the case, then a referral can be issued with a maximum duration of six months. Next to the criminal courts, the public prosecution also has the discretionary power to divert someone from the criminal justice system to general mental healthcare through bringing the request for an authorization before a civil court. It is important to note that even when this civil care referral is issued by a criminal court, it is not accepted as a forensic care title, meaning that it is less easy to be placed in a forensic mental health facility.[1124]

Since this scheme is – contrary to its predecessor in Article 37 – not limited to the offenders who are not criminally responsible, the application scope of application is broader. In practice, the combination with a suspended prison sentence is most common as it cannot practically be combined with a prison sentence (longer than two weeks).[1125]

However, this order has some practical problems. It is indicated by the criminal justice practitioners and health care practitioners that within this existing framework, it is difficult to accommodate persons with multiple diagnoses such as mental disorders, addiction and/or intellectual disability combined with dangerousness seem difficult to place in the first place, because there would be limited healthcare options for them.[1126] Moreover, in cases where the placement is possible, the patients reported that they were placed in a facility which does not meet their needs.[1127] Therefore, there are certain reasons listed why this order is found less favourable: the maximum duration of the warrant is only six months, medical declaration and treatment plan are necessary before the warrant can be given, facility may avoid receiving a patient or may not want these forensic patients, and also, securing a bed in a forensic mental health facility is really hard.[1128] Contrary to the intended purpose of the Wfz, it resulted in numbers of patients in under-secured institutions, and it is, traditionally, a reason for mental health sector to release these persons.[1129] Hence, based on this

1121 Oosterhuis, et. al. (2023), p. 34.
1122 Van der Wolf et al. (2020), p. 35.
1123 Post, E. (2023). *De kunst van het straffen? Forensische zorg als premisse.* [PhD-Thesis – Research and graduation internal, Vrije Universiteit Amsterdam], p. 460.
1124 Oosterhuis, et. al. (2023), p. 34.
1125 Van der Wolf & Mevis (2022), p. 377.
1126 De Kogel, C., Van der Ree, J., & Burger, A. (2021). *Artikel 2.3 Wet forensische zorg in de praktijk. Toepassing en ervaringen van ketenpartners in de eerste anderhalf jaar na inwerkingtreding*. WODC-publicaties, p. 145-146.
1127 Schaftenaar, P., Vogel, V. de, & Clercx, M. (2019). Continuïteit van en na forensische zorg: Een grote zorg. *Sancties, 77*(5), 361-367, p. 364.
1128 Van der Wolf & Mevis (2022), p. 377-378.
1129 Van der Wolf et al. (2020), p. 70.

information, it appears that for the time being, the flow from criminal law to the general mental health care via Article 2.3 Wfz has not yet really gotten off the ground.[1130]

It shall be lastly noted that even though Article 2.3 is a part of the Wfz, the civil care referral is not funded by the Ministry of Justice and Security, as it is not deemed forensic care, but by the person's own health insurance. Even though the civil care referral can be issued by the criminal court during the criminal proceedings, since it is a diversion to the civil justice system, Article 2.3 of the Wfz will not be further elaborated on under the execution section, but will be part of the compliance assessment with the ECtHR in Chapter 4.

3.3.6 Dangerousness

Preventing offenders from reoffending is an important objective of criminal law; as it does not only protect future victims, and as it is also in the interest of the offender not to have to appear in court again.[1131] Dutch criminal law has fundamentally changed over the last quarter century due to a sharp increase in the popularity of recidivism prevention through criminal law.[1132]

As in other criminal justice systems, there are multiple mentions of dangerousness assessment in the Dutch sentencing law (*sanctierecht*): for TBS-order with or without compulsory care, extension of the TBS-order, ISD-order, freedom restricting measure, behaviour influencing and freedom restricting measure, and the extension of probation on conditional release.

First and foremost, the TBS measure requires a dangerousness assessment (*gevaarsinschatting*), as a substantive criteron for imposing the measure. Article 37a/1 of the DCC regulates that the safety of others *(veiligheid van anderen*) or the general safety of persons or goods (*algemene veiligheid van personen of goederen*) requires the imposition of that measure. This dangerousness criterion (*gevaarscriterium*) of the TBS-order is intended to demonstrate that the person involved represents a serious danger to their surroundings, either a direct danger to more individually determined persons in the vicinity of the person involved (safety of others), or a wider and undirected circle of persons (general safety), but in any case, always directed at other persons or their property.[1133] The same dangerousness criteria are applicable to extend the TBS period, according to Article 38d/2. It is established in the judgments of the Penitentiary Chamber of the Arnhem-Leeuwarden Court of Appeal that the dangerousness criteria are explicitly considered in relation to the principles of subsidiarity and proportionality when extending the TBS period.[1134] The dangerousness criterion regulated in Article 37a/1 of the DCC is the same as the Article

1130 De Kogel et al. (2021), p. 145.

1131 Bijlsma, J. (2024). *Risicostrafrecht en rechtsorde: Kent noodzaak geen recht? (Inaugural Lecture).* Groningen: University of Groningen Press, p. 6.

1132 Bijlsma (2024), p. 6.

1133 Struijk, S., & Van der Wolf, M. (2018, November). Gevaarscriteria in het strafrechtelijk sanctierecht: een risicovol ratjetoe? *67*(11), 938-947, p. 939.

1134 Gerechtshof Arnhem, 21-07-2003, ECLI:NL:GHARN:2003:AI0168; mentioned in Struijk & Van der Wolf (2018), p. 940.

37b/1, which is on the order for compulsory care. In practice, however, the dangerousness criterion for compulsory care is higher than that for the conditional measure, because it concerns a danger that cannot be controlled without coercion.[1135]

Over the last decades, several new penalties and measures have been incorporated into the legal systems in order to deal with *dangerous* offenders, such as a long-term supervision order in the Netherlands.[1136] The behaviour influencing and freedom restricting order or GVM-order (*Gedragsbeïnvloedende en Vrijheidsbeperkende Maatregel*) is a criminal law measure aimed at restricting liberty or influencing behaviour.[1137] This sanction was introduced in 2018 to create a possibility of continuing supervision for sex offenders and seriously violent offenders for whom it is estimated that *extra* supervision will be needed for society after the end of the prison sentence or TBS measure that was imposed, by means of behaviour-influencing and/or freedom-restricting conditions.[1138] Hence, the execution of the GVM-measure requires a new judicial decision, to be taken when the execution of the simultaneously imposed prison sentence and/or TBS-order is fully completed and the necessity of continuing with the freedom-restricting GVM-framework has become apparent. The dangerousness criterion for imposition of the GVM-measure is similar to that of the TBS-order, even though no relationship with a mental disorder is required.[1139] However, the criterion for execution of the order is much higher as serious concerns (*ernstig rekening mee moet worden gehouden*) that another offence for which a GVM order can be imposed will be committed. Surely, this dangerousness assessment is not unique to the GVM-order, but it plays a much broader role in Dutch sentencing law.[1140] In principle, however, no psychiatric assessment is needed.

The ISD-measure (*inrichting stelselmatige daders*) focuses on systematic offenders, as briefly explained above. The ISD-order is based first and foremost on the (expected and/or assumed) social dangerousness of the offender (*maatschappijgevaarlijkheid*).[1141] Article 38m/4 of the DCC underlines the need of reasoned, dated, and signed advice on the appropriateness of or need for the measure by the probation service; hence, the dangerousness assessment is necessary, unless the defendant refuses to cooperate in the assessment. The same assessment is also necessary for the conditional ISD measure.

Article 38v of the DCC introduced the freedom-restricting measure (*vrijheidsbeperkende maatregel*) in 2012. Paragraph 4 states that the court may order the measure if there are serious concerns (*ernstig rekening*) that the offender will again commit an offence or behave in an incriminating manner towards a certain person or persons. With this measure, a new means of restraint of liberty with location and/or contact bans for up to five years is possible

1135 Struijk & Van der Wolf (2018), p. 940.
1136 J. Jehle, C. Lewis, M. Nagtegaal, N. Palmowski, M. Pyrcak-Gorowska, M. Van Der Wolf, J. Zila (2021), Dealing with Dangerous Offenders in Europe. A Comparative Study of Provisions in England and Wales, Germany, the Netherlands, Poland and Sweden, Criminal Law Forum, 32, pp. 181-245; p. 182.
1137 Struijk & Van der Wolf (2018), p. 938.
1138 Struijk & Van der Wolf (2018), p. 938.
1139 Van der Wolf, Van Marle & Roza (2022), p. 205.
1140 Struijk & Van der Wolf (2018), p. 938.
1141 Struijk (2011), p. 42.

in order to protect the society or prevent criminal offences.[1142] For the imposition of this type of security supervision measure, there is no forensic or behavioural assessment needed.

Lastly, since 2018, the extension of probation on conditional release also requires a legal dangerousness assessment. The conditional release has long been regulated by law, and in practice, the dangerousness assessment was being carried out, anyway.[1143]

This collection of dangerousness criteria in the Dutch sanctioning law is defined as a "hotchpotch" (ratjetoe), as they are not clearly delineated or explicitly related to the extent to which a sanction intervenes in the person's life, and since the legislator has not designed an unambiguous and coherent system of substantive dangerousness criteria.[1144]

Finally, in mental health law the criterion of dangerousness is now 'serious disadvantage' for others and self. The criminal court has to deal with that criterion as well when it considers a civil care referral under Article 2.3 Wfz.[1145]

When an expert is asked to write an opinion on the dangerousness of a person (*delictgevaarlijkheid*), it is about the danger at the time of the investigation and in the future.[1146] After all, recidivism (*recidivegevaar*) is an important factor in assessing the degree of punishment and imposition of any measures.[1147] Prediction of dangerousness depends on some factors, including the number of previously committed offences, types of offences committed, socioeconomic status, alcohol and drug use, gun ownership, broken relationships, deviant psychosocial and sexual preferences, and social incompetence; yet, even a good method of predicting would still have too many 'false positive' statements and therefore the number of persons who are wrongly declared dangerous may be very high.[1148]

The expert must be asked to state the seriousness of the re-offending risk, the nature and severity of the disorder, whether treatment is necessary, and which legal framework would be suitable.[1149] Thus, the psychologist must pay special attention to risk assessment (*risicotaxatie*), and dangerousness of the defendant; and in order to assess it, historical, clinical, and risk control factors should be taken into account.[1150] According to the Guideline on Psychiatric Examination and Reporting in Criminal Cases (*de Richtlijn psychiatrisch onderzoek en rapportage in strafzaken*), the expert should do the estimation of recidivism risk

1142 Van der Wolf, Van Marle & Roza (2022), p. 205.
1143 Struijk & Van der Wolf (2018), p. 943.
1144 Struijk & Van der Wolf (2018), p. 946.
1145 Van der Wolf, Van Marle & Roza (2022), p. 206.
1146 Van Marle, H.J.C, & Roza, S. (2020). Het strafrechtelijk psychiatrisch gedragskundigenonderzoek ('pro justitia'). In F. Bakker, & H. Van Marle, *De psychiatrie in het Nederlandse recht* (pp. 121-144). Deventer: Wolters Kluwer, p. 135.
1147 Van Marle & Roza (2020), p. 135.
1148 Van Marle & Roza (2020), p. 135-136.
1149 Van Mulbregt & Beekman, p. 58.
1150 For further information *see*. Koenraadt, F., & Van Deutekom, C. (2007). The Psychological Assessment. In F. Koenraadt, A. Mooij, & J. van Mulbregt, *The Mental Condition in Criminal Law* (pp. 101-126). Amsterdam: Dutch University Press, p. 115-116.

based on risk factors that have been scientifically shown to influence the likelihood of recurrence of delinquent behaviour, thus, it is essential not only to look at the value of individual risk factors, but especially also to consider their significance for the individual.[1151]

In the past, risk assessment took place only through a clinical assessment; however clinical assessment was found to have little precision and little transparency, because it is not standardized, reproducibility and comparison is difficult to establish.[1152] Over the years it has also been shown that various person-related (clinical) and environmental (situational) factors influence recidivism risk. Disorder-related risk factors make up only a small fraction of all factors that have been shown to influence recidivism risk. Even if no mental disorder is diagnosed, meaningful statements about risk assessment and risk management can be made based on previous risky behaviour.[1153]

SECTION 4: CRIMINAL PROCEDURE LAW RELATED TO MENTALLY DISORDERED OFFENDERS OF THREE CRIMINAL JUSTICE SYSTEMS

This section examines three criminal justice systems to reveal their procedural rules and practices on sentencing mentally disordered offenders. Specific attention will be given to experts and forensic psychiatric assessments.

The forensic psychiatric assessment of a suspect is an important connection in between the criminal justice system and the mental healthcare system, and it demands well-established procedures and clearly defined responsibilities for both systems involved. The approach of the criminal justice system towards the psychiatric experts reflects on the content and detail of the report.[1154] Depending on the criminal justice system, psychiatrists, psychologists, behavioural scientists, social workers, and nurses may be involved in the forensic psychiatric assessment.[1155]

4.1 Relevance of Mental Disorder in Criminal Procedure in Türkiye

In order to explain the relevance of mental disorder in criminal procedure in Türkiye, fitness to plead and fitness to stand trial shall be explained first. Afterwards, relevance of mental disorder in the trial phase, sanction types and verdicts will be discussed.

1151 Nederlandse Vereniging voor Psychiatrie (2012), Hoofdstuk 6, §1, p. 70.
1152 *See*. Nederlandse Vereniging voor Psychiatrie (2012), Hoofdstuk 6, §1, p. 67.
1153 Nederlandse Vereniging voor Psychiatrie (2012), Hoofdstuk 6, §1, p. 68.
1154 Dressing, H., & Salize, H. J. (2006). Forensic Psychiatric Assessment in European Union Member States. *Acta Psychiatrica Scandinavica*, *114*(4), 282–289, p. 283.
1155 *See*. Dressing & Salize (2006), p. 284.

4.1.1 Fitness to Plead and Stand Trial

There is no fitness to plead or fitness to stand trial claims in Türkiye. According to Yargıtay, the public prosecutor cannot issue a decision of not prosecuting the suspect who was suffering from a mental disorder at the time the offence was committed. According to the judgments, persons with mental disorders shall be dealt with in the same way as other suspects; a public prosecution must be initiated against the person in order to rule on acquittal or a security measure by a competent court, as a result of a criminal trial.[1156] The rationale behind this is that the decision not to prosecute would result in depriving the person of the right to acquittal.[1157]

According to Article 150/2 of the TCCP[1158], when a suspect or a defendant does not have an appointed lawyer and is incapable of defending himself, an attorney shall be assigned without their request. This is called *mandatory advocacy (zorunlu müdafilik)*, and therefore the Bar Association must assign a lawyer free of charge. In this way, the defence rights are expected to be protected by the presence of a lawyer both in the pre-trial and the trial phase.

4.1.2 Criminal Procedure Regulations for Trial Phase

In the Turkish criminal justice system, according to Article 2/1 of the TCCP, the investigation phase (*soruşturma*) starts with a suspicion of a crime that had been learned by the competent authorities and ends with the admission of the indictment, after which the prosecution phase (*kovuşturma*) starts with that admission of the indictment and ends when the verdict is final. The person who is the subject of the criminal investigation is called suspect (*şüpheli*); and the subject of the criminal prosecution is named accused (*sanık*). According to the preamble to the Article 2 of the TCCP, when the criminal trial results against the defendant and the person is found to be the perpetrator of the alleged crime; then the person's title becomes convict (*hükümlü*) to serve their time.

Under the following subsection, the forensic psychiatric assessment within the time frame of the trial phase will be examined.

4.1.2.1 Forensic Psychiatric Assessment

The main principles of evidence in Turkish criminal justice system are based on the continental European system. Criminal courts must conduct a full investigation to determine the factual truth; and in order to reach the factual truth evidence is used. Courts are not reliant on the evidence presented by the prosecution, the accused, or the other parties.[1159] According to Article 230 of the TCCP, criminal courts are obliged to

1156 Yargıtay 9. Ceza Dairesi, 13/04/2011, 3444/2270; Yargıtay 8. Ceza Dairesi, 01/02/2013, 23625/4121; Yargıtay 8. Ceza Dairesi, 24/11/2011, 10974/13420; Yargıtay 4. Ceza Dairesi, 21/05/2008, 11626/10272; *See*. Aydın, A. (2017). *Türk Ceza ve Ceza Muhakemesi Hukukunda Akıl Hastalığı ile Akıl Hastalarına Uygulanan Güvenlik Tedbirleri*, Bursa: Uludağ Üniversitesi Sosyal Bilimler Enstitüsü. Retrieved from https://tez.yok.gov.tr/, p. 147.

1157 Aydın (2017), p. 147.

1158 *See.* ANNEX 3 – Relevant Articles of the Turkish Code of Criminal Procedure.

1159 Yenisey (2021), §430.

discuss and evaluate the evidence used to reach the conclusion and to provide reasoning for the ones rejected.

However, there is no definition of evidence provided, nor an explanation of what is accepted as evidence. Therefore, there is a freedom of evidence.[1160] Generally, physical evidence, witness testimonies, confessions, and expert witnesses are used. Nevertheless, the evidence shall be obtained lawfully, according to Article 38 of the Constitution and Article 217/2 of the TCCP.

As it is stated above, there is no "competency to stand trial", however, according to Article 150/2 of the TCCP, a defence counsel shall be appointed without the request of the suspect or the defendant when the suspect or the accused who does not have a defence counsel is an incapable of defending himself. This regulation designates mandatory obligations; thus, demand is not needed.

4.1.2.1.1 Expert Selection

The science of psychiatry is responsible for determining whether a person has a mental disorder and whether this mental disorder affects the perception or the control of behaviour.[1161] If strong indications of suspicion are present, the person should be referred to an expert.

According to Article 2/1 of the Law on Expert Witness, the term *expert* refers to a natural or private legal person[1162] who is appointed to provide their opinion and vote either orally or in writing in cases where special or technical knowledge is required to reach a decision. Legal persons to be assigned as expert witnesses must still be in operation, and the natural person or persons who will carry out the examination on behalf of the legal persons must also meet the conditions of admission to the list.[1163]

Article 63/1 of the TCCP also provides a definition of the *expert,* stipulating that the expert is someone whose special or technical knowledge and experience are needed to solve a case.[1164] Since technology and science develop rapidly, it is impossible for a judge to have knowledge on every subject, therefore an expert might be needed in order to enlighten a case. The special or technical knowledge and experience do not only refer to medicine or physics; a craftsman's experience is also accepted as a special knowledge.[1165] An expert cannot be appointed in matters that can be solved with general knowledge or experience or can be enlightened with the legal knowledge required by the judge profession. The only exemption is the circumstance of international cases where the court

1160 Yenisey (2021), §432.

1161 Akbulut (2017), p.508.

1162 Article 64/4 of the TCCP regulated that the in the event of a legal entity being selected as an expert, the names of the person or persons who will carry out the examination shall be communicated to the appointing judicial authority to be approved. However, this regulation was abolished in 2016.

1163 Article 56 of the Regulation on the Organisation of Expert Witness Lists by Provincial Judicial Justice Commissions in accordance with the Code of Criminal Procedure.

1164 *See.* ANNEX 3 – Relevant Articles of the Turkish Code of Criminal Procedure.

1165 Özbek, Ö. V. (2005). *CMK İzmir Şerhi – Yeni Ceza Muhakemesi Kanununun Anlamı.* Ankara: Seçkin Yayıncılık, p. 214-215.

requires information on regulations or practices of other countries; only in such cases it is possible to appoint an expert in legal knowledge.[1166] For the same reason, persons who have studied law cannot be registered and listed as experts, unless they certify that they have a separate expertise outside the field of law and meet the conditions in Article 38/1.

According to Article 64 of the TCCP, an expert is chosen from the regional expert list. The listed experts shall give an oath, repeating the following sentence in front of the Regional Expert Commission or the Justice Commission of the city: *"I swear on my honour and conscience that I will perform my duty; by adhering to justice, in accordance with science and technology, and in an impartial manner."*.[1167] It is not necessary to repeat the oath for every expert testimony that will be given in the future. However, it is mandatory to take the oath again for those who have been voluntarily de-listed and re-listed.[1168] In cases where there no expert can be found in the regional list, experts from other regional lists may be appointed. If no expert can be found to enlighten the case, a non-listed expert may be appointed.[1169]

According to Article 31 of the Law on the Forensic Medicine Institution, faculty members of higher education institutions who work in departments related to issues that are subject of judicial disputes are considered official experts. In addition to that, according to Article 130 of the Constitution, faculty members of universities directly bear the title of official experts, as the universities have an advisory duty.[1170] The Law on Road Traffic regulates that traffic police act as experts in order to present their opinion and the information about the accident.

An expert can be a natural or a legal person who is impartial and has sworn in to tell the truth to the Court. There are some requirements listed in Article 38/1 of the Expert Regulations; in order to become a natural person expert, a person should not be sentenced more than one year of imprisonment, or be convicted, even if pardoned, of crimes against the state security, crimes against constitutional order and the functioning of this order, embezzlement, extortion, bribery, theft, fraud, forgery, breach of trust, fraudulent bankruptcy, collusive tendering, fraud in the performance of execution, laundering, smuggling of assets resulting from crime, misstatement by an expert or an interpreter, perjury, or false oath. Moreover, the person should not be affiliated with terrorist organizations; not to have been removed from the expert list against their will, or not be prohibited from practicing the profession; successfully complete the basic training to become expert; meet the requirements by the legislation in order to be able to practice; have a diploma, qualification certificate, or a similar document showing the field of specialization required to be able to practice; have actually worked for at least five years. Private legal persons shall only become an expert if they employ natural persons who meet the conditions regulated in Article 38/1.[1171] Some

1166 Ünver, Y. (2005). Deliller ve Değerlendirilmesi. *Legal Hukuk Dergisi, 3*(32), 2885-2913; p. 2894.

1167 Article 64/5 of the TCCP.

1168 Article 44 of the Expert Regulations, *Bilirkişilik Yönetmeliği*, no 30143.

1169 Article 64/2 of the TCCP.

1170 Dinçtürk Şenel, Ö. (2015). *Türk Ceza Hukuku Reformu Bağlamında Bilirkişilik*. İstanbul: İstanbul Üniversitesi Adli Tıp Enstitüsü. Retrieved May 12, 2021, from https://tez.yok.gov.tr/, p. 41.

1171 Article 10/2 of the Law on Expert Witnesses.

institutions are legally defined as official experts[1172], such as the Forensic Medicine Institute[1173], the Criminal Police Laboratories[1174], the Criminal Gendarmerie Laboratories[1175], higher education institutions,[1176] etc.

It should be noted that the natural persons acting on behalf of the legal persons send the results of their work to the board, after which the legal persons finalise and sign the report. In other words, natural persons do not have a direct link with courts. The selection of the natural persons and the legal responsibility of the report rests with the legal personality. However, if harm is caused as a result of the expert's report or thoughts, the legal person may turn to the natural persons to seek recourse.[1177]

Legal persons cannot be sworn to become an expert, likewise, natural persons who act on behalf of the legal persons do not take an oath.[1178] This can cause a moral problem, since the medical doctors are the only ones who are taken the Hippocratic Oath during their graduation from the faculty; the other experts do not have any ethical oath to conduct their duty by adhering to justice and in an impartial manner. The Yargıtay rules that the expert who performs autopsy on deceased shall take the oath.[1179] When the identity or the oath of the expert cannot be determined, according to the Yargıtay, the judgment shall be reversed.[1180]

As a general rule, experts receive the original criminal case file, however they do not have the right to ask direct questions to the suspect or to the defendant; they can convey their questions through judge or prosecutor of the case. When it comes to the medical and forensic experts, the rules differ. According to Article 66/6 of the TCCP: "*If the experts deem it necessary to ask questions to the suspect or the accused, these questions shall be addressed through the presiding judge, judge or public prosecutor. However, the presiding judge, judge or*

1172 Erman & Eroğlu (2013), p. 947.

1173 According to Article 1 of the Law on the Forensic Medicine Institution; the Institution in entitled as an official expert in judicial matters. In addition, in Article 2, the first duty of the Institution is specified as providing scientific and technical opinions on forensic medicine issues referred by courts, judges, and prosecutors.

1174 According to Article 1 of the Technical Service Regulation of Central and Regional Criminal Police Laboratories of General Directorate of Security; the duty of the Criminal Police Laboratories is by analysing and evaluating the material evidence obtained during judicial, administrative, and political investigations with scientific methods in order to serve as a technical unit that assists the security forces and judicial authorities, in detection and proof of crime and offender, and in the fight against explosive substances.

1175 Article 8 and 9 of the Regulation on the Establishment, Duties and Authorities of the Gendarmerie Criminal Department and the Regional Headquarters of Gendarmerie Criminal Laboratories.

1176 According to Article 31 of the Law on the Forensic Medicine Institution; higher education institutions or their units are considered as official experts in forensic medicine cases and in other cases within the framework of forensic medicine legislation.

1177 Dinçtürk Şenel (2015), p. 33.

1178 Dinçtürk Şenel (2015), p. 155.

1179 Yargıtay 1. Ceza Dairesi, 10/06/2008, 362/4866.

1180 Yargıtay 7. Ceza Dairesi, 07/02/2006, 38450/159; Yargıtay 11. Ceza Dairesi, 16/10/2006, 1300/8136; Yargıtay 8. Ceza Dairesi, 27/07/2008, 1307/9387.

public prosecutor may give a permission, to ask direct questions. The experts who are medical doctors, appointed to entitled to ask questions they deem necessary in order to fulfil their duties directly to the victim, suspect or the accused, the presence of the judge, the public prosecutor or a lawyer is not required.". Since medical and forensic experts do not decide on the case file solely by reading, but by examining the defendant or the suspect face to face, they can ask their questions directly; especially at the mental examination.[1181]

4.1.2.1.2 Role of the Expert

The appointed expert shall be informed in writing of the determination of investigation clearly indicating its limits, the questions to be answered by the expert, the expert's fee, the deadline for submitting the report, information on the penalty for misstatement, according to Article 51 of the Expert Regulations.

The court *may* appoint an expert ex officio, by the motion of the public prosecutor, the intervening party, their representative, the suspect or the accused, their defence counsel, or their legal representative. Article 67 of the TCCP regulates that if the parties bring their own expert report prepared by an expert who is not officially appointed by the court, then these experts are called as a "*specialist*" (*uzman*) and their report is as "*specialist opinion*" (*uzman mütalaası*), in order to emphasise the difference.

It is not mandatory to appoint an expert according to the regulations in the TCCP, as the language refers to '*may*' instead of 'shall'. According to the Yargıtay decisions, however, when there is a claim of having a mental disorder or reduced imputability, a psychiatric report becomes mandatory.[1182] If a court decides on its own without consulting an expert or if it ignores the claims on reduced imputability, the Yargıtay overturns the case and sends it back to the competent court.[1183]

The role of the expert for the criminal proceeding is defined as a means of evaluating evidence.[1184] According to a Yargıtay judgment, the expert opinion cannot be accepted as evidence, as it is the explanation of the evidence.[1185] The preamble of Article 62 of the TCCP adopts the same approach.

According to the TCCP, if there is no special provision regulated for experts, the provisions for the witnesses shall be applied. They both have the right to recuse in cases where their impartiality jeopardise, and also need to be sworn in; experts take the oath in before being appointed to the case, witnesses at the trial. The main difference between the expert and a witness is that the witness cannot be replaceable, but another expert may be found to enlighten the case. In addition, witnesses tell an event that they experienced

1181 Dinçtürk Şenel (2015), p. 143.

1182 Yargıtay 19. Ceza Dairesi, 08/11/2018, 5696/11552; Yargıtay 4. Ceza Dairesi, 06/02/2017, 34969/3212; Yargıtay 4. Ceza Dairesi, 13/01/2016, 32727/269.

1183 Yargıtay 10. Ceza Dairesi, 12/02/2008, 21336/2196; Yargıtay 1. Ceza Dairesi, 23/01/2008, 4558/246; Yargıtay 10. Ceza Dairesi, 19/03/2007, 7922/3159; Yargıtay 4. Ceza Dairesi, 19/02/2007, 10741/1675; Yargıtay 11. Ceza Dairesi, 06/07/2006, 2718/6432.

1184 Toroslu, N., & Feyzioğlu, M. (2006). *Ceza Muhakemesi Hukuku*. Ankara: Savaş Yayınevi, p. 195.

1185 Yargıtay 1. Ceza Dairesi, 01/03/1991, 391/559.

with their five sense organs; while experts answer questions on an event that they did not directly gain information.[1186]

It should be also mentioned that if the suspect or the accused is charged with more than one crime, an expert report should be prepared for each crime separately. The Yargıtay underlines that when there is a mental evaluation report ready for the crime of arson, it shall not be used for the crime of coercion.[1187]

In the Turkish criminal justice system, there are some cases where gathering expert report is mandatory; such as murder, manslaughter, injury, forgery, sexual offences. Therefore, it can be said that there is a need for an expert when a body examination, an autopsy, a DNA analysis, or a recon is required. Another mandatory situation is when a suspect or the accused has to be sent for a stationary mental examination, as an expert diagnosis is needed.[1188] The expert report on criminal responsibility of a person should be written by and submitted to the court by a *medical board,* which usually consists of at least three psychiatrists.[1189]

4.1.2.1.2.1 How an expert conducts an examination

In order to assess the mental state of the person, with the demand of the expert, the Magistrate Judge during the pre-trial phase or the Criminal Court during the trial phase, may order to be stationed in a public medical centre, according to Article 74 of the TCCP. The period of the stationary mental examination shall not exceed three weeks. However, if this period is not sufficient, upon the motion of the public medical centre, a ruling may be made and the additional terms not exceeding three weeks each may be given. The total time in the stationary mental examination shall not exceed three months.

Article 66 of the TCCP[1190] regulates the conduct of an expert examination. According to it, an expert will be appointed in order to answer the questions raised by the Court, and the answering period cannot be longer than 3 months. If the examination or the report cannot be carried out within 3 months, additional 3 more months may be granted on request. If the experts deem it necessary to ask questions to the suspect or the accused, these questions shall be addressed through the presiding judge, judge or public prosecutor. However, the medical doctor experts who are appointed to make the examination are entitled to ask questions that they deem necessary in order to fulfil their duties directly to the victim, suspect or the accused, hence the presence of the judge, the public prosecutor or a lawyer is not required. This regulation is significant for the mental health examination, as it can only be done with observation and via asking questions directly to the suspect or the accused.

1186 For the comparison, *see.* Yenerer Çakmut, Ö. (2008). Tıp Ceza Hukukunda Bilirkişilik. In *V. Türk-Alman Tıp Hukuku Sempozyumu* (pp. 1033-1184). Ankara: Türkiye Barolar Birliği Yayınları, p. 1140-1141; Ulutürk (2014), p. 121-122.

1187 Yargıtay 4. Ceza Dairesi, 13/12/2007, 6979/10853.

1188 Dinçtürk Şenel (2015), p. 76.

1189 Balcıoğlu et al. (2023), p. 7.

1190 *See.* ANNEX 3 – Relevant Articles of the Turkish Code of Criminal Procedure.

The expert will examine the moment of having the mental disorder, because it should cover the occurrence of the act that establishes a crime.[1191] The mental disorder diagnosed before or after the time of crime does not affect the criminal responsibility, if it does not exist at the time of the offence. However, it may affect the criminal procedure and the execution.[1192] If the person develops a mental disorder during the imprisonment, according to Article 16/1 of the EPSM, the execution shall be suspended, and the person shall be sent to a health institution until the recovery is completed. The period held in the health institution is accepted as held in prison.

Before starting the psychiatric evaluation, in order to protect the personal rights and confidentiality, the patient must be informed about the fact that the final report will be sent to the court. During the evaluation, the handcuff should be removed, meanwhile, the security guards should remain at a short distance to prevent unpredictable attacks. The questions should be chosen carefully; unbiased and neutral, in order not to blame the person. For example, "What did you do yesterday?" instead of "Did you commit a burglary yesterday?" or "Do you know that burglary is a crime?" instead of "What did you do with the item that you took?". The language should be clear and simple. Medical history of the patient, awareness of the time and place, tiredness, unwillingness, fear, understanding the questions, ability to answer, ability to learn new information or to memorise, ability to remember the past, general appearance, speed of speaking, choice of word, grammar of sentences, nonsense or incomprehensible sentences, gaps between the words should be taken into consideration and noted for the court. The final report is sent to the court with a closed envelop, in private.[1193]

According to a judgment of the *Yargıtay*, the report on the mental state of the defendant on the time of committing the crime must be from one of three authorised institutions: from the relevant specialisation board of the Forensic Medicine Institute, or from the fully-equipped Mental Health and Neurological Diseases Hospital or from the Committee of a Medicine Faculty.[1194] Therefore, a single psychiatrist report cannot be valid for criminal cases. In the presence of non-valid reports, however, it is a legal obligation to investigate whether the suspect or the defendant has criminal capacity.

4.1.2.1.2.2 Scope of the report

There should be three main issues addressed in a mental health report[1195]. An expert should cover:

1). Whether the person has a mental disorder, if yes, what the diagnosis is,
2). Whether the mental disorder affected or caused the criminal act,
3). What would be the best measure to be taken.

1191 Artuk et al. (2013), p. 509.
1192 Akbulut (2017), p.508.
1193 Bilge, Y. (2013). *Adli Tıp.* İstanbul: İstanbul Tıp Kitabevi, p. 90-94.
1194 Yargıtay 3. Ceza Dairesi, 04/03/2015, 29900/8120.
1195 Şensoy, N. (1950). Akli Maluliyetin İlmi Cepheden Tetkiki. *Ankara Üniversitesi Hukuk Fakültesi Dergisi, 7*(1-2), 160-197, p. 182-185.

Some scholars claimed that the expert is also in charge to determine whether the person should be accepted as imputable, and this determination would be exceptionally useful.[1196] However, according to Article 63/1 of the TCCP, an expert cannot be appointed in matters that can be solved with general knowledge or experience; or can be enlightened with the legal knowledge required by the judge profession. As stated under the substantive criminal law section, determining imputability stays purely in the legal area. Moreover, Article 67/3 regulates that the expert shall not make any legal evaluation, which shall be conducted by the judge. It is an undeniable fact that the diagnosis and its effect on the acts shall be determined by an expert, however the report should not include any suggestion or determination on the criminal liability of the person.[1197] At the preamble of Article 32 of the TCC, it is stated that: "*It is a medical issue to determine whether a person is mentally disordered and how it might affect their perception, ability, and behaviours in general. After the expert clarifies these issues, it is the duty of the judge to normatively determine whether the mentally disordered person has the ability to perceive or want in terms of the criminal act and to what extent the mental disorder affects these abilities of the person in terms of the criminal act.*".

The expert report shall be written in plain language; the medical terminology must be avoided. A judge should be able to understand the answers to the questions asked by the court. Every conclusion or diagnosis made should be supported by justification.[1198]

In the report, the causal link should also be mentioned, since there should be a *causal relation* between the mental disorder and the lack of the ability to perceive the legal meaning and consequences of the offence. For instance, if a person is a kleptomaniac, the causal link might be found in the crimes of robbery, theft, burglary, stealing, shoplifting, pick pocketing, and so on.

4.1.2.1.2.3 Liability of Experts

According to Article 8 of the Expert Regulations, the expert shall be independent of the judicial authorities, the parties of the case, and their employer; and shall conduct their duties only in accordance with the scientific data in their field of expertise. Moreover, the expert shall carry out their duties, according to Article 9, in accordance with the principles of fairness and impartiality, without discrimination on grounds of language, race, colour, sex, political opinion, philosophical belief, religion, sect and so on.

Article 48 of the Expert Regulations, experts shall be removed from the register and from the list when one of the following conditions is fulfilled: a) failure to meet the requirements for admission or later discovery that the necessary requirements were not met on the date of admission, b) abstaining to become expert in a case without good reason, or failing to submit the report within the determined time without an excuse, (c) engaging in attitudes and behaviours that are inconsistent with the duty of expertise and the ethical principles

1196 *See*. Taner, T. (1953). *Ceza Hukuku Umumi Kısım*. İstanbul: İsmail Akgün Matbaası, p. 274.
1197 Yenerer Çakmut (2008), p. 1191.
1198 Yargıtay Ceza Genel Kurulu, 18/11/1980, 1-323/364; Yargıtay 1. Ceza Dairesi, 30/10/1985, 3266/3702.

that such duty requires and that undermine a sense of trust, ç) acting as an expert in contravention of fundamental principles, d) failure to qualify at the performance evaluations carried out by the Regional Board, e) failure to submit a request for renewal within the time limit despite expiry of the time limit as an expert, f) the expert's request to be removed from the register and from the list. In cases referred to in points (b), (c), (ç) and (d), a warning or temporary removal from the list for up to one year may be imposed instead of the sanction of removal from the register and from the list, depending on the nature of the violation.

Experts who do not fulfil their duties may be criminally prosecuted. Article 276 of the TCC regulates the crime of making *misstatement by an expert or an interpreter*; where an expert appointed by a court makes a misstatement, a sentence of imprisonment for a term of three to seven years shall be imposed. This regulation also applies to an interpreter, appointed by a person or a committee, who falsely translates any document or statement. It is not necessary for this offence to cause damage nor have a demonstrable effect on the outcome of the case; the intent is sufficient to carry out the offence.[1199]

Moreover, in terms of their duties as experts, they are considered public officials and are subject to the same conditions. Consequently, they can be held responsible for bribery (Article 252 of the TCC), misuse of public duty (Article 257 of the TCC), disclosure of confidential information in respect of a duty (Article 258 of the TCC), abandonment or non-performance of a public duty (Article 260 of the TCC), and other offences that can exclusively be committed by public officials.

4.1.2.1.3 Remand to Hospital for Report on Mental Condition

If an expert cannot reach a satisfactory outcome with an examination, the suspect or the accused can be requested to be stationed. It refers that the stationary mental examination is not always a mandatory measure.[1200] As it is given above, drug addiction and alcohol addiction are also accepted as a mental disorder; thus, a person can be stationed in order to assess their ability to both perceive and want due to alcohol or drugs.[1201]

The stationary mental examination, as briefly explained above, is regulated in Article 74 of the TCCP.[1202] According to it, when the suspect or the accused is claimed to have a mental disorder, or when there are strong indications of suspicion are present; the Magistrate Judge during the pre-trial (investigation) phase, and the Criminal Court of the case during the trial (prosecution) phase may order the suspect or the accused to be stationed in a medical centre. The request should be raised by the expert, and the Judge or the Court may decide after hearing both the public prosecutor and the defence counsel.

According to Article 74/2, for stationary mental examination decision, if the suspect or the accused has no defence counsel, a counsel shall be appointed by the Bar Association upon the request of the judge or the court. If this regulation was not regulated privately

1199 Erman & Eroğlu (2013), p. 960.
1200 Yargıtay 9. Ceza Dairesi, 30/12/2008, 6230/1.
1201 Yargıtay 1. Ceza Dairesi, 08/05/2008, 2995/3854.
1202 *See.* ANNEX 3 – Relevant Articles of the Turkish Code of Criminal Procedure.

under the stationary mental examination regulation, thanks to Article 150/2, a defence counsel shall be appointed without the request of the suspect or the accused if they do not have a defence counsel and is a minor, or deaf-mute, or a person who is disabled to the extent that they cannot make their own defence. Both of the regulations designate mandatory obligations; thus, demand is not needed.

Stationing in a medical centre is to conduct a mental health examination, and the period of it shall not exceed three weeks. However, if that time is not sufficient, upon the motion of the public medical centre, an extension which is not exceeding three weeks each may be given. In any case, the sum of the terms shall not exceed three months.

The stationary mental examination is criticised as persons are held in a place without their consent that may make them feel under arrest. In addition, persons with mental disorders may act differently than their normal behaviours since they acknowledge that they are under observation.[1203] The decision on stationary mental examination may be objected to; this motion suspends the execution of the decision.

The place where to station a suspect or an accused poses a problem. Article 72 regulates that the examination, observation, and diagnosis shall be done in a "public medical centre", however there is no definition provided. The *Yargıtay* usually rules that the Forensic Medicine Institute is the only competent authority to conduct the stationary mental examination.[1204] However, sometimes the *Yargıtay* also rules that when there are inconsistencies in mental evaluation reports, then the case should be referred to the Forensic Medicine Institution, which is the highest decision-making mechanism.[1205] These decisions imply that examination by other institutions or hospitals is also accepted, until claimed otherwise.

The topics that should be covered in the report on mental health have already been discussed above and will not be repeated here.

4.1.2.1.4 Presence of Expert During Trial

As a rule, the expert report should be in writing and be read at a hearing. However, in Article 68 of the TCCP, listening to the expert at a hearing is also regulated. The Court may rule to listen to the expert anytime to enlighten the case. At the hearing, the public prosecutor, the intervening party, their representative, the accused, their defence counsel or the legal representative are allowed to ask direct questions to the expert, instead of through the Court.

As explained above, according to Article 64 of the TCCP, an expert shall be sworn in before being entered on the expert list; thus, it is not necessary for an expert to be sworn in at a hearing.

1203 Tosun, Ö. (1966). *Suçluların Gözlemi.* İstanbul: Sulhi Garan Matbaası, p. 169.

1204 Yargıtay 1. Ceza Dairesi, 21/07/2005, 152/2283; Yargıtay 1. Ceza Dairesi, 14/11/2005, 805/3236; Yargıtay 1. Ceza Dairesi, 04/04/2006, 2366/1145.

1205 Yargıtay 8. Ceza Dairesi, 15/01/2008, 12434/112; Yargıtay Ceza Genel Kurulu, 01/04/1985, 1418/175.

4.1.2.2 Discretion of the Judge on the Mental Evaluation Report

The discretion afforded to criminal judges to accept evidence gives rise to a long-standing debate among legal scholars.[1206] The question of whether expert reports should be binding in criminal cases has been a particularly contentious issue. Some have argued that expert reports should be binding, while others have defended the regulation in the TCCP. According to Article 217/1 of the TCCP, *the judge shall only rely upon evidence that is presented at the main hearing and has been discussed in their presence while forming their judgment. This evidence is subject to free discretion of the conscious opinion of the judge*.

As previously stated, the expert report on criminal responsibility should be prepared by and submitted to the court by a medical board, which typically comprises a minimum of three psychiatrists.[1207] The judge may request an additional report or a re-examination from the same expert or assign a new expert, in the event of ambiguity in the expert report. This is to guarantee the establishment of the truth. In cases where the judge is not convinced by the conclusions of the mental evaluation report or where they have concerns, they may refer the case to the General Assembly of the Institution of Forensic Medicine, which serves as the highest decision-making authority. Contradictions between expert reports must be resolved before a decision can be made by the judge.[1208]

A recent study demonstrated that 10% of the examined overruling judgments ruled by the *Yargıtay* were related to Article 32 of the TCC.[1209] Upon analysis of the files according to the grounds for overruling, it was found that 129 files had been overruled solely on forensic psychiatric grounds.[1210] Of these, 126 cases had the grounds that the final judgement was rendered without obtaining an expert report on assessing imputability in that case.[1211] In 31 cases, the judgment was overturned due to inconsistencies between the expert reports.[1212]

1206 See. Şensoy, N. (1950). Cezai Mesuliyeti Tamamen veya Kısmen Kaldıran Akli Maluliyet. *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, 16*(3-4), 615 – 658.

1207 In accordance with the ruling of the *Yargıtay*, the report on the mental state of the defendant at the time of crime can only be from three authorised institutions: from the relevant specialisation board of the Forensic Medicine Institute, or from the fully-equipped Mental Health and Neurological Diseases Hospital or from the Committee of a Medicine Faculty. It thus follows that a single psychiatrist report cannot be deemed valid in the context of criminal proceedings. *See.* Yargıtay 3. Ceza Dairesi, 04/03/2015, 29900/8120.

1208 In light of the discrepancy between the University's report, which asserts that the defendant falls within the purview of Article 32/2 of the Turkish Criminal Code, and the findings of the Forensic Medicine Institution's Observation Department and the Specialised Board, which conclude that the defendant is fully imputable for the crime committed; the case has been overruled due to the incompetence of the court in failing to consider that the defendant's imputability should be determined after receiving a report from the General Assembly of the Forensic Medicine Institution. *See.* Yargıtay 1. Ceza Dairesi, 27/06/2018, 403-3087.

1209 Total of 1986 overruled cases were examined and 207 of them were on Article 32 of the TCC. *See.* Depreli, A., Ataseven, T., & Malkoç, M.A. (2023). Adli Psikiyatrik Gerekçelere Dayanan Yargıtay Bozma Kararlarının Değerlendirilmesi. *The Bulletin of Legal Medicine, 28*(3), 229-238.

1210 Depreli, Ataseven & Malkoç (2023), p. 231.

1211 Depreli, Ataseven & Malkoç (2023), p. 231.

1212 Depreli, Ataseven & Malkoç (2023), p. 234.

As evidenced by the rulings of the *Yargıtay*, the presence of a statement or medical document within the court file indicating that the defendant has a mental disorder necessitates the acquisition of an expert report on criminal responsibility. The failure to do so results in the overturning of the decision. Similarly, if the expert reports obtained are contradictory, the judge is obliged to resolve the contradiction by requesting a new report from the higher board. The failure to do so also constitutes grounds for overruling.

However, it is important to underline that the expert report does not, actually, have a significant value on determining the criminal responsibility, since the report cannot include any legal determination. In accordance with Article 63/1 of the TCCP, an expert cannot be appointed in matters that can be solved with general knowledge or experience, or that can be sufficiently enlightened with the legal knowledge required by the judge profession. In conclusion, although the evaluation of mental disorders and their impact on an individual's actions during the commission of a crime is the domain of medical expertise, the assessment of a person's criminal responsibility based on a medical report is a legal matter for the judge.[1213] In accordance with the aforementioned, the expert is not vested with the authority to determine or advise the judge on the matter of the person's imputability.

4.1.3 Verdict

Article 223 of the TCCP[1214] regulates six final verdicts that concludes the main hearing: 1) acquittal, 2) not imposing a punishment (*ceza verilmesine yer olmadığı kararı*), 3) conviction, 4) imposition of security measure, 5) inadmissibility, and 6) dismissal. The explanations of these notions are provided in Article 223 as well. A verdict of "*acquittal*" shall be issued when a) the person's act is not defined as a crime in the law, b) the person's innocence is proven, c) the person has no intention or negligence to commit the crime, d) although the charged offence was committed by the accused, there is a reason of lawfulness(justification), or e) it has not been proven that the person committed the alleged crime. In cases where a verdict of acquittal can be rendered immediately, a decision of suspension, dismissal, or not to impose a penalty cannot be issued.

When it is proven that the accused committed the charged offence, the accused shall be *convict*. Article 223/3 of the TCCP regulates that a verdict of "*not imposing a punishment*" shall be made for the accused in case of the presence of a mental disorder, due to the fact that it lifts the imputability. In cases where it is proven that the mentally disordered offender committed the charged offence, a security measure shall be imposed instead of or in addition to a certain punishment.

Therefore, the offender who has no imputability due to the mental disorder should receive the verdict of *not imposing a punishment*. Furthermore, the security measure, according to Article 32 of the TCC, shall be imposed. For the mentally disordered offenders who are found to have diminished responsibility, the verdict should be *conviction*, however as stated in Article 32/2, the court should then abate the imprisonment sentence; the

1213 Same opinion, See. Ulutürk (2014), p. 62.

1214 *See.* ANNEX 3 – Relevant Articles of the Turkish Code of Criminal Procedure.

court also has the discretion to impose the abated imprisonment sentence partly or entirely as a security measure.

These two types of main sanctions imposable to mentally disordered offenders -imprisonment and security measure- can be found under *Section 2* on the substantive criminal law above.

4.2 Relevance of Mental Disorder in Criminal Procedure in England and Wales

In England, for persons with psycho-social vulnerabilities who interact with the police and criminal justice system, the National Health Service ("NHS") is the responsible institution for commissioning and providing liaison and diversion ("L&D") schemes. Early identification, assessment, and intervention are the main aims of these schemes, while responding to concerns raised by the police and criminal justice system and providing clinical advice.[1215]

Forensic psychiatric reports for criminal proceedings can be requested directly by the Crown Prosecution Service, by defence lawyers, and by the courts.[1216] Not every defendant has a legal representative during the criminal procedure, unlike in Türkiye. The funding for the legal representation via Legal Aid scheme is very limited.[1217]

In the criminal law generally, the prosecution may accept a plea by the defendant, and a trial is then avoided. This is not the case for a plea of not guilty by reason of insanity: the verdict must be delivered by the jury or, in the magistrates' court, by the magistrates.

In order to explain the relevance of mental disorder in criminal procedure in England and Wales, fitness to plead and fitness to stand trial shall be explained first. Afterwards, relevance of mental disorder in the trial phase, sanction types and verdicts will be discussed.

4.2.1 Fitness to Plead and Stand Trial

Before explaining the fitness to plea for England and Wales, criminal procedure regulations for pre-trail phase requires explanation. According to Section 22 of the Criminal Procedure and Investigations Act 1996 ("CPIA"); a criminal investigation is "*an investigation conducted by police officers with a view to it being ascertained; (a)whether a person should be charged with an offence, or (b)whether a person charged with an offence is guilty of it.*". If an officer decides to investigate a suspected offence further, the use of a mental health

1215 Grounds, A., & Padfield, N. (2022). An English perspective. In M. van der Wolf (Ed.), *Safeguarding the Quality of Forensic Assessment in Sentencing a Review Across Western Nations* (pp. 34-62). Routledge, p. 45.

1216 Grounds & Padfield (2022), p. 45.

1217 Grounds & Padfield (2022), p. 46.

street triage process[1218] can also ensure that a vulnerable suspect is not unnecessarily arrested and detained in custody, which may aggravate their condition. An arrest must be necessary pursuant to s.24(4) of the Police and Criminal Evidence Act 1984 ("PACE").

In the criminal justice system of England and Wales there is no automatic and free mandatory legal representation for the accused who has mental disorder. A procedure for appointing a representative for the accused is currently available the person is unfit to plead.[1219] This is to ensure that the accused has *"the best person to put the case for the defence"*.[1220] Having a mental disorder makes the defendants vulnerable while seeking to invoke the new defence, despite being found to fit to plead. It therefore seems inappropriate to accept for the plea of such a defendant, without legal representation present.

During the investigative stage, a detained person who appears to have a mental disorder must receive appropriate clinical attention as soon as it is reasonably practicable, even if the detainee makes no request for medical attention, pursuant to Code C, paragraph 9.5. Medical assessments must be carried out by an Appropriate Healthcare Professional. Under this subsection, Liaison and Diversion assessments, appropriate adults, intermediaries, charging decisions and the decision to prosecute will be explained.

If police officers decide that it is necessary to arrest someone and take them into custody, it is the responsibility of the custody sergeant to conclude, with or without the advice of an Appropriate Healthcare Professional, or a Liaison and Diversion assessment (L&D)[1221], that the individual is "vulnerable" and therefore in need of further support through the custody process. The Government accepted Liaison and Diversion only in principle, stating that it: *"agrees with the goal behind this recommendation, and as a medium term goal that every police custody suite and every court should have access to mental health liaison and diversion services, able to carry out timely assessments, and where appropriate refer offenders to treatment. The Programme Board will consider, as part of the delivery plan, what further advice needs to be given to PCT commissioners and the CJS to help achieve this goal"*.[1222]

1218 Street triage models for mental health care usually involve "mental health professionals working in partnership with police officers, providing expertise through a telephone service or an in-person mobile unit". See. Kirubarajan, A., Puntis, S., Perfect, D., Tarbit, M., Buckman, M., & Molodynski, A. (2018). *Street triage services in England: service models, national provision and the opinions of police*. BJPsych bulletin, 42(6), 253–257. https://doi.org/10.1192/bjb.2018.62 Accessed 15 September 2022.

1219 Section 4A(2)(b) of the 1964 Act.

1220 *Norman [2008] EWCA Crim 1810, [2009] 1 Cr App R 13 at [34].*

1221 *"There is no agreed definition of what constitutes a liaison and diversion scheme, and there is no national list of schemes."*, The Right Honourable Lord Keith Bradley. (2009, April). *The Bradley Report : Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system*. Retrieved 2024 August, from https://basw.co.uk/sites/default/files/resources/basw_120004-10_0.pdf, p. 81.

1222 Ministry of Justice. (2009). *Lord Bradley's Report on People with Mental Health Problems or Learning Disabilities in the Criminal Justice System: The Government's response*. London: Ministry of Justice, p. 21.

L&D is not yet fully operational across England and Wales; however, L&D integration is contributing to greater awareness of vulnerability in custody.[1223]

The PACE 1984 Codes of Practice set out the procedures for police to follow, and Code C addresses the custodial setting. Paragraph 1.4 and Annex E, require any officer who has suspicion or is told in good faith that a person may be mentally disordered or is otherwise mentally vulnerable or mentally incapable of understanding the significance of questions put to them or their replies, to treat the person as such under the Code. This includes persons with learning disabilities or difficulties. The consequence of this is that a suspect must receive the support of an *appropriate adult*.[1224] Appropriate adults provide advice, support, and assistance to vulnerable suspects in police custody. The purpose of appropriate adults is to ensure fair treatment and effective participation in investigative procedures, including in interviews. An appropriate adult may be a family member, guardian or other person responsible for the care or custody of the suspect, someone experienced in dealing with vulnerable persons or if none of these are available, some other responsible adult aged 18 or over. The length of training that appropriate adults receive – if any – is insufficient to provide them with the knowledge and experience to appropriately protect vulnerable suspects on these issues. Vulnerable suspects need trained professionals. If this is not the case, there is a risk that the rights of vulnerable defendants will be violated. Yet, the PACE only provides for the assistance of an appropriate adult and no other professional support.

Intermediaries are experienced professionals with specific expertise in assessing and facilitating communication. Although initially devised as a special measure for vulnerable witnesses when giving evidence, their use has been extended to assisting in the taking of witness statements and assisting suspects and defendants. There is no statutory right to an intermediary for vulnerable defendants and detainees.

A custody officer may make the charging decision in respect of certain *summary* and *either-way offences*.[1225] In some police force areas this is done by a police Evidential Review Officer who then confirms with the custody officer that the suspect should be charged, and this will be done either prior to the suspect being released from custody or on a return date to the police station. Whether the decision is taken by the Evidential Review Officer or the custody officer, the Full Code Test has to be satisfied. This requires sufficient evidence to prosecute and a determination as to whether it would be in the public interest to prosecute.

1223 Justice. (2017). *Mental health and fair trial.* Retrieved 01 2022, from JUSTICE: https://files.justice.org.uk/wp-content/uploads/2017/11/06170615/JUSTICE-Mental-Health-and-Fair-Trial-Report-2.pdf, p. 33.

1224 *Home Office 2015*, Code C, para. 16.

1225 *Summary* offences can only be heard in magistrates' courts, and these are less serious cases. *Either-way* offences are more serious ones, and they can be heard either in magistrates' court or the Crown Court. *See.* <https://www.sentencingcouncil.org.uk/going-to-court/which-court-will-a-case-be-heard-in/> accessed 29 December 2023.

custody officer, as to whether it is appropriate to charge in the circumstances.[1226]

If the custody officer or Evidential Review Officer decides to charge, or the case needs a Crown Prosecution Service (CPS) charging decision, the case file is passed to the CPS to review for prosecution against the Full Code Test. The CPS relies on the Police to provide accurate information about the suspect with no opportunity for this to be viewed by or on behalf of the suspect. However, in practice, vulnerability will only be apparent to a prosecutor from looking at the custody record answers concerning mental health and whether an appropriate adult was present.[1227]

The CPS guidance on the *Resuming a Prosecution when a patient becomes fit to plead*[1228] states that the CPS is responsible to take the decision whether to continue the prosecution. According to the aforementioned Guidance, the responsible clinician should provide a report to the CPS regarding the offender that includes: "(a) an opinion on the likely mental state of the patient at the date of the offence; (b) the patient's response to treatment provided; (c) any further proposed treatment, the aim of that treatment and its potential impact on offending behaviour; (d) whether the patient is likely to continue to be detained in hospital under the Mental Health Act 1983; (e) the likely impact of a prosecution on future offending. A prosecution may have the effect of confronting the offender with their behaviour and taking responsibility for their actions. A prosecution may not be necessary where the risk of reoffending is low; (f) the risk that the patient is likely to pose in terms of reoffending and causing serious harm; (g) probable impact of a prosecution on the offender's health; (h) any previous response to treatment provided when the offender had been diverted from prosecution for another offence".

As briefly explained earlier, unfit to plead test is obtained from *R v Pritchard*.[1229] Where the prosecution does initiate proceedings, one must be *'of sufficient intellect to comprehend the course of the proceedings in the trial so as to make a proper defence, to challenge a juror to whom he might wish to object and comprehend the details of the evidence'. R v M(John)*[1230] case set out the six-point test asking whether the defendant is capable of:

i). *Understanding the charges,*
ii). *Deciding whether to plead guilty or not,*
iii). *Instructing solicitors and counsel,*
iv). *Exercising his right to challenge a juror,*
v). *Following the course of proceedings,*
vi). *Giving evidence in his own defence.*

Without one or more of these abilities, a conventional trial should not proceed.[1231]

1226 Justice (2017), p.49.
1227 Justice (2017), p.49.
1228 *See.* <https://www.gov.uk/government/publications/resume-a-prosecution-when-a-patient-becomes-fit-to-plead> accessed 17 June 2024.
1229 *R v Pritchard (1836) 7 C&P 303.*
1230 *R v M(John) [2003] EWCA Crim 3452.*
1231 *R v Padola [1960] 1 QB 325.*

The *Criminal Procedure (Insanity) Act 1964*, Section 4 regulates finding of unfitness to plead. It shall be determined as soon as it arises; and the question of fitness to be tried shall be determined by the court, without a jury.[1232] The court may postpone the exercise of its power to decide whether the defendant is fit to be tried, until immediately before the opening of the defence case.[1233] It is impossible for the judge to find the defendant unfit, without the agreement of at least two medical practitioners.[1234] However, a finding that the defendant is fit is not a determination and so does not require evidence from two practitioners.[1235]

It should be also underlined that very few persons are found to be unfit to plead,[1236] since the threshold for being found unfit is high.[1237] Thus, professionals are unease about the usefulness of the current assessment process.[1238] It can be claimed that mentally disordered offenders are, therefore, unfairly subjected to criminal trials.[1239] If a person is later fit to plead, the Secretary of State now has the power to remand him back for trial.[1240]

The Criminal Procedure (Insanity) Act 1964, Section 4 (1) applies to *any* disability.[1241] Apart from the Act, in the case law, a test is created that can be found in *Pritchard (1836)*[1242]. The test to apply in deciding fitness to plead is: *"There are three points to be enquired into:- first, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of the proceedings in the trial so as to make a proper defence – to know that he might challenge any of you to whom he may object – and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation."*. This was also approved in *Berry (1876)*[1243] and *Robertson (1968)*[1244]. According to *Sharp (1957)*[1245] if the defendant is unable to communicate with their legal advisers, they should be found unfit.

If the argument that the defendant is unfit is put forward by the defence, the burden of proof is upon the defence. Thus, the defendant bears the burden of proof to show that

1232 *CrimPR, r.25.10, (2).*
1233 *CrimPR, r.25.10, (2).*
1234 *Lederman [2015] EWCA Crim 1308; [2016]R.T.R. 16.*
1235 *Ghulam [2009] EWCA Crim 2285; [2010] 1 Cr. App. R. 12.*
1236 Padfield (2016), p. 81.
1237 Brown (2019), p. 187.
1238 Brown, P., Stahl, D., Appiah-Kusi, E., Brewer, R., Watts, M., Peay, J. & Blackwood, N. (2018). Fitness to plead: Development and validation of a standardised assessment instrument. *PLoS ONE 13(4)*, 1-13, p. 1.
1239 Brown, et al. (2018), p. 1.
1240 Brown (2019), p 194.
1241 However, amnesia, that eliminates all recollection of the events surrounding the alleged crime, cannot of itself render the accused unfit to plead or to stand trial: *see. Podola (1959) 43 Cr. App. R. 220, CCA.*
1242 *Pritchard (1836) 7 C. & P. 303.*
1243 *Berry (1876) 1 Q.B.D. 447.*
1244 *Robertson (1968) 52 Cr. App. R. 690, CA.*
1245 *Sharp (1957) 41 Cr. App. R. 197.*

they were *"insane"* on the balance of probabilities. The accused who raised the new special defence would be required to adduce evidence from two expert witnesses. If the Crown makes the allegation and the defence objects to the issue, the burden rests upon the Crown.[1246]

If it is determined by a court that the accused is under a disability in accordance with s.4(5) of the *Criminal Procedure (Insanity) Act 1964*; the trial shall not proceed or further proceed. The court must select a jury if none has been chosen yet.[1247] However the jury shall determine;

a). *"on the evidence (if any) already given in the trial; and*
b). *on such evidence as may be adduced or further adduced by the prosecution, or adduced by a person appointed by the court under this section to put the case for the defence, whether they are satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, that he did the act or made the omission charged against him as the offence."*.[1248]

Thus, magistrates or a jury must decide at a *fact-finding hearing* whether the defendant did the act or made the omission charged against him. If the jury are not so satisfied on the count or any of those counts, they shall acquit as if the trial had proceeded on the charge in question. If a defendant later becomes fit to be tried, there may be the opportunity of resuming the prosecution in limited circumstances.

In practice, if there is evidence that someone is unfit to plead, then the court first hears evidence on the matter. However, if the person is fit to plead, then the trial proceeds. If they are not fit to plead, another court then decides if they did the act or made the omission charged against them as the offence, as amended by s.22 of the Domestic Violence, Crime and Victims Act 2004.[1249] In cases where the court is satisfied that the person committed the alleged crime or made omission; the court has a choice of disposals, including admission to hospital with or without limitation, or an absolute discharge. [1250] The regime until 1991 was disproportionally strict on those unfit to plead; the only result could be an indefinite committal to hospital.[1251] Currently, it only applies in the case of murder, as the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 granted courts the discretion to decide from a variety of sentencing alternatives.[1252]

The Mental Health Casework Section keeps the fitness to plead issue under review, and seeks for the opinion of the responsible clinician, at least once a year.[1253] S.5A(4) of the

1246 *Podola (1959) 43 Cr. App. R. 220, CCA.*
1247 *CrimPR, r.25.10, (3)(b).*
1248 *Criminal Procedure (Insanity) Act 1964, Section 4A (2).*
1249 Grounds & Padfield (2022), p. 40.
1250 *Criminal Procedure (Insanity) Act 1964, Section 5(2).*
1251 Grounds & Padfield (2022), p. 40.
1252 Grounds & Padfield (2022), p. 40.
1253 The CPS guidance on the *Resuming a Prosecution when a patient becomes fit to plead: See.* <https://www.gov.uk/government/publications/resume-a-prosecution-when-a-patient-becomes-fit-to-plead > accessed 17 June 2024.

Criminal Procedure (Insanity) Act 1964 gives the Secretary of State for Justice the power to remit for trial a person who becomes fit for trial while detained in hospital under a hospital order with a restriction order made under s.5(2)(a). Accordingly, the Secretary of State for Justice notifies the CPS, in cases where the responsible clinician determines that a restricted patient has become fit to plead.

4.2.2 Criminal Procedure Regulations for Trial Phase

According to s.36 of the Mental Health Act 1983, the court may remand the accused person to a hospital, on the written or oral evidence of two registered medical practitioners. However, there are two conditions for the remand; the accused must be suffering from a mental disorder of a nature or degree that makes it appropriate for him to be detained in a hospital for treatment, and there should be an appropriate medical treatment available for him.

The court shall not remand an accused person to a hospital unless it is satisfied with the arrangements for their admission to that hospital within the 7-day period, beginning with the date of the remand. Based on the written or oral evidence of the responsible clinician, if a further remand is warranted, the court may further remand them.

The regulations set forth in CrimPR 2020 r.28.8 and r.28.9 are also applicable for when the court is considering a hospital order. According to the regulation, as soon as practicable, the court officer must make some documents available to the hospital; a record of the court's order, information about the defendant's mental condition, defendant's other circumstances, the circumstances of the offence, also other information and documents that are likely to assist in treating or dealing with the defendant.

4.2.2.1 Forensic Psychiatric Assessment

If there is a suspicion of the presence of a mental disorder, every detained person in a police station or a place of safety can receive an initial assessment.[1254] The defence may ask the competent court or the court may also order, at its discretion, a criminal responsibility assessment.[1255] In cases where the alleged offence is murder, the criminal responsibility assessment is conducted for both the prosecution and the defence.[1256] The psychiatric evaluation to determine the criminal responsibility may be conducted anywhere: in prison, in the community, or in a hospital.[1257] The Crown Court or a Magistrates' court may also remand an accused person to a hospital for an inpatient psychiatric observation, according to s.35 of the MHA.

When a party is to submit a forensic psychiatric assessment evidence to a criminal court of England and Wales, CrimPR Part 19 shall be followed. Part 19(4) of the Criminal

1254 Pouls, C., Jeandarmea, I., Al-Taiar, H., Bradford, J., Canton, W., Kristiansson, M., Thibaut, F., Verreyt, V., Konrad, N. (2022). Criminal responsibility evaluations: Benchmarking in different countries. *International Journal of Law and Psychiatry, 81*, 1-9, p. 4.

1255 Pouls et al. (2022), p. 4.

1256 Pouls et al. (2022), p. 4.

1257 Pouls et al. (2022), p. 4.

Procedure Rules 2020 specifies that a forensic psychiatric expert report must include the following content:

a). *give details of the expert's qualifications, relevant experience and accreditation;*
b). *give details of any literature or other information which the expert has relied on in making the report;*
c). *contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based;*
d). *make clear which of the facts stated in the report are within the expert's own knowledge;*
e). *where the expert has based an opinion or inference on a representation of fact or opinion made by another person for the purposes of criminal proceedings (for example, as to the outcome of an examination, measurement, test or experiment)—*
  i). *identify the person who made that representation to the expert,*
  ii). *give the qualifications, relevant experience and any accreditation of that person, and*
  iii). *certify that that person had personal knowledge of the matters stated in that representation;*
f). *where there is a range of opinion on the matters dealt with in the report—*
  i). *summarise the range of opinion, and*
  ii). *give reasons for the expert's own opinion;*
g). *if the expert is not able to give an opinion without qualification, state the qualification;*
h). *include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence;*
i). *contain a summary of the conclusions reached;*
j). *contain a statement that the expert understands an expert's duty to the court, and has complied and will continue to comply with that duty; and*
k). *contain the same declaration of truth as a witness statement.*

4.2.2.1.1 Expert Selection

In England and Wales, the experts are not listed for the court duty, as they are not assigned by the criminal courts. Parties are free to choose their own expert.

However, there are some regulations on professional requirements and ethical duties.[1258] For the entire United Kingdom, the Health and Care Professions Council is responsible to set standards to be registered on the Chartered Psychologists.[1259] The British Psychological Society ("BPS") has also a Code of Ethics and Conducts to set professional requirements and ethical guidelines. Four ethical principles that the BPS members are expected to have are respect, competence, responsibility, and integrity.[1260] Moreover, the Guidelines and Procedure published by the BPS regulates the duty to the court, legal

1258 For information in detail *See.* Grounds & Padfield (2022), p. 49.
1259 *See.* https://www.hcpc-uk.org
1260 British Psychological Society (2018). *Code of Ethics and Conduct*. Leicester: British Psychological Society.

instructions, confidentiality, court testimony, and conflicts of interest.[1261] Practising doctors are registered with the General Medical Council ("GMC"), and the GMC has an ethical guidance, as well, and it includes requirements of honesty, recognising and working within the limits of one's competence, keeping up to date with relevant law and regulations, and the overriding duty to the court.[1262] However, in England and Wales, there is not only one system of credentialed training or qualification particularly for expert witness skills among psychologists and psychiatrist. Yet, there are membership-based organisations of expert witnesses and independent sources of training.[1263]

The Court's power to assign a single joint expert is regulated in CrimPR Part 19.7. According to the regulation:

1). *"Where more than one defendant wants to introduce expert evidence on an issue at trial, the court may direct that the evidence on that issue is to be given by one expert only.*
2). *Where the co-defendants cannot agree who should be the expert, the court may—*
   a). *select the expert from a list prepared or identified by them; or*
   b). *direct that the expert be selected in another way."*

The instructions to be given to the assigned single joint expert is regulated on the following CrimPR Part 19.8.

1). *"Where the court gives a direction under rule 19.7 for a single joint expert to be used, each of the co-defendants may give instructions to the expert.*
2). *A co-defendant who gives instructions to the expert must, at the same time, send a copy of the instructions to each other co-defendant.*
3). *The court may give directions about—*
   a). *the payment of the expert's fees and expenses; and*
   b). *any examination, measurement, test or experiment which the expert wishes to carry out.*
4). *The court may, before an expert is instructed, limit the amount that can be paid by way of fees and expenses to the expert.*
5). *Unless the court otherwise directs, the instructing co-defendants are jointly and severally liable for the payment of the expert's fees and expenses."*

4.2.2.1.2 Role of the Expert

A long-standing acceptance is that specialised areas of knowledge, if relevant to the determination of a disputed factual issue, should be explained to the jury by experts in that field, because the jury can be assumed to be unfamiliar with such areas.[1264] According

1261 British Psychological Society (2017). *Psychologists as Expert Witnesses: Guidelines and Procedure* (4th edition). Leicester: British Psychological Society.

1262 General Medical Council (2013). *Acting as a Witness in Legal Proceedings*. London: General Medical Council.

1263 Grounds & Padfield (2022), p. 50.

1264 The Law Commission (2009). *Consultation Paper No. 190: The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales: A New Approach to the Determination of Evidentiary Reliability*, Retrieved 29 January 2024, from https://webarchive.nationalarchives.gov.uk/

to the theoretical view, experts are simply supposed to *educate the jury*, and pass on their relevant knowledge and expertise to enable the jury itself to properly assess the evidence.[1265]

Expert witnesses are quite different from other witnesses due to the fact that they are in a very privileged position to provide the jury with *opinion evidence* within their area of expertise.[1266] Since jury consist of lay persons, they may not be well equipped in terms of training or experience to assess the reliability of technical or complex expert evidence, especially evidence of a scientific nature.[1267]

Expert's duty is regulated in CrimPR Part 19.2. According to the regulation:

1). *"An expert must help the court to achieve the overriding objective—*
   a). *by giving opinion which is—*
      i). *objective and unbiased, and*
      ii). *within the expert's area or areas of expertise; and*
   b). *by actively assisting the court in fulfilling its duty of case management under rule 3.2, in particular by—*
      i). *complying with directions made by the court, and*
      ii). *at once informing the court of any significant failure (by the expert or another) to take any step required by such a direction.*
2). *This duty overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid.*
3). *This duty includes obligations—*
   a). *to define the expert's area or areas of expertise—*
      i). *(i)in the expert's report, and*
      ii). *(ii)when giving evidence in person;*
   b). *when giving evidence in person, to draw the court's attention to any question to which the answer would be outside the expert's area or areas of expertise;*
   c). *to inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement; and*
   d). *to disclose to the party for whom the expert's evidence is commissioned anything—*
      i). *of which the expert is aware, and*
      ii). *of which that party, if aware of it, would be required to give notice under rule 19.3(3)(c)."*

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ukgwa/20230301134758/https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/cp190_Expert_Evidence_Consultation.pdf, p. 8.

1265 *Ibid.*

1266 The Law Commission. (2011). *Expert Evidence in Criminal Proceedings in England and Wales.* Retrieved 15 January 2024, from https://assets.publishing.service.gov.uk/media/5a7cc0c0e5274a38e575689b/0829.pdf, p. 3.

1267 *Ibid.*, p. 4.

According to the mentioned Rule 19.3(3):

3). *"A party who wants to introduce expert evidence otherwise than as admitted fact must—*
   a). *serve a report by the expert which complies with rule 19.4 (Content of expert's report) on—*
      i). *the court officer, and*
      ii). *each other party;*
   b). *serve the report as soon as practicable, and in any event with any application in support of which that party relies on that evidence;*
   c). *serve with the report notice of anything of which the party serving it is aware which might reasonably be thought capable of—*
      i). *undermining the reliability of the expert's opinion, or*
      ii). *detracting from the credibility or impartiality of the expert; and*
   d). *if another party so requires, give that party a copy of, or a reasonable opportunity to inspect—*
      i). *a record of any examination, measurement, test or experiment on which the expert's findings and opinion are based, or that were carried out in the course of reaching those findings and opinion, and*
      ii). *anything on which any such examination, measurement, test or experiment was carried out."*

4.2.2.1.3 Remand to Hospital for Report on Mental Condition

According to the first principle of the Mental Capacity Act 2005 ("MCA")[1268]; a person must be assumed to have capacity unless it is established that they lack capacity. In order to establish this, the court shall remand the accused to a hospital for a report on their mental condition.

The psychiatric evaluation to determine the criminal responsibility may be conducted anywhere: in prison, in the community, or in a hospital.[1269] The Crown Court or a magistrates' court may also remand an accused person to a hospital for an inpatient psychiatric observation, according to Section 35 of the MHA. According to the regulation, the Crown Court or a magistrates' court may remand an accused person to a hospital specified by the court for a report on their mental condition. In relation to the Crown Court, a person *who is awaiting trial before the court for an offence punishable with imprisonment or who has been arraigned before the court for such offence and has not yet been sentenced or otherwise dealt with for the offence on which he has been arraigned* may be placed in a hospital up to 28 days at a time, and the court may at any time terminate the remand.[1270] The time to be spent in remand can be extended by the court up to a maximum of 12 weeks.[1271] In cases where the

1268 Mental Capacity Act 2005, Section 1.

1269 Pouls, C., Jeandarmea, I., Al-Taiar, H., Bradford, J., Canton, W., Kristiansson, M., Thibaut, F., Verreyt, V., Konrad, N. (2022). Criminal responsibility evaluations: Benchmarking in different countries. *International Journal of Law and Psychiatry, 81*, 1-9, p. 4.

1270 Section 35(7) of the MHA1983.

1271 Section 35(7) of the MHA1983.

court decides that the report can be written in prison, remand may happen there instead of in hospital.

An accused person shall not be remanded to a hospital unless the court is satisfied on the written or oral evidence; and if the court is so satisfied it may, pending the admission of the accused, give directions for the transfer to and custody in a place of safety.[1272] In case an accused person flees from a hospital where they have been remanded or while being transported to or from the hospital, they may be arrested without warrant.[1273]

4.2.2.1.4 Presence of Expert During Trial

As experts can assist the magistrates and juries in cases, expert witnesses may present evidence at court, also in the criminal justice system of England and Wales. It shall be underlined that in the legal system of England and Wales, cross examination is possible for experts. In order to determine how to challenge the defence's expert evidence, points of conflict can be identified by setting joint conferences between the prosecution and the defence.[1274]

When the expert report includes highly technical matters for jury to understand, the expert should give the evidence at court in two stages: first the terms and processes must be explained, and then the technical knowledge must be applied to the particular case.[1275] According to Office for Nuclear Regulation Guidance Document on the Expert Witness in Criminal Proceedings in England and Wales; expert witnesses may have three privileges over ordinary witnesses. Expert witnesses may remain in the courtroom prior to giving evidence, may give their opinions on issues that fall within their expertise, and may refer to the studies of others in their discipline without violating the hearsay rule.[1276]

During a hearing, the expert witness must duly introduce and present all the presentation material they produced, and they may refer to exhibits produced by others, including photographs, plans, and graphs. Illustrational material can be very useful in even the simplest cases to explain the case to the court.[1277]

4.2.2.2 Discretion of Magistrates or Jury on the Mental Evaluation Report

In England and Wales, the decision-making mechanisms are the courts and the jury. If the evidence presented at the hearing is going to be considered by the jury, it will be done under the guidance of the judge. It is permissible for an expert to expert to advice whether there is any violation of law, according to their opinion; however, the judge in a Crown

1272 Section 35(4) of the MHA1983.
1273 Section 35(10) of the MHA1983.
1274 Section 35(10) of the MHA1983.
1275 Section 35(10) of the MHA1983.
1276 Office for Nuclear Regulation Guidance Document on the Expert Witness in Criminal Proceedings in England and Wales, (November 2022), p. 4 <https:// www.onr.org.uk/operational/investigations/onr-enf-gd-010.docx> accessed 25 June 2023.
1277 *Ibid*., p. 21.

Court shall instruct the jury that they are not bound by the expert's opinion, and it is up to them to decide.[1278]

During the pre-trial phase, according to the general procedure, the prosecution may accept a plea by the defendant, and a trial may therefore be avoided. However, for the plea of not guilty by reason of insanity, the verdict must be delivered by the jury or, in the magistrates' court, by the magistrates.[1279]

Appeal cases demonstrate major inconsistencies in the use of experts.[1280] When a defendant claims the special defence, they are required to produce evidence from two expert witnesses. The experts who are drafting the mental health report cannot comment on the verdict. Even though the evidence from two experts is required, the jury is not bound by the expert opinion.[1281] In *R v Turner*[1282], Lawton LJ stated: *"... the fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; there is a danger that they think it does... Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life"*.[1283]

4.2.3 Verdict

According to s.52 of the SA 2020, while a court passing sentence on an offender[1284], the court shall state in open court, in ordinary language, the court's reasoning for deciding on the sentence. The court shall also explain the effect of the sentence and the effects of non-compliance to the offender in ordinary language. It is significant to reiterate that the court does not determine the hospital. This is determined by the defendant's place of residence and the psychiatrists' opinion on the level of security required.[1285]

It is important to underline that in England and Wales, there is the concept of insanity defence. If the insanity defence is accepted, in magistrates' courts the defendant is *acquitted*. In the Crown Court, when an offender has found not to have a criminal responsibility – thus insane–, a special verdict is pronounced: "*not guilty by reason of insanity*". When the individual is found not to be legally responsible for the offending, on

1278 *Ibid.*, p. 23.

1279 The Law Commission (2013), para. 114.

1280 *See. Burinskas [2014] EWCA Crim 334; Thompson [2018] EWCA Crim 639.* The *Burinskas* (2014) judgement included eight cases before the court considering amending the sentencing of the provisions on dangerous offenders, however not every case had psychiatric evidence. In the case of *Thompson (2018)*, one out of four separate appeals involved psychiatric evidence.

1281 *Walton v The Queen [1978] AC 788; Khan [2009] EWCA Crim 1569, [2010] 1 Cr App R 4.*

1282 *R v Turner* (1975) 60 Cr App R 80.

1283 *See.* CPT's website on Expert Evidence, <https://www.cps.gov.uk/legal-guidance/expert-evidence> accessed 08 February 2024.

1284 Please note that s.224 of the SA 2020 directs that a magistrates' court does not have jurisdiction to impose a sentence of imprisonment, or detention in a young offender institution, for longer than 6 months in respect of any one offence.

1285 European Commission (2005), p. 122.

grounds of mental disorder, then –just like in Türkiye– there can be no punishment, only a health-based disposal.

As discussed earlier, the diminished responsibility is only possible when an offender commits a murder. In these cases, the verdict would be guilty of manslaughter.

Since it is possible to be found guilty and receive sentences, the sentencing options were explained in substantive criminal law section above. Disposals are also important for mentally disordered offenders. As explained earlier, *"disposals"* are the court's options where a person is found to be unfit or found to meet the lack of capacity test, and the facts are proved; and *"sentencing"* is for the cases where the defendant is fit to plead and has the capacity to stand trial and either pleads guilty or is found guilty.[1286] As provided in sanctioning subsection under the substantive criminal law section, there are a large number of sentences that a judge or magistrates can issue. According to the Sentencing Council, the main sentencing types are discharge, fine, community sentence, and custodial sentence.[1287]

The SA 2020, s.232 regulates additional requirements in case of offender suffering from mental disorder. This section applies where *(a) the offender is or appears to be suffering from a mental disorder, and (b) the court passes a custodial sentence other than one fixed by law ("the sentence")*. Prior to passing the sentence, the court must obtain and consider a medical report unless the court determines that it is unnecessary due to the circumstances of the case.[1288] Here, the *medical report* refers to a report on a detainee's mental condition prepared or submitted, orally or in writing, by a registered medical practitioner recognised for the purposes of the MHA 1983; and *mental disorder* has the same meaning as in the MHA 1983.[1289] The sentence is not rendered invalid by the fact that the court did not obtain a medical report where it was required.[1290]

According to the SA 2020 section 31, "*pre-sentence report*" means a report which *(a) is made or submitted by an appropriate officer with a view to assisting the court in determining the most suitable method of dealing with an offender, and (b) contains information as to such matters, presented in such manner, as may be prescribed by rules made by the Secretary of State*. The pre-sentence report requirements shall apply to a court in relation to the formation of a judgment; however, if a court does not obtain and consider a pre-sentence report before forming an opinion, the failure to do so shall not invalidate a custodial sentence or community sentence.[1291] According to s.35 of the MHA 1983, the Crown Court or a magistrates' court may remand the person concerned to a hospital specified by the court to receive a report on mental condition. However, the court shall not transfer an accused to a hospital unless satisfied on the basis of written or oral evidence given by the licensed medical practitioner who would be responsible for making the report or of some other

1286 Justice, p. 87.

1287 <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/> accessed 20 December 2023.

1288 S.232/2 of the SA 2020.

1289 S.232/6 of the SA 2020.

1290 S.232/4 of the SA 2020.

1291 The SA 2020 *chapter 1, section 30(1) and (4).*

person representing the managers of the hospital, that arrangements have been made for their admission to that hospital and for their admission to it within the period of 7 days beginning with the date of the remand. The remand of an accused person cannot be for more than 28 days at a time or for more than 12 weeks in all; the court may at any time terminate the remand if it appears to the court that it is appropriate to do so. Where an accused person is remanded under s.35, the managers of the hospital must admit them within the period mentioned above.

The court must also consider, prior sentencing, any information relating to the offender's mental condition –whether given in a medical report, a pre-sentence report or other–, and the probable effect of such a sentence on that condition and on any *treatment which may be available* for it.[1292] The MHA 1983 has also made a distinction between mental illness, mental impairment, and psychopathic disorder, and deliberately differentiated the mental disorders on whether they were *treatable* when deciding to admit a patient to hospital.[1293] Hence, a hospital order can only be made if the mental disorder is *treatable*, and if the hospital specified is willing to admit the offender.[1294] It is also the case when a transfer is needed from prison to a hospital. The Prison Reform Trust states that the courts cannot transfer a patient if there is no bed available; and courts have no powers to enforce this.[1295] This *treatability criteria* will be discussed in *Chapter 4*.

4.3 Relevance of Mental Disorder in Criminal Procedure in the Netherlands

In order to explain the relevance of mental disorder in criminal procedure in the Netherlands, fitness to plead and fitness to stand trial shall be explained first. Afterwards, relevance of mental disorder in the trial phase, sanction types and verdicts will be discussed.

4.3.1 Fitness to Plead and Stand Trial

Dutch criminal procedural law also includes unfitness test for competency to stand trial, which is quite remarkable to have such a regulation in an inquisitorial system.[1296] According to Article 16 of the DCCP[1297], if the defendant suffers from such mental disorder, psychogeriatric disorder, or intellectual disability to such an extent that they lack the

1292 S.232/3 of the SA 2020.

1293 Brown (2019), p. 192.

1294 *Parker (unreported, 21 March 1975; Jones, unreported, 19 November 1976* (cited by Archbold. *Criminal Pleading Evidence and Practice*, §5A-1403.)

1295 Kimmett Edgar and Dora Rickford (2009): *Too Little Too Late: an independent review of unmet mental health need in prison*, Prison Reform Trust, prisonreformtrust.org.uk/Portals/0/Documents/Too%20Little%20Too%20Late%20-%20a%20review%20of%20unmet%20mental%20health%20need%20in%20prison%20.pdf, p. 8.

1296 Van der Wolf & Mevis (2022), p. 364.

1297 *See*. ANNEX 5: Relevant Articles of the Dutch Code of Criminal Procedure.

capacity to understand the meaning of the prosecution initiated against them, the court shall suspend the prosecution, irrespective of the stage of prosecution; and the suspension shall be revoked as soon as the recovery of the defendant has been proven. This current regulation dates back to 1986 and was a codification by a ruling of the *Hoge Raad* in the well-known Pieter Menten case.[1298]

There is a debate as to whether the application of Article 16 precludes the subsequent application of security measures on grounds of diminished or non-responsibility. Originally, the DCCP of 1838 regulated the unfitness depending on the mental disorder having its onset after committing the offence; therefore, this discussion is debate is connected to the timing[1299] of the presence of the mental disorder.[1300] It was most likely derived by the French Penal Code which states that there was no crime when it was committed by a "*lunatic*" (*il n'y a ni crime ni délit*). In 1886 the legal insanity doctrine became an excuse, hence defendants who had mental disorder at the time of the crime were also included. Furthermore, legal insanity doctrine also requests a causal link between disorder and offence. Only in 1928, through the safeguards of Article 509a of the DCCP, a procedural consideration was introduced for offenders who were either not responsible or had diminished responsibility for the act, yet the prosecution of these individuals still could not be suspended on grounds of unfitness. It can be claimed that the Dutch doctrine has always been determined by the responsibility doctrine and the consequential appropriate facility, rather than by procedural values like fairness. However, Article 16 CCP was amended after the Menten case, and the criterion was formalized, the ever-present element "after the committing of the act" was omitted.[1301] The criterion for unfitness is the question of understanding the intention of the proceedings, however it is not elaborated on in the case law, hence it is open for interpretation.[1302]

According to Article 16 of the DCCP, the suspension shall be revoked as soon as the recovery of the defendant has been proven, therefore after the recovery, the prosecution will be continued.

4.3.2 Criminal Procedure Regulations for Trial Phase

As it is stated above, the Dutch criminal justice system is also an inquisitorial system, therefore judges play a significant role in fact-finding. The most important consequence of having the inquisitorial system is that forensic psychiatric expert witnesses officially do the assessment on behalf of the court, instead of being hired by the parties.[1303]

1298 Van der Wolf & Mevis (2022), p. 361.

1299 *"Adjournment of the prosecution on the ground of a mental disorder is only applicable to a defendant who is contending with mental problems after having committed the criminal act. In such a case there is no causal relationship between his mental state and the crime that has been committed."*, Bal & Koenraadt (2007), p. 128.

1300 Van der Wolf & Mevis (2022), p. 362.

1301 Van der Wolf & Mevis (2022), p. 362.

1302 Van der Wolf & Mevis (2022), p. 364.

1303 Van der Wolf et al.(2022), p.200.

The legal criteria to be accepted to have criminal liability was provided earlier under *3.3.2 Mental Disorder as an Exemption* subsection. In 2017, the Court of Appeal in the Hague delivered a decision on and under the *Criminal liability of the accused* (*Strafbaarheid van de verdachte*) title, the legal framework (*wettelijk kader*) is further elaborated on. According to the judgement, in order to form an opinion on the criminal responsibility of the accused, it is important to determine:

1). whether, at the time of the proven crime committed, the accused was suffering from a defective development or mental disorder;
2). if so, whether there is a causal link between that development or mental disorder and the proven facts;
3). if so, whether the accused was able to understand the unlawfulness of their actions;
4). if so, whether the development or mental disorder of at the time of the proven facts fully determined the actions of the accused, in the sense that the accused was not or insufficiently able to act in accordance with their understanding of the unlawfulness of the facts.[1304]

The forensic assessment and the role of the expert in the Netherlands will be further examined below.

4.3.2.1 Forensic Psychiatric Assessment

Article 227-236 of the DCCP regulates the legal framework of the experts in criminal processes. According to Article 227, the examining magistrate (*rechter-commissaris*) may, in the interests of the investigation, appoint one or more experts of their own discretion, at the request of the public prosecutor or at the request of the accused. The examining magistrate is, in principle, at liberty choose a behavioural expert, albeit that the law may impose requirements on the number of experts.[1305] Apart from this, the offender can also call in their own counter-expertise, especially when they are not satisfied with the investigation or its results.[1306]

In 2007, it was reported that approximately 5000 mental health assessments are conducted each year.[1307] The vast majority of the assessments, approximately 3000 per year, are outpatients.[1308] The offender cannot be forced to cooperate in these evaluations.[1309] Offenders may give their informed consent but may also reject to give their consent; in any case, they have to be informed about the course of events during and after the investigation, to whom and what will be reported, and how this information will be used.[1310]

1304 Gerechtshof Den Haag, 16-03-2017, ECLI:NL:GHDHA:2017:684.
1305 Van Marle & Roza (2020), p. 124.
1306 Van Marle & Roza (2020), p. 123.
1307 Bal & Koenraadt (2007), p. 29.
1308 Van Marle & Roza (2020), p. 128.
1309 Meynen, G. (2022). Legal Insanity in the Netherlands: Regulations and Reflections. In R. Mackay, & W. Brookbanks, *The Insanity Defence* (pp. 274-294). Oxford: Oxford University Press, p. 277.
1310 Van Marle & Roza (2020), p. 131.

Once the case file is received from the competent court, the legal counsel, who is a member of the assessment team, studies the documents and summarises them for the team.[1311] The case file contains all the information, including interrogation reports of witnesses, findings of forensic investigation, photographic material, and even the criminal record of the defendant.[1312] In the Pieter Baan Centre, the investigation team consists of a psychologist, psychiatrist, lawyer (as chair), group leader, environmental investigator and process supervisor (called process psychiatrist or psychologist).[1313] There, the assessment also includes observation by a multidisciplinary team during the daily activities.[1314]

Forensic mental health assessment asks experts to evaluate whether the defendant has a mental disorder, if so, to what extent the mental disorder is a factor in the commission of the offence, and how mental disorder might have diminished their ability to choose and their judgments in the commission of crime.[1315] However, the court should be the competent authority to rule on the legal question to what extent they can be held liable for the offence.[1316]

In the 1990s, a standard set of questions was developed, however the standard questionnaire has been developed in recent years.[1317] Previously, in addition to the questions passed on by the court, the experts were supposed to answer the following questions:

1). *Is the examined person suffering from a mental disorder/ defective development of the mental faculties? If so, how can this be described diagnostically (in terms of the DSM)?*
2). *What was the person's mental condition at the time the criminal offense was committed?*
3). *Did the mental disorder/defective development of the mental faculties influence the behavioral choices of the examined person, or his behavior during the offense, to an extent that the alleged offense can be explained from this disorder/defective development?*
4). *If so, can the behavioral expert substantiate:*
    a). *in what way this happened,*
    b). *to what extent this happened, and*
    c). *which conclusion with regard to the examined person's criminal responsibility can be advised?*
5). *Can the behavioral expert substantiate to what extent and in what way the (possible) mental disorder/defective development of the mental faculties could lead to similar or other offenses?*[1318]

1311 Van Mulbregt, J., & Beekman, H. (2007). The Legal Framework. In F. Koenraadt, A. Mooij, & J. van Mulbregt, *The Mental Condition in Criminal Law* (pp. 57-75). Amsterdam: Dutch University Press, p. 63.
1312 Van Mulbregt & Beekman, p. 63.
1313 Nederlandse Vereniging voor Psychiatrie (2012), p. 21.
1314 Meynen (2022), p. 277.
1315 Van Mulbregt & Beekman, p. 57.
1316 On the same opinion. *See*. Van Mulbregt & Beekman, p. 57.
1317 Van Oploo (2021), p. 52.
1318 Kooijmans & Meynen (2017), p. 2-3.

The current form reads as follows:

0). If suspect refuses to be examined, to what considerations of the investigator does that refusal cause?
1). Is examined person suffering from a mental disorder, psychogeriatric condition or intellectual disability, and if so, how can this be described in a diagnostic sense?
2). How was this situation at the time of the commission of the offence?
3). Did any mental disorder, psychogeriatric disorder or intellectual disability influence examined person's behavioural decisions and actions at the time of the charge?
4). If so, please state the reasons: a) In what way this was done, b) whether this leads to the recommendation to attribute the offence to a diminished extent or not at all, and c) if the recommendation is to attribute to a diminished extent, specify this behaviourally.
5). a) Given the disorder described above, what is your expectation regarding the risk of recidivism?; b) What protective functions in personality or functioning should be considered in this regard?; c) What contextual, situational or other conditions should be considered in this regard? d) Is there anything to be said about any possible reciprocal influence of these factors and conditions?
6). Are there arguments situated in the personality and/or development of examined person that give reasons to apply the juvenile criminal law?
7). a) What behavioural and other recommendations can be made for interventions that could limit the possible risk of recidivism; b) Within which legal framework(s) could these be realised?[1319]

It is always possible to add questions to the standard questionnaire when the assignment is given to the rapporteur, should the specific situation demand it.

As can be seen, in order for the court to decide on the responsibility, the expert must reply to the following legal questions also, such as:

- *Is there a defective development or pathological disorder of the mental faculties, and if so, how can this be described in a diagnostic sense?*
- *If so, what was this like at the time of the charges?*
- *If so, is there a connection between this defective development or pathological disorder of the mental faculties and the charged offense?*
- *If so, how can this connection be described?*
- *Is this connection so absolute that one can speak of a causal link?*[1320]

Therefore, the relationship between the psychiatric disorder(s) and the charge must be described in the context of the expert report in such a way that the judge can draw a conclusion for legal causation from it. Since, the court also inquiries about a causal relationship between the crime and the mental disorder, the report should also include whether a mental disorder has been established to be present *at the time of the crime*.[1321]

1319 Van Oploo (2021), p. 53-54.
1320 Nederlandse Vereniging voor Psychiatrie (2012), Hoofdstuk 5, §3, p. 58.
1321 Van Mulbregt & Beekman, p. 68.

When there is no basis in the investigative material to describe a causal relationship but there is a basis to make concurrence plausible, then the rapporteur should stick to this.[1322]

As stated in the substantive criminal law section, until 1 January 2020, two core concepts of Article 39 of the DCC played a role in *pro Justitia* examinations: pathological disorder and defective development of the mental faculties; however, as a result of section 14:25 of The Dutch Compulsory Mental Health Care Act ("Wvggz", *Wet verplichte geestelijke gezondheidszorg*), the old criterion was abolished and a new one was introduced: mental disorder, psychogeriatric disorder or intellectual disability.[1323] This also led to an adjustment of the pro Justitia questionnaire.[1324] According to the explanatory memorandum to the Wvggz, one of the aims of adapting the conceptual framework was to modernise the use of language; by choosing the term mental disorder, an attempt was made to connect to a behavioural conceptual framework as used in the DSM-IV.[1325]

It is important to underline that the Guideline on Psychiatric Examination and Reporting in Criminal Cases (*Richtlijn psychiatrisch onderzoek en rapportage in strafzaken*) also explains further on the concept of criminal responsibility *((on)toerekeningsvatbaarheid)* by stating that that it leads to a confusion by suggesting a separate and objectifiable characteristics of the concept, while it is not.[1326] The assessment of the possible relationship between disorder(s) and the charges is only advice to the judge, and therefore, in order to prevent that confusion, experts must realise that the criminal responsibility cannot have an measurable characteristic (*meetbare eigenschap*). Furthermore, the report must include substantive psychiatric arguments that the judge can consider while deciding on the criminal responsibility.[1327]

In the Dutch criminal justice system, as it is explained above under the subsection *3.3.4 Diminished Capacity as a Partial Excuse*, there was a five degree grading system (*vijfpuntsschaal*) for forensic assessment: full criminal responsibility (*toerekeningsvatbaar*), slightly diminished responsibility (*enigszins verminderd toerekeningsvatbaar*), diminished responsibility (*verminderd toerekeningsvatbaar*), severely diminished responsibility (*sterk verminderd toerekeningsvatbaar*) and no criminal responsibility (*ontoerekeningsvatbaar*).[1328] Currently three degree system is in use: full criminal responsibility, diminished responsibility, and no criminal responsibility.

1322 Nederlandse Vereniging voor Psychiatrie (2012), Hoofdstuk 5, §7, p. 62.

1323 Article 14:25 of the Wvggz states that:
The Dutch Criminal Code shall be amended as follows: In Articles 13(1), 15d(1)(a) and 39, "defective development or pathological disorder of the mental faculties" shall be replaced each time by: mental disorder (*psychische stoornis*), psychogeriatric disorder (*psychogeriatrische aandoening*), or intellectual disability (*verstandelijke handicap*). (<https://zoek.officielebekendmakingen.nl/stb-2018-37.html>, accessed 23/01/2024).

1324 Van Oploo (2021), p. 55.

1325 Van Oploo (2021), p. 55.

1326 For mor information, *see*. Nederlandse Vereniging voor Psychiatrie (2012), Hoofdstuk 5, §8, p. 63.

1327 Nederlandse Vereniging voor Psychiatrie (2012), Hoofdstuk 5, §8, p. 63.

1328 Nederlandse Vereniging voor Psychiatrie (2012), Hoofdstuk 5, §10, p. 65.

The behavioural expert is not only faced with the difficult task of identifying a disorder that existed at the time of the offence, but must also assess the causal link between disorder and offence.[1329] The expert, therefore, has to discuss the effect of the mental disorder on the defendant's actions and behavioural choices at the time of the offence.[1330] To get a picture of the mental state at the time of the charge, the expert will, in addition to interviews with the suspect, also draw on other sources of information, such as witness statements and (recorded) interrogations with the suspect.[1331] A relevant issue here is the amendment of Article 37a of the DCC as of 1 January 2020 made it possible to use existing medical data of a reluctant suspect.

The expert must also be asked to state the seriousness of the re-offending (recidivism) risk, the nature and severity of the disorder, whether treatment is necessary, and which legal framework would be suitable.[1332] Thus, the psychologist must pay special attention on risk assessment (*risicotaxatie*), and dangerousness of the defendant; and in order to assess them, there are three tools possible to identify risk factors: historical, clinical, and risk control factors.[1333] This issue is discussed above under the subsection *3.3.6 Dangerousness*, therefore it will not be repeated here.

The Guideline on Psychiatric Examination and Reporting in Criminal Cases (*De Richtlijn Psychiatrisch Onderzoek en Rapportage in Strafzaken – "pro Justitia"*) advices that the report should answer all questions, the reader of the report must be kept in mind to avoid technical terminology and to explain the findings further, the observational data must be separated from the interpretation, and last but not least, the existence of the mental disorder cannot be inferred from the offence.[1334]

The report must also contain a conclusion and a recommendation, and be dated and signed by two sworn experts.[1335] The report should preferable be completed within eight weeks, so that the report can be present at the hearing on time; in cases where the report cannot be completed on time, the psychiatrist rapporteur should make this known promptly.[1336]

In most cases, the mental assessment is conducted by a psychiatrist or a psychologist visiting the defendant in their residence or prison for a series of interviews.[1337] However, it may also be done in an inpatient setting, which will be explained under the subsection *4.3.2.1.3 Remand to Hospital for Report on Mental Condition* below.

1329 Van Oploo (2021), p. 57.
1330 Meynen, G. (2016). *Legal Insanity. Explorations in Psychiatry, Law, and Ethics*. New York: Springer, p. 44-45.
1331 Van Oploo (2021), p. 58.
1332 Van Mulbregt & Beekman, p. 58.
1333 For further information *see*. Koenraadt & Van Deutekom (2007), p. 115-116.
1334 Nederlandse Vereniging voor Psychiatrie (2012), Hoofdstuk 3, §9.3, p. 43.
1335 Koenraadt & Van Deutekom (2007). p. 117.
1336 Nederlandse Vereniging voor Psychiatrie (2012), Hoofdstuk 9, §2, p. 85.
1337 Van Mulbregt & Beekman, p. 58.

Usually at least 10 interviews must be conducted; yet it differs from case to case.[1338] IQ tests, neuropsychological test, personality questionnaires, and projective tests may also be carried out.[1339] An expert has broad resources to gather relevant data about the defendant: *observation and perception, interviews, an arsenal of psychological test and the criminal case file*.[1340] Addition to the results of assessments, the findings and opinions of the experts will also be found on the report.

Even though the defendant has no legal right to read the draft report, at the Pieter Baan Centre they are usually allowed to see it unless their situation might be seriously affected by it.[1341]

It shall be lastly noted that, unlike in England and Wales, however, the question of whether the offender is regarded as treatable is not an issue in the Netherlands, since the main purpose of the TBS order are the protection of society and, when possible, the rehabilitation of the mentally disordered offender.[1342]

4.3.2.1.1 Expert Selection

According to Article 227 DCCP and onwards, the examining magistrate is authorised to appoint an expert. The accused may make recommendations as to the experts to be appointed, unless the interests of the investigation do not permit this. On the initiative of the defence, the magistrate may also proceed to call in experts.

The Stichting Landelijk Register van Gerechtelijke Deskundigen (LRGD) registers experts in all fields working in criminal, administrative, and civil law. Currently, the register imposes the following basic requirements for the expert registration: the register is only accessible to experts who (1) are experts in their own field, (2) are sufficiently trained as judicial experts, (3) maintain their knowledge (both professional and legal knowledge) up to date by participating in continuing education.[1343]

With the entry into force of the Expert in Criminal Cases Act (*Wet deskundige in strafzaken*) on 1 January 2010, the Netherlands Register of Court Experts (*Nederlands Register Gerechtelijk Deskundigen*, "NRGD") was also established.[1344] The NRGD is governed by the independent Board of Judicial Experts and the Board that sets the standards against which experts are assessed. The members of the Board are appointed by the Minister of Security and Justice. The applicant expert completes an application form and submits it, together with supporting documentation, to the NRGD. Applicants are assessed against

1338 Koenraadt & Van Deutekom (2007), p. 109.
1339 Koenraadt & Van Deutekom (2007), p. 110-113.
1340 Koenraadt & Van Deutekom (2007), p. 108.
1341 Van Mulbregt & Beekman, p. 66.
1342 De Boer, J. & Gerrits, J. (2007). Learning from Holland: the TBS system. *Psychiatry 6(11)*, 459-461, p. 459.
1343 <http://www.lrgd.nl/nl/reglementen_en_besluiten> accessed 13 August 2023.
1344 < https://english.nrgd.nl/about-the-nrgd> accessed 13 August 2023.

objective criteria of quality, trustworthiness and competency. The NRGD then publishes the details of registered experts.[1345]

In December 2010, the first registered experts were made visible on the NRGD website.[1346] In the period 2010-2013, among others the following fields of expertise were standardised and assessed and registered: criminal law adults–psychiatry, adult criminal law–psychology, juvenile criminal law–psychiatry, juvenile criminal law-psychology/orthopedagogy (remedial education). These areas of expertise are also categorised under the collective term FPPO (forensic psychiatry, psychology and orthopedagogy).[1347]

In order to become an expert in this field, the entry requirement is being a registered psychiatrist or clinical psychologist.[1348] Article 12 paragraph 2 of the Decree on Registry of Experts in Criminal Cases (*Besluit register deskundige in strafzaken*) regulates the requirements for an expert to get registered as an expert in criminal cases upon their application. For the registry, the Board of Judicial Experts (*College gerechtelijk deskundigen*) should be convinced on, for instance, that candidates have sufficient knowledge and experience in the field, they are sufficiently familiar with the expert's position and role, they are able to report both in writing and orally, and they are able to perform independently, impartially, carefully, competently, and with integrity.[1349] The assessment takes place on the basis of written documents, including case reports and documents, and in principle it is supplemented by an oral assessment; when deemed necessary as part of the assessment, an additional case report and/or information may be requested.[1350]

According to the Forensic Psychological Examination and Reporting in Criminal Law Guideline, in order to be assigned to a case, no treatment relationship and no family relationship or other relationship that could affect the investigation must exist between the defendant and the expert.[1351]

It is evident that the regulations are formulated on the assumption that the expert witness is a natural person; a legal person cannot become an expert to be appointed or registered as an expert in the NRGD.[1352]

1345 https://integraties.doclogic.nl/nrgd/nrgdsearch accessed 13 August 2023.

1346 De Ridder, J., Akerboom, C., Hoving, R., Schudde, L., & Struiksma, N. (2014). *Evaluatie van het Nederlands Register Gerechtelijk Deskundigen*. WODC Publications, p. 11.

1347 De Ridder et al. (2014), p. 11.

1348 *See*. The NRGD website on the FPPO Assessment Framework: <https://www.nrgd.nl/deskundigheidsgebieden/fppo-psychiatrie-psychologie/documenten/publicaties/2018/09/01/beoordelingskader-fppo-html > accessed 17 June 2024.

1349 Article 12/2(a)-(i) of the Decree on Registry of Experts in Criminal Cases.

1350 *See*. The NRGD website on the FPPO Assessment Framework: <https://www.nrgd.nl/deskundigheidsgebieden/fppo-psychiatrie-psychologie/documenten/publicaties/2018/09/01/beoordelingskader-fppo-html > accessed 17 June 2024.

1351 Nederlandse Vereniging voor Psychiatrie (2012), p. 17.

1352 Hoving, R.A. (2017). *Deskundigenbewijs in het strafproces*. Oisterwijk: Wolf Legal Publishers, p. 74.

4.3.2.1.2 Role of the Expert

In this *'scientified'* ('verwetenschappelijkte') and increasingly complex society, the criminal judge and all other actors in the criminal investigation cannot escape calling on experts more and more often.[1353] Thus, the role of the expert in the criminal process is increasing and their input can be of great significance for the outcome of the trial. The expert is consulted to uncover the material truth.[1354] The interviews show that in many cases the judge relies on the expert's conclusions of fact and there is very high confidence in experts and their reports.[1355] Ultimately, it is the judge who weighs the evidence. The judge then makes a decision. In certain fields, few are really experts, so the same ones are often asked. Thus, calling in counter expertise then becomes very difficult.[1356]

By virtue of the *innocence until proven guilty* principle, during the pre-trial and trial phase, experts cannot assume whether the defendant committed the crime, and thus, the expert report must consider a range of scenarios.[1357] It should be also considered that defendants may confess other crimes or may change the concept of the committed crime(s) during their forensic evaluation. In such cases, the Peter Baan Centre temporarily suspends the assessment to inform the judicial authorities, and this is quite important so as not to lose its neutral role in the proceedings.[1358]

Similar to most of the inquisitorial system, witness testimony is usually handled through written reports and is not read out by the expert in court.[1359] Therefore, most of the time the expert's duty terminates when the report is sent to the court, unless the court requests clarification on the report.

The expert bears three responsibilities during the mental assessment: psychiatric diagnosis, assessment of the role of the disorder in the crime committed, and finally the care and treatment.[1360] Thus, experts are obliged to prepare a report according to what is explained under the subsection *4.3.2.1 Forensic Psychiatric Assessment* above.

During the assessment, the expert introduces themselves, tells the defendant that they work in accordance with the NRGD ("Het Nederlands Register Gerechtelijk Deskundigen") Code of Conduct, and explains what the investigation entails.[1361] The length of the prepared report should be within reasonable limits without compromising quality; but

1353 Kwakman, N. (2000). De deskundige in het strafproces. In M. Groenhuijsen, & G. Knigge, *Het onderzoek ter zitting; eerste interim rapport van de onderzoeksgroep Strafvordering 2001* (pp. 343-393). Groningen: Rijksuniversiteit Groningen, p. 344.

1354 Kwakman 2000, p. 344.

1355 Dobbelaar, J., Visser, D., & Muller, E. (2009). *Recherchewerk en Forensische Expertise -Een verkenning-*. Den Haag: COT Instituut voor Veiligheids- en Crisismanagement, p. 60.

1356 Dobbelaar et al. (2009), p. 60-61.

1357 Van Mulbregt & Beekman, p. 60.

1358 Van Mulbregt & Beekman, p. 60.

1359 Van der Wolf, Van Marle & Roza (2022), p. 200, 201.

1360 Ronhaar, P. (2007). The Psychiatric Assessment. In F. Koenraadt, A. Mooij, & J. van Mulbregt, *The Mental Condition in Criminal Law* (pp. 127-141). Amsterdam: Dutch University Press, p. 127.

1361 Nederlandse Vereniging voor Psychiatrie (2012), p. 17.

the goal for a maximum length should be about twenty to twenty-five pages. However, these matters regulated by the Guideline are not rigorous, therefore they only have advisory status. The report and related documents must be kept for twenty years, according to the legal retention period regulated in Wet geneeskundige behandelings-overeenkomst ("WGBO"), and this term continues even after retirement or death of the expert.

As in every criminal justice system, there are four ethic principles for the Netherlands Institute for Psychologists (*Nederlands Instituut van Psychologen*): integrity, respect, expertise, and responsibility.[1362] As it is mentioned above, there are also guidelines for the experts to follow during the assessment period, such as the Guideline on Psychiatric Examination and Reporting in Criminal Cases (*De Richtlijn Psychiatrisch Onderzoek en Rapportage in Strafzaken* – "pro Justitia"). According to Chapter 4 of the Guidelines[1363]: A pro Justitia examination is done at the request of a judge or other judicial authority, thus, the consent requirement, as well as the duty of confidentiality are set aside with respect to the defendant. A person cannot be forced to cooperate in a behavioural expert examination, yet, according to the *Hoge Raad*, no statutory provision requires that the opinion issued by the experts must be with the cooperation of the defendant. An examination, if a defendant is unable or unwilling to communicate with the experts, may be limited to observing, taking note of their conduct, as well as studying other reports concerning them, thus, much will depend on the other information available. In practice, various types and sizes of refusal occur: a person may not cooperate at all, be ambivalent, or refuse parts of the investigation. In these cases, the expert shall describe these limitations, and answers the questions on which there is sufficient information.

According to the Guideline on Psychiatric Examination and Reporting in Criminal Cases (de Richtlijn psychiatrisch onderzoek en rapportage in strafzaken), known deficiencies in forensic reporting commonly involve:

- *insufficient inclusion of collateral information;*
- *building only on statements made by the person examined;*
- *not properly substantiating professional judgment or diagnosis;*
- *not properly using forensic diagnostic instruments;*
- *insufficiently clarifying how and to what extent any disorder is related to the psychological and legal capabilities of the investigated person;*
- *not making the conclusion follow logically from the diagnosis;*
- *insufficiently reflect the limitations of the used methods, conclusions and judgments used.*[1364,1365]

1362 <https://psynip.nl/beroepskwaliteit/beroepscode/> accessed 11 June 2023.

1363 Nederlandse Vereniging voor Psychiatrie (2012), Hoofdstuk 4, §4.1, p. 52-53.

1364 Nederlandse Vereniging voor Psychiatrie (2012), Hoofdstuk 7, §1, p. 75.

1365 According to an empirical study conducted in 2010, ten most frequent faults in forensic report writing with their percentages are: 1. opinions without sufficient explanations (56%), 2. forensic purpose unclear (53%), 3. (dis)organization problems (36%), 4. irrelevant data or opinions (31%), 5. failure to consider alternative hypotheses (30%), 6. inadequate data (28%), 7. data and interpretation mixed (26%), 8. over-reliance on single source of data (22%), 9. terminology

Over the course of the assessment, team members, meet multiple times to discuss the progress of the observation and the report drafting.[1366] In the meeting stage, the legal counsel serves the coordinating role, "translates" the legal questions and makes them clear, checks the report for internal consistency, and after that they liaison between the team and the court.[1367]

Expert rapporteurs may be expected to keep their profession up to date. To facilitate this, forensic psychiatric institutes, universities, and the NIFP ("Nederlands Instituut voor Forensische Psychiatrie en Psychologie") organize regular meetings for this purpose with the aim of inter-vision and the advancement of expertise; and regular participation in these meetings is recommended.[1368]

Article 37a/3 of the DCC regulates that a report is needed to impose a TBS-order from at least two behavioural experts from different disciplines, including a psychiatrist, who examined the person concerned. However, this paragraph does not apply when the person refuses to cooperate with the investigation.[1369] In cases where the person in question is suspected of a crime against or causing danger to the integrity of the body as referred to in Article 38e of the DCC, and they refuse to cooperate, the public prosecutor may ask the multidisciplinary Advisory Committee on the Provision of Data on Refusing Observers (*Adviescommissie Gegevensverstrekking Weigerende Observandi*, "AGWO").[1370] The AGWO, then, collects all available personal data, including ones concerning health, and advices the public prosecutor within thirty days.[1371] It is aimed to gather sufficient evidence, since a TBS measure can only be imposed if there is sufficient evidence that the offender was suffering from a mental disorder at the time of the offence.[1372] In some cases -with or without the consent- old medical records and information as a result of previous counselling contacts can be drawn upon. According to the *Regeling weigerende observandi*, this regulation shall be only used as an *ultimum remedium*, and the breach of medical confidentiality should not go beyond what is strictly necessary for that purpose.[1373] It was

problems (19%), 10. improper usage of test (15%). *See.* Grisso, T. (2010). Guidance for improving forensic reports: A review of common errors. *Open Access Journal of Forensic Psychology*, 2, 102-115.

1366 Van Mulbregt & Beekman, p. 64.

1367 Van Mulbregt & Beekman, p. 64-65.

1368 Nederlandse Vereniging voor Psychiatrie (2012), Hoofdstuk 9, §4, p. 87.

1369 Article 37a/4 of the DCC.

1370 The multidisciplinary committee shall consist of two doctors, including a psychiatrist, a behavioural expert and two lawyers. The chairman of the committee should be a psychiatrist doctor. *See.* Article 37a/4-9 of the DCC.

1371 Article 37a/6 of the DCC.

1372 *See.* De context van de regeling weigerende observandi: <https://www.adviescommissieweigerendeobservandi.nl/over-de-wetgeving/de-context-van-de-regeling-weigerende-observandi-1>, accessed 02 September 2024.

1373 Nagtegaal, M.H. (2021). *De effectiviteit van de aanpak weigerende verdachten in het Pro Justitia onderzoek: Achtergrond en contouren van een onderzoeksprogramma*. WODC, Retrieved 2024 August, from https://repository.wodc.nl/bitstream/handle/20.500.12832/3148/Cahier-2021-16-volledige-tekst.pdf, p. 15.

claimed that this procedural approach may complicate the investigation.[1374] According to the NVvP, the rapporteur should make an assessment of reliability based on the degree of consistency of statements in different occasions, accuracy in agreement between facts and statements and completeness of details, for example by mutual coordination between the different reporting rapporteurs in a multiple prosecutorial investigation.[1375]

4.3.2.1.3 Remand to Hospital for Report on Mental Condition

Article 196 of the DCCP regulates that in cases where it is necessary that an examination of the mental state of a person against whom pre-trial detention has been ordered will be conducted and this cannot be sufficiently carried out in any other way, the examining magistrate shall order that the person shall be transferred for clinical observation to a psychiatric hospital. Article 198 states that the stay in the institution shall be considered temporary custody, may not exceed seven weeks, however, the examining magistrate may, either ex officio, at the request of the public prosecutor, or at the request of the accused, extend the order once, by a maximum of seven weeks. The examining magistrate may order at any time that the stay in the institution shall end. Even though the observation period is significantly long, it is impossible to withdraw from the observation.[1376]

As it is stated earlier, an expert has broad resources to gather relevant data about the defendant, including observation and perception, interviews, and psychological tests.[1377] The residential observation, thus, an important tool for the expert.[1378] Less than 5% of all reports per year involves inpatient mental health assessment, and the vast majority are completed at the Pieter Baan Centre,[1379] where defendants stay for a period of seven weeks.[1380]

Despite the fact that the defendant's criminal case file arrives before their admission to the remand centre, the actual assessment starts soon after their arrival.[1381] The psychiatrist is responsible for the psychiatric assessment of the defendant during the observation period; and it involves consistent and systematically assessment of the causes, symptoms, progression, and consequences of each mental disorder found in the defendant.[1382] Psychiatrists are obliged to contact the defendant at least once a week, within the seven week observation period.[1383] Before the remand, the patient shall be informed well that

1374 Van Oploo (2021), p. 58.
1375 Nederlandse Vereniging voor Psychiatrie (2012), p. 35.
1376 Van Marle & Roza (2020), p. 133.
1377 *See.* Koenraadt & Van Deutekom (2007), p. 108.
1378 Van Mulbregt & Beekman, p. 57.
1379 The Pieter Baan Centre is a psychiatric observation clinic and an official remand centre. <https://www.nifp.nl/onderwerpen/pieter-baan-centre> accessed 12 June 2023.
1380 Van Mulbregt & Beekman, p. 58.
1381 Ronhaar (2007), p. 131-132.
1382 Ronhaar (2007), p. 131.
1383 Ronhaar (2007), p. 132.

the confidentiality between the therapist and patient does not apply when answering the questions sent by the Court.[1384]

In cases where multiple defendants need to be assessed for the same crime, it is possible to observe them simultaneously at the Pieter Baan Centre, thanks to the Centre's settings that allow both genders to be together.[1385] It is important to mention that at the Pieter Baan Centre, the rules, staff, settings, and the ward of the observation phase differ from the treatment phase.[1386]

During the hospital stay at a centre, the life of the detainee may be limited due to language barriers, customary rules, religious practices, and dietary habits.[1387] Choosing a language for psychiatric assessment and treatment may become a complicated problem, when dealing with foreigners and migrants, thus it is found logical to conduct the examination in the common language, without an interpreter.[1388] Language plays a significant role in influencing the expression and personal perception; and words also have cognitive meaning or denotations.[1389] Translating these words or phrases in between languages is, therefore, not an easy task; which is the number of misdiagnosis may be alarmingly high in the absence of cross-cultural approaches.[1390] The added anxiety to speak in a second language must also be taken into consideration.[1391]

When the remand ends, the diagnostic assessment also ends. The classification of the diagnosis must be in line with the DSM-5 or ICD-11.[1392]

4.3.2.1.4 Presence of Expert During Trial

Article 343 of the DCCP defines the expert testimony as a statement given at the hearing regarding what their knowledge and expertise tell them about the issue in their opinion. The expert, who is the forensic psychiatrist or psychiatrist, might be asked to testify in court, after the forensic mental health report is sent to the court.[1393] This does not happen often, only in cases where there is a lot of media attention, or when the report does not provide adequate responses to the court's queries.[1394]

1384 Ronhaar (2007), p. 135.
1385 Van Mulbregt & Beekman, p. 59.
1386 Koenraadt & Van Deutekom (2007), p. 120.
1387 *See*. Koenraadt & Van Deutekom (2007), p. 118-119.
1388 Westermeyer, J. (1990., December). Working with an Interpreter in Psychiatric Assessment and Treatment. *The Journal of Nervous and Mental Disease, 178*(12), 745-749, p. 745.
1389 Westermeyer (1990), p. 745.
1390 Westermeyer (1990), p. 745.
1391 Westermeyer (1990), p. 745.
1392 Ronhaar (2007), p. 138. The cited source mentions DSM-IV and ICD-10. However, DSM-5 and ICD-11 are released in 2022.
1393 Koenraadt & Van Deutekom (2007), p. 121; Bal & Koenraadt (2007), p. 31.
1394 Bal & Koenraadt (2007), p. 31.

The summon is not a voluntary invitation, and thus, absenteeism shall have profound consequences.[1395] During the hearing, the summoned expert can only express their professional opinion, and shall reply to the questions posed.[1396]

4.3.2.2 Discretion of the Court on the Mental Evaluation Report

Once the court receives the mental assessment report, it shall be added to the case dossier to be used on behalf of or against the defendant.[1397] Ultimately, it is the judge who weighs the evidence.

According to the facts of the *Constancia v. the Netherlands* case[1398], during the criminal proceedings, the accused refused to cooperate with the experts, and it had made the situation impossible to draw any definite conclusions for the mental health assessment. The experts made use of all the information available, including previous mental health assessments, the criminal file, the audio and audio-visual recordings of interrogations; however, there were *unable* to supplement this information with their findings resulting from their own observation. The Court of Appeal, however, used the police reports, reports by prison staff and statements of witnesses including close relatives of the accused to rule that the accused is described as manifesting unusual behaviour. As their reasoning, it is stated that it is up to the trial court to make the establishment of a mental disturbance or inadequate development of the accused's mental faculties at the time when they committed the act, when behavioural experts reach the limits of what is justifiable within their scientific knowledge. The ECtHR acknowledged the fact that, facing the applicant's complete refusal to cooperate with any examination of their mental state at any relevant time, the Court of Appeal was entitled to conclude from the information thus obtained that the applicant was suffering from *a genuine mental disorder* which, regardless of its precise nature, was of a nature or degree that warranted enforced confinement.[1399] The Court, therefore, found the allegations inadmissible and ill-founded which claimed that the applicant's rights under Article 5/1(e) had been violated since the applicant had not been diagnosed as mentally unfit.[1400]

The discussion on this judgment can be found under *Chapter 4*. However, it is relevant to underline here that the Hoge Raad stated that it is most certainly for the court to decide whether the defendant was suffering from a mental disorder at the time the offence was committed, and the court has its own responsibility with respect to this assessment; yet the court is not restrained by the advice of behavioural experts.[1401]

1395 Koenraadt & Van Deutekom (2007), p. 121.
1396 Koenraadt & Van Deutekom (2007), p. 121-122.
1397 Van Mulbregt & Beekman, p. 60.
1398 *Costancia v. the Netherlands*, op. cit., §3-22.
1399 *Costancia v. the Netherlands*, op. cit., §30.
1400 *Costancia v. the Netherlands*, op. cit., §31-32.
1401 Hoge Raad, 22-01-2008, ECLI:NL:HR:2008:BC1311.

4.3.3 Verdict

The final element of the criminal justice chain is the execution of sentences and measures imposed by the court or settlements and penal orders issued by or on behalf of the public prosecutor.[1402] At the end of the hearing, the court shall deliberate on the decisions to be taken. The outcome of those deliberations shall be recorded in the judgment; the judgment shall be in writing at the multi-judge court.[1403] By law, the judgment has several requirements. It shall include for as much as possible name and first names, age, place of birth, occupation and place of residence or domicile of the accused, the day of the verdict, as well as the names of the judges by whom the verdict was given.[1404] The verdict shall also include the legal justification. It has two functions: explication function for the offender, prosecution, victim, and the society; and a control function for the higher courts.[1405]

A verdict ("uitspraak", "eindvonnis") is a decision issued by a court at end of the criminal proceedings. Article 348 of the DCCP regulates that the court shall examine whether the charges are admissible and whether there are grounds for suspending the prosecution. In cases where this examination does not lead to dismissal or suspention, the court shall deliberate, on the basis of the offence charged and the examination at the hearing, on that 1) whether it has been proved that the offence was committed by the accused, and if so, 2) which offence the proven conduct constitutes under the law, –and if it is considered that the offence is proved and punishable, the court shall then deliberate on–, 3) whether the offender has the criminal responsibility, and 4) the imposition of punishment or measure determined by law.[1406] Answers to these questions shall be mentioned in the judgement. Sanction types can be found under the substantive criminal law section.

The verdict can be an acquittal, dismissal of all charges (*ontslag van alle rechtsvervolging "ovar"*),[1407] or a conviction to punishment (*straffen*) and/or measures (*maatregelen*). Penalties (principal and additional) and measures are collectively referred to by the umbrella term 'sanctions' (*sancties*).[1408] Punishments and measures are deprivation of liberty (*vrijheidsstraf*), community service (*taakstraf*), judicial fine (*geldboete*), additional sentences (*bijkomende straffen*)[1409], custodial and freedom-restricting measures (*vrijheidsbenemende en vrijheidsbeperkende maatregelen*), measures relating to assets (*measures relating to assets*), conditional sentences (*voorwaardelijke veroordeling*). The most important deprivation of

1402 Openbaar Ministerie, Aanwijzing kader voor tenuitvoerlegging, <https://www.om.nl/onderwerpen/beleidsregels/aanwijzingen/executie/aanwijzing-kader-voor-tenuitvoerlegging-2020a007> accessed 19 March 2024.

1403 Keulen, B., & Knigge, G. (2020). *Strafprocesrecht*. Deventer: Wolters Kluwer, p. 601.

1404 Article 357 of the DCCP.

1405 Keulen & Knigge (2020), p. 601.

1406 According to Article 350 of the DCCP.

1407 Dismissal of all charges verdict is given when the court finds that the accused did commit the offence charges, however the fact or the accused is not punishable due to certain circumstances. In this sense, it is different than acquittal.

1408 Knigge, G., & Wolswijk, H. (2015). *Het materiële strafrecht*. Deventer: Wolters Kluwer, p. 367.

1409 An additional punishment is, for example, the revocation of the driving licence. Openbaar Ministerie, Straffen en maatregelen, *See.* https://www.om.nl/organisatie/openbaar-ministerie/het-werk-van-het-om/straffen-en-maatregelen> accessed 12 July 2024.

liberty punishment (*vrijheidsstraf*) is the prison sentence (*gevangenisstraf*),[1410] and the most important freedom-restricting measure is the TBS-order. As explained under the substantive criminal law subsection, for cases of diminished responsibility, the combination sentence can be issued by the competent court that combines the imprisonment sentence and the TBS-order.

When the court decides on imposing a *suspended/conditional sentence*, it has to make a decision on the type of conditions.[1411] The courts rely on the probation service advice reports extensively. Most of the *suspended/conditional sentences* or freedom-restricting security measures can be declared immediately enforceable, which means that appeals against the sentence do not suspend the execution.[1412]

According to Article 359 of the DCCP, the decision that the offence was committed by the accused must be based on the content of the evidence included in the judgment, containing the facts and circumstances giving reasons. When imposing a custodial sentence or measure, the judgment shall state in particular the reasons which led to the choice of that type of sentence or measure. The judgment shall also indicate, as far as possible, the circumstances that were taken into account when determining the length of the sentence.

For a long time, acquittals were mostly barely justified; courts usually sufficed with a standard justification stating that they did not consider the legal and convincing evidence to be credible.[1413] This practice was partly motivated by the idea that detailed reasoning was not in the interest of the accused.[1414] The idea that society and victims are entitled to have the judge justify why they are acquitting the accused has gained ground, and as a result, acquittals are nowadays motivated more often than before.[1415]

After the judicial authority -court- reaches a sentence, the administrative execution -prosecution, Ministry, directors of institutions, probation services- becomes the authority to execute the verdict.[1416]

SECTION 5: EXECUTION OF VERDICTS IN THREE CRIMINAL JUSTICE SYSTEMS

After explaining substantive criminal law and criminal procedural law aspects of sentencing mentally disordered offenders in three different criminal justice systems, Section 5 focuses on the execution of verdicts. Hereby the terminology used and explained in *Section 1* will be adhered to.

1410 Knigge & Wolswijk (2015), p. 367.
1411 Van der Wolf, Van Marle & Roza (2022), p. 208.
1412 Van der Wolf, Van Marle & Roza (2022), p. 208.
1413 Keulen & Knigge (2020), p. 634.
1414 Keulen & Knigge (2020), p. 634.
1415 Keulen & Knigge (2020), p. 635.
1416 Van der Wolf, Van Marle & Roza (2022), p. 208.

5.1 In Türkiye

The execution law is an autonomous branch of law that regulates the rules of execution of final verdicts by criminal courts; it is, therefore, not a subsection of criminal procedural law.[1417] As it is given above, fundamental rules on the imposition phase are regulated in the Turkish Code of Criminal Procedure ("TCCP"); however, the execution phase is regulated in the Law on Execution of Penalties and Security Measures ("EPSM"); furthermore, general provisions can be found in the Turkish Criminal Code ("TCC"). The independence of the branch was strengthened in 2020, by the amendment made in Article 1 of the Law on Execution Judgeship (*İnfaz Hâkimliği Kanunu)*, which regulates the aim and scope. All decisions regarding the execution phase will now be made by the execution judge, instead of the criminal court that ruled the verdict.

The Turkish criminal law scholars mainly focus on and study substantive criminal law and criminal procedure law. Execution is not a preferred area of study, therefore there is not enough source in detail to cite, apart from court decisions. When it comes to execution of the sentences of mentally disordered offenders, the scale of the sources narrows down to a few articles and theses.[1418] Therefore, this study will examine this important subject in detail.

In the Turkish criminal justice system, the *sanction* refers to the result of the violation, and *violation* is the failure to follow a rule that is an order to act or not to act. Therefore, the sanction is a legal consequence that must follow the violation of the criminal norm.[1419] According to Article 45 of the TCC, there are two types of sanctions: *penalty* and *security measures*; and two types of penalty; imprisonment and judicial fine. *Security measures* are the remedies that supplement the penal system in cases where punishment cannot be applied, or even if it is applied when it is insufficient or when it cannot prevent the commission of new crimes.[1420] When the prosecution is of a penalty nature, the main aim is to reach the factual truth and punish the offender; however, the prosecution of security measures is about rehabilitation and social reintegration.[1421] In other words, *penalties* are intimidating and punitive sanctions established by law and in principle imposed by a court judgement as a last resort, in proportion to the degree of responsibility of the offender, and in response to acts that cause great harm to society;[1422] on the other hand, *security measures* are means of prevention and treatment designed to protect society against the danger of committing new offences.[1423] The most important point where security measures differ from penalties is that they do not require a criminal conviction,

1417 Özbek (2021), p. 29-30.

1418 For instance: a book on criminal execution law consist of 503 pages has only one page on the execution of security measures specific to mentally disordered offenders; *See*. Özbek (2021), p. 435.

1419 Toroslu & Toroslu (2018), p. 36.

1420 Hafızoğulları (1973), p. 233-273.

1421 Bayındır, p. 132.

1422 Nuhoğlu (1997), p. 10; Dilberoğlu, V. (2016). Cezalar ve Güvenlik Tedbirlerinin Amacı ve Niteliği. *Ankara Üniversitesi Hukuk Fakültesi Dergisi, 65*(4), 1517-1544, p. 1521.

1423 Artuk (2008), p. 474.

but rather the existence of an affirmative judgement as to whether the offence has been committed or not.[1424] When this opinion is formed, the measure shall be applied in proportion to the degree of dangerousness of the perpetrator; whereas for penalties, it shall be in line with the gravity of the offence and its damage to public welfare.[1425]

Below, execution of imprisonment and security measures that are applicable to the mentally disordered offenders will be further explained.

5.1.1 Execution of the Imprisonment

As given above, according to Article 45 of the TCC, there are two types of penalties: imprisonment and judicial fine. Imprisonment affects the person's liberty, while the judicial fine is directed against the person's property.[1426]

Article 46 of the TCC regulates the types of imprisonment: a) aggravated life imprisonment, b) life imprisonment, and c) imprisonment for a fixed term. An aggravated life imprisonment requires the prisoner to stay in a cell for one-person in a high-security prison. After the death penalty was abolished in 2002, "aggravated" life imprisonment has been introduced in order to fill the gap. As mentioned earlier in this chapter, the legal position of those sentenced to aggravated life imprisonment differs from the legal position of those sentenced to life imprisonment.

As mentally disordered offenders who are criminally not responsible or has diminished responsibility may receive imprisonment, it requires special attention. As reiterated multiple times before, there are two degrees of effect of having a mental disorder. Article 32 of the TCC states that "*(1) A person lacking the ability to perceive the legal meaning and consequences of the offence or having considerably lost the capacity to control their actions due to having a mental disorder cannot be subject to any punishment. However, security measures are imposed on such individuals*". Therefore, imprisonment cannot be applied to persons who have no criminal responsibility. The second paragraph of Article 32 regulates the diminished responsibility: *(2) Even if not to such an extent as stated in the first paragraph, a person lacking ability to control or direct their actions in respect of the offence committed by them is sentenced to twenty-five years imprisonment instead of aggravated life imprisonment and to twenty years imprisonment instead of life imprisonment. In other cases, up to one sixth of the punishment to be imposed may be abated. The entire or part of the penalty imposed may be applied as a security measure specific to mentally disordered persons, provided that the sentence period remains the same*". Hence, here, the competent court has the discretion to choose imprisonment or security measure.

The distinction rises on the effect of the mental disorder on the abilities of the person. If the person is not able to perceive the legal meaning and consequences of the offence or if they have significantly lost the capacity to control their actions due to having a mental

1424 Dilberoğlu (2016), p. 1543.
1425 Dilberoğlu (2016), p. 1543.
1426 Yenidünya (2006), p. 121.

disorder, then that they cannot be subject to any punishment. Security measures are nonetheless imposed on such individuals. In order to render a verdict on security measures specific to a mentally disordered offender, the competent court must first ascertain that the crime is committed, and it is committed by the mentally disordered person. Therefore, a case must be opened to investigate the crime. If the committal of the crime is not certain, the accused should benefit from the "*in dubio pro reo*" principle and be acquitted. [1427]

The second paragraph regulates the diminished responsibility. If the mental disorder of the person does not affect their abilities to that degree, but still they are unable to control or direct his actions with regard to the offence committed by them, then their imprisonment period shall be abated. However, the judge may, at their discretion, decide on remission or on security measures specific to mentally disordered persons for the entire or part of the penalty, while the sentence period remains the same.[1428] Thus, in cases there is a diminished responsibility, the court has two issues to use the discretion on: to choose for remission and to choose partially or completely security measures. Yet, there is no regulation on which comes first, in cases where the court decides on partial security measure and partial imprisonment. Not having a regulation always causes issues in application in Türkiye, therefore it would be wise to amend the code and clearly state which should come first. As the imprisonment aims to punish the offender, the offender should be in a state of mind to comprehend the meaning and the consequences of the imprisonment. However, security measures aim at treatment and rehabilitation, thus it would make more sense to prioritise the implementation of the security measure, given the fact that this will be applied in a highly secured institution as well. Thus, it serves the purpose of the protecting society, in any case.

Stay of execution will be examined below under the *5.1.3 Stay of Execution Due to Mental Disorder* subsection.

5.1.2 Execution of Security Measures

As given, security measures are remedies that supplement the penal system in cases where punishment cannot be applied, or even if it is applied when it is insufficient or when it cannot prevent the commission of new crimes.[1429] It is, therefore, argued that they are not a consequence of a violation of a criminal rule, which makes the security measures different from the penalties.[1430] Dangerousness of the offender is the main criterion to apply security measures, especially in relation to the commission of prospective crimes.[1431] The dangerousness, as a term, has been used in criminal justice to describe persons who run a high risk to physically, psychologically, or morally harm themselves or others. Thus,

1427 Akbulut (2017), p. 834.

1428 "*It is established by the legal norm that when a person is sentenced to imprisonment and executed as security measures specific to mentally disordered persons, the time period cannot be more than the imprisonment sentence.*"; Yargıtay 6. Ceza Dairesi, 09/04/2014, 22154/6774; Yargıtay 2. Ceza Dairesi, 12/11/2014, 32377/26673.

1429 Hafızoğulları (1973), p. 233-273.

1430 Toroslu & Toroslu (2018), p. 463.

1431 Gödekli (2020), p. 180.

the dangerousness focuses on the future, instead of the past.[1432] Purposes in dealing with dangerous persons are; to protect the society, to provide reprisal for offence, to discourage future offences, to treat mental disorders, to rehabilitate persons, and to compensate victims and their families.[1433] Due to the ubiquity character of security measures, courts and lawyers need to pay more attention to how and why to justify these deprivations of liberty based on dangerousness.[1434]

As it is explained earlier, there is a significant difference between Article 32/1 and 32/2. Persons whose case falls under Article 32/1 cannot be subject to any punishment; security measures *shall* be imposed. If a case falls under the regulation of Article 32/2, the court has the discretion to choose for remission or security measures. According to the second paragraph, the first option is to sentence twenty-five years imprisonment instead of aggravated life imprisonment and to twenty years imprisonment instead of life imprisonment, or in other cases, one-sixth of the punishment to be imposed may be reduced; and the second option is to impose the entire or part of the sentence as a security measure specific to the mentally disordered persons, while the sentence period remains the same. Yet, there is no regulation on which one is going to come first: imprisonment or security measure. As stated under the previous subsection, it would make more sense to prioritise the implementation of the security measure instead of the imprisonment. As the person stays in a highly secured institution while getting treatment and rehabilitation, the purpose of protecting society is secured as well.

For the cases of persons with no responsibility or of persons with diminished responsibility and the court has chosen security measures instead of imprisonment, Article 57/6 should be applied. According to the regulation "*The imprisonment of a person whose ability to control their actions is reduced due to a mental disorder may be applied, partially or entirely, as a security measure specific to mentally disordered persons, by a Court judgment, on the basis of the commission's report issued by the highly secured health institution where the mentally disordered person is sheltered according to the provisions of the paragraphs 1 and 2 of this Article; however, the conviction period shall remain the same.*". Thus, imprisonment may be applied as a security measure, either partially or entirely, the period remaining the same.[1435] This constitutes another important aspect to be discussed. Article 32/2 specifically states that *the sentence period remains the same* when the penalty is going to be applied as a security measure and Article 57/6 reiterates it. Hence, in cases where the competent court alters the imprisonment sentence into a security measure due to diminished responsibility, the period of time that will be spent in the YGAP Hospital shall stay the same as the prison sentence issued by the court.[1436] Thus, mentally disordered offenders with diminished responsibility cannot be released by a medical report stating that the

1432 Petrunik (1994), p. 9.

1433 Petrunik (1994), p. 11.

1434 Slobogin (2003), p. 62.

1435 The discussion is provided under the "*3.1.4 Diminished Capacity as a Partial Excuse*" subsection.

1436 According to Article 32/2 of the TCC: The entire or part of the penalty imposed *may be* applied as a security measure specific to mentally disordered persons, provided that the *sentence period remains the same*.

dangerousness of the person has significantly decreased or no longer exists. The persons who do not have criminal responsibility, however, can be *discharged from the health institution where they are receiving treatment under the court's or judge's decision if the report prepared by the health commission of the institution states that their release carries no risk to the community, or if there is a risk that it is considerably diminished*, according to Article 57/2 of the TCC. This will be discussed more in detail under the *5.1.2.3 Prolongation and Termination of the Measures and Discharge* subsection.

To sum up, the significant difference between the regulations on discharging mentally disordered offenders regulated under Article 32 paragraph 1 and under paragraph 2 can be stated as follows: In the first case, if the dangerousness is diminished, the court may decide on the discharge on the basis of an expert report; however, in the second situation, the offender remains in the health care institution until the fixed period is completed.[1437]

Lastly it shall be noted that the authority for the placement and transfer to a highly secured health institutions is the Public Prosecutor of Execution. According to a judgment of the *Yargıtay*, the competent court shall not rule on security measure in a specific institution; it restricts the execution authority of the Public Prosecution Office.[1438]

5.1.2.1 Security Measures Applicable to Offenders with Drug or Alcohol Addiction

For the cases of alcohol or drug addicts, Article 57/7 reads as follows: *"Persons who have committed a crime while addicted to alcohol or drugs or other stimulants shall be treated in the health institutions rendering therapy in this field. The therapy continues until these persons are rescued from using alcohol or drugs. Upon completion of therapy, they may be discharged from the health institution on the basis of the report to be prepared by the health commission under the court's or judge's decision."*

The ability to perceive should be significantly reduced or the capacity to control one's acts should be considerably lost as a result of being addicted. Only in these cases, no punishment can be imposed and solely security measures can be applied. In other words, solely being an addict does not automatically exempt the imputability of the person.[1439]

5.1.2.2 Types of Facilities

YGAP – 'Highly Secured Health Institution'

Until the current TCC, which is in force since 2005, there was no place mentioned in the Code where the security measures specific to mentally disordered offenders shall be applied. However, in Article 57/1 of the current TCC, the notion of *'highly secured health institution'*[1440] is mentioned. According to the Article: *"Mentally disordered persons that are*

1437 Artuk et al. (2013), p. 512.

1438 Yargıtay 11. Ceza Dairesi, 26/12/2005, 11115/14353.

1439 Akbulut (2017), p. 836.

1440 The naming of the *"highly secured health institutions"* is a one-to-one translation of the terminology used in the TCC.

subject to security measures under the court's decision are sheltered and are taken under protection for treatment purposes in the highly secured health institutions.". Thus, it can be said that a mentally disordered offender cannot be taken to a highly secured health institution without treatment purposes.

In Türkiye, there are a lot of mental healthcare institutions. However, as mentioned multiple times above, until 2018, there was no highly secured health institution established, even though it was mandatory to have it according to the TCC. The very first highly secured health institution was opened with the name Yüksek Güvenlikli Adli Psikiyatri Hastanesi ("YGAP", Highly Secured Forensic Psychiatry) inside the Adana City Hospital on 23 January 2018. Later, other YGAPs were established in Kayseri, Elazığ, Eskişehir, Bursa, and Ankara, respectively.[1441] Currently, Adana, Bursa, Eskişehir, and Elazığ YGAP Hospitals have a capacity of 100 beds, Kayseri 72 and Ankara 80 beds.[1442]

It should be mentioned that the meaning of the notion of *'highly secured health institution'* is not discussed.[1443] However it was stated that the physical conditions of the county lag behind the regulation.[1444] In practice, on the other hand, this regulation was sent to the Directorate General for Penal Affairs of the Ministry of Justice to receive the official opinion by a court of cassation in 2007. According to the opinion,[1445] filling the gap in law could be achieved by comparatively applying the provisions regarding penitentiary institutions. Hence, the institutions where mentally disordered offenders are detained must have both physical and electronic security equipment, as well as internal and external security personnel, to prevent them from escaping and harming others and staff. Since there was not yet a highly secured health institution established at the time the opinion was written, it was notified to all Public Prosecution Offices that the execution of the security measure specific to the mentally disordered offenders can be fulfilled by receiving treatment and protection in one of the special departments of mental health and nervous diseases hospitals (*ruh sağlığı ve sinir hastalıkları hastaneleri*) until one is established. Currently, there are six YGAP Hospitals in active service, thus this concern has been solved in time.

As stated above, according to the Yargıtay, the competent Court cannot determine the place for security measure, in the decision. The competent authority to decide on the institution is the Public Prosecutor of Execution. The Court shall only decide on the protection and treatment, thus ruling in a way that restricts the authority of the Public Prosecutor of Execution is not seen to be legitimate.[1446]

1441 The opening dates are 01 July 2018 in Kayseri, 18 August 2018 in Elazığ, 21 February 2019 in Eskişehir, 11 November 2019 in Bursa, and 22 March 2021 in Ankara. *See.* ANNEX 9- Opening Dates and Bed Capacities of YGAP Hospitals.

1442 *See.* ANNEX 9- Opening Dates and Bed Capacities of YGAP Hospitals.

1443 Ulutürk (2014), p. 151.

1444 Yıldız, M. E. (2020). *Ceza Hukukunda Akıl Hastalığının Kusur Yeteneğine Etkisi ve Akıl Hastalarına Özgü Güvenlik Tedbirleri.* Ankara: Adalet Yayınevi, p. 555.

1445 *See.* Yıldız (2020), p. 555-556.

1446 Yargıtay 11. Ceza Dairesi, 26/12/2005, 11115/14353.

It shall be lastly noted that due to the fact that the YGAP Hospitals are new institutions, currently there is no separate institutions for high, medium, or low security: YGAP Hospitals are high security institutions by default. When the system is on track and the operation runs properly, the next step should be to have separate institutions for different degrees of security.

5.1.2.3 Prolongation and Termination of the Measures and Discharge

The distinction between paragraphs 1 and 2 of Article 32 is elucidated above. It is also crucial to emphasise the distinction between the procedures outlined in Article 32, paragraphs 1 and 2, for the discharge of mentally disordered offenders.

In cases that fall under paragraph 1, the period to be spent in a mental health institution is not determined by the court in sentencing.[1447] Upon the significant reduction or complete disappearance of the patient's dangerousness, indicated by a medical report from the institution, the execution judge may rule on the discharge. According to Article 4/6 of the Law on the Execution Judge, the competent execution judge is the judicial authority responsible for approving the discharge request of the treating institution. However, the absence of a regulatory framework governing the execution of security measures results in the absence of automatic or periodic reviews by the institution or renewal assessments by the judicial authority. Consequently, the judicial review is contingent upon the initiative of the hospital. In contrast, for cases that fall under Article 32/2, the offender remains in the healthcare institution until the set sentence period is completed. In this instance, the competent criminal court is the authority to determine the period.

According to Article 57/2 of the TCC; *"A mentally disordered person on whom security precautions have been imposed, may be discharged from the health institution where they are receiving treatment under the court's or judge's decision if the report prepared by the health commission of the institution states that their release carries no risk to the community, or if there is a risk that it is considerably diminished"*.

In order for the security measure for the mentally disordered person to be terminated, it is necessary that the individual in question no longer presents a danger to society, or that the level of danger they pose has been significantly reduced. Therefore, the law does not 'await' the *healing* of the mental disorder. The only prerequisite is the current level of the dangerousness. Consequently, when the medical report issued by the health institution indicated that the dangerousness is diminished to an extent that justifies release, the execution judge may order the release. This is because it demonstrates that the security measure is no longer necessary.

As underlined before, when the case falls under Article 32/2, due to diminished imputability, the judge has the discretion to choose for remission or the security measure. In this respect it should be noted that in cases where the competent court alters the

1447 Yargıtay 3. Ceza Dairesi, 19/09/2018, 5035/13163.

imprisonment sentence into a security measure due to diminished responsibility, the period of time that will be spent in the YGAP Hospital is the same as the prison sentence issued by the court.[1448] Thus, mentally disordered offenders with diminished responsibility cannot be released by a medical report stating that the dangerousness of the person has significantly decreased or no longer exists.

The significant difference between the regulations on discharging mentally disordered offenders regulated under Article 32 paragraph 1 and under paragraph 2 can be summarised as follows: In the first case, if the dangerousness is diminished, the court may decide on the discharge on the basis of an expert report; however, in the second situation, the offender remains in the health care institution until the fixed period is completed.[1449]

However, this regulation and its application violate equality between patients since the person with a diminished imputability shall remain in the institution even if they are healed beforehand; or they shall leave the institution when their fixed period is over, but not because they are healed or do not pose a risk to the community, or the risk has been significantly diminished.

It is also pointed out that this situation is against the very logic of sentencing and therefore against science and the law.[1450] Criticism was also expressed against giving the court the discretion to choose between prison or institution, without regulating in which cases institution shall be chosen.[1451] It should be, however, considered appropriate, since not every circumstance can be covered in a regulation. The court shall at its discretion choose what is the best for the offender.

For the cases of alcohol or drug addicts, Article 57/7 reads as follows: *"Persons who have committed a crime while addicted to alcohol or drugs or other stimulants shall be treated in the health institutions rendering therapy in this field. The therapy continues until these persons are rescued from using alcohol or drugs. Upon completion of therapy, they may be discharged from the health institution on the basis of the report to be prepared by the health commission under the court's or judge's decision."*.

The ability to perceive should be significantly reduced or the capacity to control the acts should be considerably lost as a result of being addicted. Only in these cases, no punishment can be given, just security precautions can be applied. In other words, solely being an addict does not automatically remove one's imputability.[1452] According to the regulation, the implementation of the security precaution should continue until the addiction is cured.

1448 According to Article 32/2 of the TCC: The entire or part of the penalty imposed *may be* applied as a security measure specific to mentally disordered persons, provided that the *sentence period remains the same*.

1449 Artuk et al. (2013), p. 512.

1450 *See*. Ünver, Y. (2012). Akıl Hastalarına Özgü Güvenlik Tedbirleri. *IV. Sağlık Hukuku Kurultayı (23-24 Eylül 2011)*, Ankara: Ankara Barosu Yayını, 136-152, p. 140.

1451 Ünver (2012), p. 137.

1452 Akbulut (2017), p. 836.

5.1.2.4 Aftercare and Medical Follow-up

As mentioned above, while discharging the person from the health institution according to Article 57/2 of the TCC, a report is required. According to Article 57/3; "*In the report of the health commission, information is provided as to the degree of the mental disorder and the nature of the offence and whether the person is to be kept under the medical control and follow-up or not and, if so, for how long this should be continued and at what intervals*". Therefore, in the release report, there should be information provided whether the control and follow-up are necessary for the released person. This decision can only be made by the doctors, no court judgment or judicial review is needed. However, this report cannot be vague or indefinite, cannot include general or abstract statements. It should define the time and the intervals in a certain manner.

The procedure of the medical control and follow-up is regulated in Article 57/4; "*Medical control and follow-up is provided through the transfer of these persons by the Public Prosecutor's Office to the health institution equipped with necessary technical instruments and specialists; according to the period of time and at intervals indicated in the report.*". A person whose dangerousness has been reduced, and who has, therefore, been conditionally released must undergo a medical examination in a health institution in order to be reassessed as to whether their dangerousness has increased. The mentioned transfer shall be done via the decision of the Public Prosecution Office.

Article 57/5 reads: "*In medical control and follow-up, when it is understood that the dangerousness of the person to society due to mental disorder has increased, the imposition of security measures for protection and treatment purposes may be re-adjudicated based on the report prepared. In this case, the procedure regulated in this Article starting from paragraph 1 onwards shall be repeated.*". Thus, the person should be in the control and follow-up stage for the re-adjudication. After this decision has been made, it is always possible that the dangerousness of the person will decrease again, which can lead to release.

It should be sadly noted that all publications; theses, books, and articles on sentencing mentally disordered offenders focus on the security measures and the concept of dangerousness. By focusing on the substantive criminal law, sentencing law is greatly neglected. Having a brand-new concept of *'highly secured health institutions'* does not help the situation. Many administrative regulations and bylaws are still pending. Besides Article 57 of the TCC, there is no other regulation on control and follow-up. Bylaws must be adopted and published, as soon as possible, to regulate the procedures for re-adjudication, medical control, follow-up and discharge. Services are currently carried out in accordance with the relevant articles of the TCC and bilateral protocols between the Ministry of Justice and the Ministry of Health.[1453]

1453 Karaağaç, H., & Çalık Var, E. (2021). Adli Psikiyatrik Alanda Sosyal Hizmet Uzmanlarının Rol ve İşlevleri. *Tıbbi Sosyal Hizmet Dergisi, 18*, 125-141, p. 138.

5.1.3 Stay of Execution Due to Mental Disorder

Article 16/1 of the EPSM reads: The execution of the sentence of the convict who developed a mental disorder shall be adjourned, and the convict shall be taken under protection and treatment in the health institution specified in Article 57 of the TCC, until they recover. The time spent in the health institution is considered to have been spent in prison.

The decision to suspend the execution of a convict suffering from mental disorder shall be made by the Public Prosecutor's Office of where the execution is carried out, after a report is issued by the Forensic Medicine Institution, or by the medical boards of full-fledged hospitals designated by the Ministry of Justice.[1454]

The decision on deferral shall be notified to the convicted person and their legal representative, specifying the obligations to which they shall be subject. The health condition of the convict shall be examined by the Public Prosecutor's Office which issued the decision of suspension or, upon its request, by the Public Prosecutor's Office in the place where they are or where they are treated, according to the periods specified in the medical report, or, if there is no period of time, in one-year period. According to the results of the examination, the Public Prosecutor's Office, which issued the deferral decision, shall decide whether the deferral shall continue or not.[1455]

5.2 In England and Wales

The results of a being mentally disordered offender in England and Wales are explained under *Section 3* on the substantive criminal law. It is important to state, again, the differences between *"disposals"* and *"sentencing"*. *Disposals* are the Court's options where a person is found to be unfit or found to meet the lack of capacity test, and the facts are proved; and *sentencing* is for the cases where the defendant is fit to plead and has the capacity to stand trial and either pleads guilty or is found guilty.[1456]

If the insanity defence is accepted, in magistrates' courts the defendant is acquitted. In the Crown Court, a special verdict is pronounced that they are not guilty by reason of insanity. If the individual is found not to be legally responsible for the offending, on grounds of mental disability, then there can be no punishment, only a health-based disposal. If a person is suffering from diminished responsibility by reason of *abnormality of mind*, they may be convicted of a more minor offence than charged; thus, in cases where a person is charged with murder, they may be convicted of manslaughter.

Below, the execution of different verdicts will be examined.

1454 Article 16/3 of the EPSM.
1455 Article 16/3 of the EPSM.
1456 Justice, p. 87.

5.2.1 Execution of Disposals and Sentencing

According to the policy of the Ministry of Justice, mentally disordered offenders *"should receive specialist mental health treatment rather than being punished, wherever that can safely be achieved"*.[1457] As long as the public safety is not compromised, this policy incentivises courts to exchange punishment for treatment; and to proactively adopt a role in diversion.

The court has four disposals available. These are: a) a hospital order, b) a guardianship order, c) a hospital order with a restriction order; and d) a "hybrid" order.[1458] The regulations established in CrimPR 28.8 and 28.9 apply when the court is contemplating a hospital order. In accordance with these regulations, the court officer is obliged to provide the hospital with a number of documents without undue delay. These include a record of the court's order, information about the defendant's mental condition, details about the defendant's other circumstances, the circumstances of the offence, and any other information or documents that may prove useful in treating or dealing with the defendant.

5.2.1.1 Disposals for Fitness to Plead and Lack of Capacity

Pursuant to s.5 of the Criminal Procedure (Insanity) Act 1964, in the Crown Court the available disposals for an unfit individual or individual lacking capacity found to have done the act or made the omission, are: a) hospital order (with or without a restriction order), b) guardianship order (supervision order), c) absolute discharge. According to s.5(3A) of the Criminal Procedure (Insanity) Act 1964, where the court has power to make an order for the absolute discharge, having regard to the circumstances the court may do so, if it considers that such an order would be most appropriate in all the circumstances of the case.

5.2.1.1.1 Hospital Order

A hospital order is an order with or without a restriction order by which an individual is detained in a secure hospital. The court must be satisfied on the basis of evidence that:

i). the individual suffers from a mental disorder of a nature or degree which makes medical treatment appropriate;
ii). treatment is available; and
iii). in the circumstances, such treatment is the *"most suitable method"* of disposing of the case.

Orders under the MHA 1983 require specific medical criteria to be met. A hospital order may be made by a Crown Court under s.37 MHA 1983 in respect of an offender convicted of an imprisonable offence. To impose such an order, the court must be satisfied, on the written or oral evidence of two registered medical practitioners, that the offender *"is*

1457 Ministry of Justice. (2008, March). *Mental Health Act 2007: Guidance for the courts on remand and sentencing powers for mentally disordered offenders.* Retrieved January 2023, from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/614497/guidance-for-the-courts-mha.pdf.

1458 Archbold. (2022). *Criminal Pleading Evidence and Practice*, Sweet & Maxwell, London, s. 5A-1379.

suffering from mental disorder… of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and appropriate medical treatment is available for him.".[1459] For such an order to be imposed, the court must be satisfied therefore, one of two medical practitioners, at least one must be a psychiatrist.[1460]

5.2.1.1.2 Mandatory restriction orders

Restriction orders are mandatory where the defendant has been found to have done the act of murder, where they suffer from a treatable mental disorder suitable for a hospital order. This means that they can be detained without a limit of time, regardless of whether they represent a serious risk to the public. However, another defendant in the same position but who does not have a treatable mental disorder will receive at most a supervision order.[1461]

5.2.1.1.3 Guardianship Order (Supervision Order)

Under the Criminal Procedure (Insanity) Act 1964 Schedule 1A, *"supervision order"* means an order requiring the person in respect of whom it is made "*the supervised person*" to be supervised by a social worker, an officer of a local probation board, or an officer of a provider of probation services (*"the supervising officer"*) for a period specified in the order of not more than two years. In brief, a guardianship order (supervision order) is a community order with or without a treatment requirement, for a period not exceeding two years.

A supervision order may require the supervised person to submit to treatment by or under the direction of a registered medical practitioner, during the whole of that period or such part of it as may be specified in the order. The court may only issue a supervision order if it is satisfied that, having regard to all the circumstances of the case, the issuance of such an order is the most appropriate means of dealing with the accused or the appellant. In addition, the court shall not issue a supervision order unless it is satisfied that the supervising officer to be named in the order is prepared to undertake the supervision; and that arrangements have been made for the treatment to be indicated in the order.[1462]

Before issuing the supervision order, the court must explain to the supervised person in plain language the effects of the order and the review power of the magistrates' court. A person subject to a supervision order must maintain contact with their supervising officer and must inform that supervisor if their addresses change. The order may require the person to submit to treatment under the direction of a registered medical practitioner for all or part of the prescribed period – known as a "treatment requirement". The treatment may also take place as a non-resident or as a resident patient.[1463]

1459 MHA 1983 s.37.2(a).

1460 James, D. (2010). Diversion of mentally disordered people from the criminal justice system in England. *International Journal of Law and Psychiatry, 33*, 241–248, p. 242.

1461 Justice, p. 91-92.

1462 Criminal Procedure (Insanity) Act 1964 Schedule 1A, Part 1-2.

1463 Criminal Procedure (Insanity) Act 1964 Schedule 1A, Part 4-5-6.

According to s.37(6) of the MHA 1983, a guardianship order can only be made if the court is satisfied that the local social services authority or any other person is willing to receive the offender onto their guardianship. Where a guardianship order is made, the court cannot pass a sentence of imprisonment, impose a fine, make a community order, or a youth rehabilitation order.

5.2.1.2 Sentencing

Where a person with a mental disorder is found to fit to stand trial, cannot successfully invoke a complete lack of capacity (insanity) as a defence and is, thus, convicted, the court imposes an appropriate sentence for the conduct.

The execution of a sentence in England, depends on the sentence involved; [1464]

i). If a person is sentenced to prison, they will be placed immediately, even if they appeal. Prison authorities are in charge with the allocations and categorisation of prisoners. Forensic psychologists play a significant role in assessing prisoners, especially in terms of risk assessment and implementing treatment programs.

ii). If a person is sentenced to a community order with a mental health requirement, they will be supervised by an offender manager within the National Probation Service. The treatment is provided under the direction of a doctor or psychologist.

iii). A person detained in the mental health system following a sentence may be under a hospital order (s.37 MHA 1983) with or without an additional restriction order, or under a hospital and limitation direction (s.37 MHA 1983). Under s.47 and s.49 MHA 1983, sentenced prisoners who require hospital treatment during their sentence can be transferred and held with restrictions on their discharge.

According to s.38 of the MHA, persons who are convicted but are waiting for their sentences may be detained in hospital for treatment. S.38 order is therefore called *"an interim hospital order"*. This detention can be up to 12 weeks, this can be extended, however the total stay cannot exceed 12 months. During this interim stay, the hospital may apply coercive medicine without consent for 3 months.

5.2.1.2.1 Hospital Orders

As explained under the substantive criminal law section, the MHA 1983 regulates interim hospital order under s.38, hospital order under s. 37, and hospital order with restriction order under s.37/41. Execution of these hospital orders will be explained under this subsection. Execution of the hybrid order regulated under s.45A will be explained under the following subsection. Afterwards, execution of transfers from the prison to hospital regulated under s. 47/49 will be explained.

A hospital order is an order with or without a restriction order by which an individual is detained in a secure hospital. A hospital order may be made by a Crown Court under s.37 MHA 1983 when the court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender *"is suffering from mental disorder... of a nature or*

1464 *See.* Grounds & Padfield (2022), p. 41-42.

degree which makes it appropriate for him to be detained in a hospital for medical treatment and appropriate medical treatment is available for him".[1465] A hospital order can only be made if the hospital specified is willing to admit the offender.[1466]

According to s.40 of the MHA 1983, on conviction, a hospital order shall be sufficient authority to convey the patient to the hospital specified in the order within a period of 28 days, and for the managers of the hospital to admit them at any time within that period and thereafter detain the person. Case law underlines that the effect of an order for the admission and detention of an offender in a hospital is limited to the period of 28 days from the date of the making of the order.[1467] When the offender cannot be transferred from court to hospital immediately, s.37(4) shall be ordered rapidly for the detention *"place of safety"*.[1468] Such orders are temporary measures, any detention for longer than 12 weeks requires a renewal by the court, on written or oral evidence of the responsible clinician.

Where a hospital order is made by the Crown Court, if it appears to be necessary to the court for the public protection from serious harm, the court may subject special restrictions, which is known as "a restriction order".[1469] During the restriction period, the responsible clinician shall examine the person subject to the restriction order and report to the Secretary of State, at intervals not exceeding one year. Each report shall contain such information as the Secretary of State may require.[1470]

Section 47 of the Crime (Sentences) Act 1997 empowers the court to specify a hospital unit as the place where the person subject to the order will be liable to be detained. However, s.47(2)(a) regulates that this power shall not apply unless the court also makes a hospital order with restriction under section 41 of the MHA 1983.

Regulations regarding prolongation and termination of the orders will be provided under subsection *5.2.1.4 Prolongation and Termination of the Orders and Discharge* below.

5.2.1.2.2 Hybrid Order: Imprisonment with Hospital Direction and Limitation Direction (s.45A)

To briefly summarise what was given under the substantive criminal law section: s.45A of the MHA 1983 regulates *hybrid orders* that allows for convicted mentally disordered offenders to receive a sentence of imprisonment, and at the same time transferred to a hospital for psychiatric treatment. The *"hybrid order"* is regulated within the legislation itself as a *"hospital direction"*. According to s.45A(3), the court may give both *hospital direction* and *limitation direction*. The latter is a direction for offenders to be subject to the special restrictions set out in s.41 of the MHA 1983. The effect of hospital and limitation directions regulated in s.45B. According to it, a hospital direction shall have effect as a transfer direction, and a *limitation direction* shall have effect as a *restriction direction*.

1465 MHA 1983 s.37.2(a).

1466 *Parker (unreported, 21 March 1975; Jones, unreported, 19 November 1976* (cited by Archbold. *Criminal Pleading Evidence and Practice*, §5A-1403.)

1467 MHA 1983 s.37(4), and *R (DB) v Nottingham Healthcare NHS Trust [2008] EWCA Civ 1354.*

1468 MHA 1983 s.37(4).

1469 MHA 1983, s.41(1).

1470 MHA 1983, s.41(6).

Hospital and limitation directions regulated in s.45A of the MHA 1983 also includes the power to specify the hospital unit, as stated in the C(S)A 1997 s.47. An offender subject to a hospital and limitation direction will be treated for the purpose of their detention in hospital; as if they had been sentenced to imprisonment and had been transferred to the hospital by order of the Secretary of State under s.47. The court must also be satisfied that the arrangements for admission have been made and that it will take place within the period of 28 days beginning with the day of giving of such directions.

A restricted patient who enters into the hospital system through the court (s. 37 or s.45A) usually begins their confinement in one of the three high-security hospitals (Broadmoor, Rampton or Ashworth) or in a medium-security hospital.[1471] It is possible to initially admit patients to lower-security hospitals, when they have already spent some time on remand in a hospital under s.48 and were being treated before the order or direction was imposed.

Persons under s.45A hospital order and limitation direction may serve their entire sentence in hospital, as long as they continue to meet the criteria for detention under the MHA.[1472] During this stay in hospital, persons are managed as if they had been transferred from prison under s.47. When the sentence release day arrives, the limitation direction ends; however, the hospital direction continues until the patient is discharged.[1473] In other words, as long as a patient continues to meet the MHA criteria for detention in hospital, they may continue to be detained in hospital, beyond the date on which they would have been released from their sentence, yet at that time they will no longer be subject to the limitations.

The release date for these patients shall be determined by the Parole Board. For hospital orders, generally the First Tier Tribunal (Mental Health) decides when the offender should be released when an order is made under s.37/41, however, for s.45A orders, the release regime differs depending on whether an offender is serving a determinate or indeterminate sentence of imprisonment.[1474] If the person was sentenced to an indeterminate imprisonment or indeterminate public protection sentence before being subjected to a s.45A order, the limitation direction remains in effect for the duration of their entire detention period in hospital, even if their the minimum term or tariff period past.[1475] The Parole Board cannot consider any discharge until the expiry date of the tariff. Furthermore, the case cannot be referred to the Parole Board while the patient is being detained under the MHA, until the Tribunal has decided that the patient would be eligible for discharge without the limitation direction.[1476]

1471 HM Prison and Probation Service (2020), p. 8.
1472 HM Prison and Probation Service (2020), p. 5.
1473 HM Prison and Probation Service (2020), p. 5.
1474 *R v Edwards; Knapper; Payne; Langley [2018] EWCA Crim 595, the Court of Appeal (Criminal Division); [2018] 2 Cr. App. R. (S) 17.*
1475 HM Prison and Probation Service (2020), p. 5.
1476 HM Prison and Probation Service (2020), p. 5.

The court in *Edwards*[1477] defined the effect of s.45A orders. When the health condition of a s.45A patient improves and their responsible clinician or the First Tier Tribunal (Mental Health) notifies the Secretary of State and states that the patient no longer is in need of treatment in hospital under MHA 1983, the Secretary of State will, in principle, transfer the patient to prison under s.50(1) to serve the rest of their sentence. Upon arrival at the prison, the s.45A order will no longer be in effect and the offender will therefore be released from prison in the standard manner; this decision will be taken by the Parole Board, not the Mental Health Review Tribunal system. Nonetheless, when the patient has already passed the expiry of minimum term and is ready for conditional release, the Secretary of State would notify the Tribunal of the discharge. In practice, however, the Secretary of State would refer the offender to the Parole Board.[1478]

If the prisoner's mental health deteriorates while they are serving their prison sentence, they may be transferred back to hospital, however this time under s.47/49.[1479]

5.2.1.2.3 Transfers From Prison (s. 47/49)

S.47 of the MHA 1983 offers a possibility for prisoners to be transferred from prison to hospital for treatment by the Secretary of State. For the transfer, the Secretary of State must be satisfied by expert reports gathered from at least two registered medical practitioners. As any hospital order regulated under the MHA, this report should include that this person has a mental disorder and this mental disorder is of a nature or degree to make the detention appropriate; and that there is an appropriate treatment available.

Should the situation necessitate a restriction order, the Secretary of State may also order it according to s.49. These cases are, therefore, called "s.47/49 order". With the restriction order, coerced treatment without consent becomes possible. In cases where the mental health of the person gets better, the person returns to prison. However, if the person is still under the hospital order when their prison sentence ends and still requires to be under treatment, then the person should be moved to another section called "*notional s.37*". The term refers to a patient who is *notionally* treated under s.37.[1480]

5.2.1.3 Types of Facilities

In England and Wales, there is no strict separation between forensic and non-forensic hospitals. Psychiatric hospitals treat both forensic and non-forensic patients, and forensic patients can be treated in the same wards as regular patients.[1481]

Important to mention that all forensic mental health institutions are part of the National Health Service, and there are no forensic hospitals in the prison system.[1482] However there are prison mental health units. Within the United Kingdom all treatments

1477 *R v Edwards [2018] EWCA Crim 595; [2018] 4 W.L.R. 64.*
1478 Archbold. *Criminal Pleading Evidence and Practice*, §5A-1422.
1479 HM Prison and Probation Service (2020), p. 5.
1480 Notional s.37: < https://www.mentalhealthlaw.co.uk/Notional_s37> accessed 07 May 2024.
1481 European Commission (2005), p. 122.
1482 European Commission (2005), p. 122.

regulated for mentally disordered offenders are entirely free of charge and paid for by the National Health Service (NHS), not only in the National Health Service hospitals, but also in private hospitals.[1483]

In the UK, forensic secure services are provided at high, medium and low levels of security.[1484] In England and Wales, there are three hight secure hospitals: Broadmoor, Rampton and Ashworth.[1485] The Broadmoor Hospital was opened in 1863, and the others are in the 20th century, with an overall capacity for about 750 patients.[1486] There are about 60 medium secure forensic units in England and Wales with a total of about 3500 beds.[1487] Lacking the exact numbers of the low secure forensic units, it is estimated that the numbers are roughly similar to those of the medium secure units.[1488]

5.2.1.4 Prolongation and Termination of the Orders and Discharge

According to the MHA 1983 Part V s.65, there is a Mental Health Review Tribunal for Wales and First-tier Tribunal ("FTT") for England. Tribunals have a role when a patient is admitted to a hospital for assessment or treatment, is received into guardianship, or is transferred from guardianship to a hospital.[1489]

The maximum period for orders and their extensions differs. S.35 order cannot last longer than 28 days at a time, or for more than 12 weeks in all. The court may terminate the remand at any time if it is appropriate.[1490] S.37 order can be up to 6 months and then can be renewed for a further 6 months; afterwards, extensions can be made for 1 year at a time. For hospital orders made under s.37/41, the person can be released by the FTT,[1491] or by the responsible clinician with the permission from the Ministry of Justice. S.38 interim hospital order can last for a maximum initial period of 12 weeks, and can be extended 28 days at a time up to a maximum of 12 months.[1492] S.47 applies when a person is transferred from prison to hospital and the order can be up to 6 months. It can be renewed for 6 months, and then 1 year at a time.

Under the hospital order, release is dependent on the responsible authority being satisfied that the defendant no longer presents any danger which arises from their medical

1483 European Commission (2005), p. 128.
1484 Secure hospital care, Information for carers: < https://institutemh.org.uk/images/research/7778_Secure_Hospital_Care_Brochure_A5_V5_Online.pdf> accessed 26 November 2023, p. 5.
1485 <https://www.mentalhealthlaw.co.uk/High_secure_hospital> accessed 26 November 2023.
1486 Secure hospital care, Information for carers: < https://institutemh.org.uk/images/research/7778_Secure_Hospital_Care_Brochure_A5_V5_Online.pdf> accessed 26 November 2023, p. 5.
1487 *Ibid.*
1488 *Ibid.*, p. 6.
1489 S.66 of the MHA 1983.
1490 S.35(7) of the MHA 1983.
1491 *R v Edwards; Knapper; Payne; Langley [2018] EWCA Crim 595, the Court of Appeal (Criminal Division); [2018] 2 Cr. App. R. (S) 17.*
1492 S.38(5) of the MHA 1983.

condition.[1493] However, the release procedure highly differs immensely from those on somewhat indeterminate sentences. When a person is sentenced to life or an extended sentence can only be released on the direction of the Parole Board, and the Parole Board depends on the reports submitted on *risks* and *needs*. The release of sentenced prisoners is also up to the Parole Board. However, this does not apply to the release of patients detained under hospital orders (s.37); they may be given leave and discharged at any time by the responsible clinician.

The hospital orders with a restriction (s. 37/41) are indefinite orders that do not have any time limitation, since 2007, thus there is no requirement for renewals.[1494] The responsible clinician decides on discharge and the Ministry of Justice approves this discharge decision.[1495] The discharge may be conditional or absolute discharge. When a detainee is discharged from s.37 or s.37/41 there will be aftercare according to s.117. In case of an absolute discharge, there are no conditions or aftercare involved, unless the patient desires so.

When there is a transfer from prison to hospital (s.47/49 order), in cases where the mental health of the person improves, the person returns to prison. However, if the person is still under the hospital order when their prison sentence ends and still requires to be under treatment, then the person should be moved to another section called "*notional s.37*". [1496] The term refers to a patient who is *notionally* treated under s.37.

Under a hybrid order (s.45A) the release is depending on the restrictions. Before restrictions cease, routes to be followed for discharge are similar as for s.47/49, and after restrictions cease, as for *notional s.37*. Hence the release regime of s.45A order is different between serving the prison sentence and the hospital order.

S.70 of the MHA regulates that a restricted patient under hospital order (s.37/41), transfer order (s.47/49), or hybrid order (s.45A) has the right to apply to the FTT once in the second six-month period of detention after the date of the order and once in any subsequent period of 12 months thereafter. S.71(2) of the MHA requires the Secretary of State to refer the cases detained restricted patients whose case has not been considered by the FTT within the last three years, and this referral does not affect the application rights of the detained person.

As stated earlier, the FTT is an independent panel that can discharge a patient where application is made under the MHA.[1497] The FTT hearings usually take place at the hospital and the tribunal will decide on discharge or remaining in hospital.[1498]

The tribunal shall direct the discharge of a patient, if it is not satisfied;

1493 *Attorney General's Reference (No 54 of 2011) [2011] EWCA Crim 2276; [2012] 1 Cr. App. R. (S) 106,* §17.

1494 MHA 1983, s.41(3)(a).

1495 The Justice Secretary can discharge under s42(2), either absolutely or conditionally.

1496 Notional s.37: < https://www.mentalhealthlaw.co.uk/Notional_s37 https://www.mentalhealthlaw.co.uk/Notional_s37> accessed 07 May 2024.

1497 MHA 1983, s.72.

1498 https://www.rethink.org/advice-and-information/rights-restrictions/mental-health-laws/section-37-of-the-mental-health-act-hospital-orders/

i). *that he is then suffering from mental disorder or from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or*

ii). *that it is necessary for the health of safety of the patient or for the protection of other persons that he should receive such treatment; or*

iia). *that appropriate medical treatment is available for him; or*

iii). *in the case of an application by virtue of paragraph (g) of section 66(1) above, that the patient, if released, would be likely to act in a manner dangerous to other persons or to himself.*

The information provided is summarised in the table below.

TABLE 3: Prolongation and Termination of the Orders and Discharge

Order	s.37/41	s. 45A, s. 47/49
Duration	• without limit of time, may be detained indefinitely (but with regular reviews)	• When there is a transfer from prison to hospital, in cases where the mental health of the person improves, the person shall return to prison. However, if the person is still under the hospital order when their prison sentence ends and still requires to be under treatment, then the person should be moved to another section called *"notional s.37"*.
Types of Discharge	• Conditional discharge • Absolute discharge	• Conditional discharge • Absolute discharge
Discharge Authority	• By the Secretary of State (s.42) • By the FTT (s.73) • By the Responsible Clinician with the consent of Secretary of State (s.23)	• By the Parole Board (when the transferred prisoner's eventual release is a matter for the Parole Board) • By the Secretary of State (Tribunal does not have the power to order the patient's discharge, instead, it must notify the Secretary of State.)

5.2.1.5 Aftercare and Medical Follow-up

After discharge, it is possible to receive free of charge aftercare services under s.117 of the MHA 1983. In England, most persons discharged from section will have their care planned under a system called the Care Planning Approach; in Wales, everyone discharged from section should have a Care Treatment Plan. Discharge decision does not mean immediate leave, the patient may stay in hospital as a voluntary patient if the medical team agrees.

S.117 of the MHA 1983 regulates that the Integrated Care Boards and local social services are obliged to provide aftercare services to discharged patients who were detained in hospital for treatment under s.3, 37, 45A, 47 or 48 of the Mental Health Act 1983. This duty continues as long as the patient is in need of such services.

The aim of aftercare is firstly to support the person to be able to live in the community, secondly to enable them to fully recover from their mental disorder, and thirdly to prevent their mental health from deteriorating to the extent that they need to be hospitalised

again.[1499] The person's needs should be assessed, the care and support should be planned, and the aftercare should be reviewed by scheduled and unscheduled meetings.[1500]

5.2.2 Stay of Execution Due to Mental Disorder

In cases where the defendant is found fit to stand trial, there is still an option to suspend the sentence due to mental disorder. If deprivation of liberty or detention is unavoidable, the impact of the disability or disorder on the offender may be relevant to the length of the sentence and whether a sentence can be suspended. The rationale behind it is that an offender's disability or disorder may result in a custodial sentence weighing more heavily on them or because deprivation of liberty may aggravate the effects of a disability or disorder.[1501] In line with the principles that are applicable to cases of physical health problems; impairments or disorders can only be taken into account to a limited extent in terms of the effects of deprivation of liberty.

Similar to stay of execution possibilities, suspended sentences exist in England and Wales. A *suspended Sentence Order* is a custodial sentence option in which the offender does not have to go to prison under the condition that they commit no further offences and meets all the requirements imposed. In cases where the given custodial sentence is between 14 days and 2 years,[1502] the judge may choose to suspend the sentence for up to 2 years. Section 287 of the Sentencing Code lists 15 requirements that could be attached to a suspended sentence order, and the related ones are mental health treatment requirement, rehabilitation activity requirement, drug rehabilitation requirement, alcohol treatment requirement, and alcohol abstinence and monitoring requirement. Failure to comply with these court-ordered requirements may trigger the Court to activate the original sentence.[1503]

5.3 In the Netherlands

As it is provided in short above, the Dutch adult sanctioning system has a distinction between penalties and measures. Penalties are designed to sanction the offender for their wrongdoing. They are primarily punitive and aim to provide retribution, deterrence, and,

1499 Section 117: After-Care under the Mental Health Act 1983/2007, *see.* <https://worcestershire.moderngov.co.uk/documents/s38991/5b.%20Mental%20Health%20Aftercare%20Appendix%202%20s117%20Joint%20SOP%20Worcester.pdf> accessed 19 March 2024, p. 5.

1500 For more information, *see. Ibid.*, p. 5-11.

1501 Sentencing Guideline by the Sentencing Council on *Sentencing offenders with mental disorders, developmental disorders, or neurological impairments*, retrieved from https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/ accessed 19 March 2024.

1502 In the Magistrates' court, it is six months. *See.* Sentencing Council, *Suspended sentences* < https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/suspended-sentences/ > accessed 13 January 2025.

1503 Curzon, E., & Roberts, J. (2021, September). *The Suspended Sentence Order In England and Wales.* Retrieved from Sentencing Academy: https://www.sentencingacademy.org.uk/wp-content/uploads/2023/08/The-Suspended-Sentence-Order-in-England-and-Wales-6.pdf, p. 6.

to some extent, rehabilitation. Security measures, on the other hand, are more preventive and protective. They aim at ensuring public safety, by providing treatment and rehabilitation to the offender. They do not, therefore, need to be proportionate to the crime committed.[1504]

Determining the height of the penalty depends on the proportionality principle related to the seriousness of the offence and blameworthiness of the offender; whereas measures are not dependent on blame.[1505] This bifurcated system separates the penalties and measures significantly in theory, however in practice the distinction is more subtle due to the recent developments.[1506] This is partly due to the compromises between classical and modern theory, of which the TBS order itself is an example.[1507] The *Hoge Raad* allowed that the gravity of punishment is not tailored only to the degree of guilt any longer, but can also be personalised to the degree of dangerousness.[1508] Thus, dangerousness, either or not based on a mental disorder may be used as an aggravating factor; while diminished responsibility due to mental disorder may be used as a mitigating factor.[1509]

The facts of the case, level of the offender's criminal liability, the type of the mental disorder and the dangerousness of the person affect the verdict. Not every mentally disordered offender will end up in the TBS centres. Therefore, it shall be underlined here, again, that the persons with mental disorders who are in the Dutch criminal justice system may receive a prison sentence, TBS-order, or both. Hence, first of all the execution of imprisonment sentence on mentally disordered offenders will be examined, and later the execution of the TBS-order will be explained.

5.3.1 Execution of Custodial Sentences

5.3.1.1 Execution of Imprisonment

As in every criminal justice system, due to the developments in society, politics, and in the justice system; the purpose and interpretation of the execution of imprisonment are almost continuously subject to change.[1510] Prisons in the Netherlands are intended for the admission of persons for whom a legal ground exists for deprivation of liberty. As was stated earlier, the offenders with mental disorders may also receive a prison sentence, therefore imprisonment in general will be explained under this subsection.

1504 Tonry, M., & Bijleveld, C. (2007). Crime, Criminal Justice, and Criminology in the Netherlands, *Crime and Justice* 35, 1-30, p. 10.

1505 *See*. Tak (2003), p. 71-79.

1506 Struijk, S., & Mevis, P. (2016, December). Legal Constraints on the Indeterminate Control of 'Dangerous' Sex Offenders in the Community: The Dutch Perspective. *Erasmus Law Review, 9*(2), 95-108, p. 97.

1507 Van der Wolf, Van Marle & Roza (2022), p. 203.

1508 SC 10-09-1957, *NJ* 1958, 5; see. Van der Wolf & Herzog-Evans (2014), p. 198-199.

1509 Van der Wolf, Van Marle & Roza (2022), p. 208.

1510 Struijk, S. (2020). Wetsvoorstel Straffen en beschermen: wordt het kind met het badwater weggegooid? *Sancties, 2*, 56-65, p. 56.

The Minister[1511] designates the institutions or wards where persons may be accommodated according to their genders and ages.[1512] Institutions or wards thereof shall be distinguished and designated according to the degree of security as follows: a. moderately secured (*beperkt beveiligd*), b. normally secured (*normaal beveiligd*), c. enhanced secured (*uitgebreid beveiligd*), d. high security (*extra beveiligd*); and the Minister determines the degree of security for each institution or ward.[1513] Institutions or wards thereof may also be designated for the accommodation of detainees in need of special care, which may be related to the age, personality, physical or mental state of health of the detainees, or the medical treatment of the mental state of health.[1514]

Offenders with mental disorders can be fully responsible for a crime and thus be sentenced to a custodial sentence.[1515] Hence, the Dutch Penitentiary Institutions ("PI", *Penitentiaire Inrichting*) also accommodate inmates with psychiatric problems. Penitentiary Psychiatric Centres ("PPC") in the Netherlands provide comprehensive care for detained patients.[1516] In order to enhance the quality of care for detainees with mental disorders, the Judicial Institutions Department ("DJI", *Dienst Justitiële Inrichtingen*) has four PPCs.[1517]

As shortly explained under the subsection *2.3.1.3 Execution Phase*, the Penitentiary Principles Act ("Pbw", *Penitentiaire beginselenwet*) regulates that the enforcement of a custodial sentence or measure shall, as far as possible and depending on the behaviour of the person concerned, be made to serve the preparation of return to society.[1518] When granting freedom to detainees, the safety of society and the interests of victims and surviving relatives are also taken into account.

The average length of stay in a PPC is four months, when further treatment is no longer necessary, the detainee is transferred to a penitentiary institution.[1519] As a part of DJI, PPCs have the social mission to contribute the safety of society on the one hand by executing custodial sentences and custodial security measures; on the other hand, by guiding and treating detainees with serious psychological problems and psychiatric disorders to

1511 In the framework of the Pbw, *the Minister* refers the Minister for Legal Protection (Minister voor Rechtsbescherming), according to Article 1/e.

1512 Articles 11 and 12 of the Pbw.

1513 Article 13 of the Pbw.

1514 Article 14 of the Pbw.

1515 Gorter, J.B. & Wesselius, J. (2020). Psychiatrische zorg in het gevangeniswezen. In F. Bakker, & H. van Marle, *De psychiatrie in het Nederlandse recht* (pp. 165-178). Deventer: Wolters Kluwer, p. 165.

1516 *See*. Kwaliteitsstatuut Penitentiair Psychiatrisch Centrum, <https://www.dji.nl/justitiabelen/documenten/publicaties/2020/10/27/kwaliteitsstatuut-penitentiair-psychiatrisch-centrum> accessed 17 January 2024, p. 4.

1517 *See*. <https://www.prison-insider.com/en/articles/pays-bas-l-enfermement-a-la-folie> accessed 05 September 2023.

1518 Article 2/2 of the Pbw.

1519 Kwaliteitsstatuut Penitentiair Psychiatrisch Centrum, <https://www.dji.nl/justitiabelen/documenten/publicaties/2020/10/27/kwaliteitsstatuut-penitentiair-psychiatrisch-centrum> accessed 17 January 2024, p. 13.

reduce the risk of delinquent behaviour.[1520] All staff at the PPCs, ensure a safe living and treatment climate. The guidance and treatment provided thereof are tailor-made, individual in nature, group-oriented where possible, supportive and autonomy-promoting.[1521] The ultimate goal of the treatment is that the detainees return to society in a safe and responsible manner and that the necessary care is continued.[1522]

In addition to care facilities within the prison system, there are legal possibilities to transfer detainees with mental disorders to general mental health care (GGZ), such as Article 15/5 and Article 43/3 of the Pbw. With these possibilities, mentally disordered offenders may be transferred to a psychiatric hospital to receive treatment. However, the person shall only stay in that hospital as long as the nursing is required.[1523] When this requirement is no longer met, the person shall be transferred back to the penitentiary. However, to this date, the government has shown little evidence of using or wanting to use such tools.[1524]

In the well-known Michael P. case, a 28-year-old man was sentenced to 28 years of imprisonment and TBS with compulsory care for rape, depriving freedom, and murder, committed during a stay in a forensic clinic to which he was transferred while serving a prison sentence.[1525] After the Michael P. case, however, the possibilities for transfer from a PI have been subject to stricter rules.[1526] For instance, an Article 15/5 Pbw placement is only possible in a Forensic Psychiatric Clinic (*Forensisch psychiatrische kliniek* "FPK") or Forensic Psychiatric Centre (*Forensisch Psychiatrisch Centrum* "FPC"), without freedoms outside the clinic and only with a recent relevant risk assessment and offence analysis. An Article 43/3 Pbw placement is only possible in the last year of detention; also with an Article 43/3, a recent relevant risk assessment and offence analysis is mandatory.[1527] Chapter 6 of the Wvggz regulates the internal legal position after transfer from prison or placement in mental health on the basis of any other forensic title. As mentioned earlier, also transfer from prison to a TBS-clinic is regulated, but similarly hardly used.

As stated above, during the sentencing stage, if the court decides on imposing a *suspended/ conditional sentence*, it has to make a decision on the type of conditions.[1528] The special conditions are filled in according to the case facts. If the person does not comply with the condition(s), then detention may follow, namely the execution of the conditional part of the sentence.[1529]

1520 *Ibid,* p. 5.
1521 *Ibid,* p. 6.
1522 *Ibid,* p. 13.
1523 Lindhout, T., Van der Wolf, M., & Van Marle, H. (2011). De Fokkensregeling is dood; leve de Fokkensregeling? *Sancties*, 347-357, p. 350.
1524 *See.* Lindhout et al. (2011), p. 350.
1525 Rechtbank Midden-Nederland, 17-07-2018, ECLI:NL:RBMNE:2018:3330.
1526 Gorter & Wesselius (2020), p. 165.
1527 Gorter & Wesselius (2020), p. 165.
1528 Van der Wolf, Van Marle & Roza (2022), p. 208.
1529 Prinsen (2021), p. 44.

5.3.1.2 Execution of the ISD-Order

As explained under the subsection *3.3.5.4 ISD-Order*, it is a measure regulated under Article 38m of the DCC that focuses on habitual offenders who cause serious social nuisance due to their frequent and persistent recidivism. The ISD-measure is applied as an *ultimum remedium*, as it is a form of detention.[1530] These offenders tend to have co-morbid problems, related to a drug or alcohol addiction and a personality disorder. Yet, as these habitual offenders may suffer from a mental disorder, the ISD-measure is not primarily aimed at mentally disordered offenders, and the presence of a disorder is not a legal requirement to impose the ISD-order. The Pbw regulates another differentiation within the prison system; institutions for the aforementioned habitual offenders, which are reserved for persons who are convicted to the ISD-order.[1531] This ISD-order may be imposed on adult offenders who have been irrevocably sentenced at least three times within the past five years.[1532] Like the TBS-order, this is regarded as a security measure and forensic care, theoretically different from a penalty because it is not intended as retribution.[1533]

The ISD-measure allows the court to detain persons for up to two years in a special institution designated for habitual offenders, which includes incapacitation and treatment.[1534] The ISD-order is executed within the penitentiary system, and it makes the placement of the ISD-order different from the TBS-order.[1535] The main difference between the ISD-order and the TBS-order is the dangerousness of the offender; it is higher for the TBS-order than the ISD-order, not due to the high risk of recidivism but because of the severity of the expected offence.

During their stay, DJI uses a person-centred approach to prepare the habitual offender for a positive return to society. The DJI works to gradually getting the habitual offender used to the freedoms after the ISD measure and ensures a proper transfer to the municipality. This is because the municipality coordinates the aftercare, or resocialisation process, at the end of the measure (or after a prison sentence). This integrated approach should ultimately result in the habitual offender no longer relapsing (as much) into criminal behaviour to protect society.[1536]

1530 Struijk, S. (2015). Punishing Repeat Offenders in the Netherlands: Balancing between Incapacitation and Treatment. *Behavioral Sciences & the Law* 1, 148-166, p. 164.

1531 Van der Wolf, M., & Mevis, P.A.M. (2022). Defendants and detainees with psychiatric disturbances in the criminal process and in the prison system in the Netherlands. In: P.H.P.H.M.C van Kempen, & M.J.M. Krabbe (Eds.), *Mental Health and Criminal Justice: International and Domestic Perspectives on Defendants and Detainees with Mental Illness* (pp. 359-386). The Hague: Eleven, p. 371.

1532 Article 38m of the DCC.

1533 Van der Wolf & Mevis (2022), p. 382. *See.* Van der Wolf & Herzog-Evans (2014), p. 193-234.

1534 Struijk (2015), p. 148, 164. *"Even when the custodial measure ISD is interpreted in the long term as behavioral treatment within detention, it is still to be considered a last resort rather than a cure-all."*, Struijk (2015), p. 165.

1535 Van der Wolf & Mevis (2022), p. 381.

1536 DJI, Straffen en maatregelen: <https://www.dji.nl/justitiabelen/forensische-zorg/straffen-en-maatregelen> accessed 05 May 2024.

5.3.2 Execution of Hospital Orders

In the Netherlands, offenders with mental disorders may receive forensic care in three systems.: a) the penitentiary system which is governed by the Pbw, b) the TBS system which is governed by the BVT, and c) the (forensic) mental health system which is governed by civil (mental) health laws.[1537] Care in the penitentiary system has been explained above. Below the other two systems will be explained. All three systems have their own special facilities. These facilities will be mentioned under the *5.3.2.3 Types of Facilities* subsection below.

5.3.2.1 Execution of the TBS-order

The regulations related to the execution of detention of forensic mental health patients in high security TBS-centres are called *Beginselenwet verpleging ter beschikking gestelden* ("BVT") and the Dutch Forensic Care Act is called *Wet Forensische Zorg* ("Wfz"). The BVT regulates the detainee's internal legal position and the Wfz regulates the organisational matters, such as placement and financing. The Wfz regulates all kinds of forensic care, not just for mentally disordered offenders. Forensic care means care provided to an offender with a psychiatric condition or limitation, including addiction, or a mental disability, and which, whether or not as a condition, forms part of a sentence or a measure, or of the execution of a sentence or measure, or as a condition forms part of a dismissal, a suspension of pre-trial detention, or a pardon under the Pardon Act (*Gratiewet*), or forms part of an order imposing a behavioural measure.

Under the Wfz, these 'forensic titles' include decisions by a judge, public prosecutor or the Minister that includes the provision of mental health care or addiction care.[1538] For the purpose of such a title, the placement, the provision of care and its declaration, an *assessment* shall be drawn up.[1539] *Assessment (Indicatiestelling)* is a reasoned, dated and signed expert opinion, drawn up on the basis of an examination of the suspect, convict or detainee, in which the intensity of forensic care requirements and the necessary level of security are included.[1540] Forensic detainees shall be provided with the forensic care to which they are designated by their *title*.[1541] The placement of forensic patients with a care provider shall be made by or on behalf of the Minister, on the basis of a dated decision. After placement of the forensic patient, the institution is obliged to admit the forensic patient, to provide forensic care, and security.[1542] In cases where the healthcare provider fails to comply with the obligation to admit and provide forensic care, the Minister may impose an administrative fine.[1543]

All these placement requirements also apply to the TBS-order. After placement of a TBS-patient, according to Article 17 of the BVT, treatment shall be provided on behalf of

1537 Van der Wolf & Mevis (2022), p. 372.
1538 Article 1.1 of the Wfz.
1539 Article 5.1 of the Wfz.
1540 Article 1.1 of the Wfz.
1541 Article 2.2 of the Wfz.
1542 Article 6.1 of the Wfz.
1543 Article 6.1 of the Wfz.

the institution. In cases where a part of the treatment cannot be provided by the institution, the director of the institution shall ensure that it can be provided by a suitably qualified third party. The director of the institution shall ensure that treatment takes place in accordance with the nursing and treatment plan.

For a long time, the costs of the TBS system were unevenly distributed to divide the costs of treatment and security: 80% came from the budget of the Ministry of Health and 20% from that of the Ministry of Justice.[1544] In 1990's, the population in the TBS centers started rising and in 2008 the TBS-population reached 2.100 which is the peak and in that year, the new financial system was introduced. The Ministry of Justice and Security became the one to pay for all forensic care, even if provided in general mental health facilities. Due to the decreasing financial status, with shortage of staff, currently, the academia is suggesting shifting a part of the payment obligations to the Ministry of Health again.[1545]

Due to adding more security requirements in execution of the TBS-orders, offenders began refusing to undergo forensic assessment, mainly on the advice of their lawyers, which led to the population dropping to 1.300 in 2018.[1546] While the TBS-population decreased in these years, the population in less structure facilities and outpatients have increased since then.[1547]

Under the previous subsection, *Michael P.* case was briefly mentioned.[1548] At the end of his prison sentence, after his reintegration program, he was placed in a FPA with leave liberties, and during one of these leaves he raped, kidnapped, and killed a student. His first charge which ended up with imprisonment was also because of violent rape of two young girls, among other offences; and thus, he was deemed vert dangerous by the district court. However, both judges did not apply a TBS-order, also because he did not cooperate with the forensic evaluation and no mental disorder which may lead to a TBS-order could be established.[1549] After this case, amendments on legislations were made to reduce the possibility of avoiding TBS for the offenders who refuses the forensic evaluation. More leeway is also provided to share file information between prison and mental health facilities.[1550] Not necessarily because of these changes, but probably more because of the raised awareness of risks, the TBS-population is rising again due to what is called the "*Michael P. effect*".[1551]

1544 Van der Wolf & Mevis (2022), p. 373.
1545 Van der Wolf & Mevis (2022), p. 376.
1546 Van der Wolf & Mevis (2022), p. 373.
1547 Van der Wolf & Mevis (2022), p. 374.
1548 Rechtbank Midden-Nederland, 17-07-2018, ECLI:NL:RBMNE:2018:3330.
1549 For the analysis of the case, *see.* Van der Wolf, M., & Mevis, P.A.M. (2018). Beschouwingen over weigeren en beveiligen n.a.v. de zaak Michael P. Rechtspraakrubriek, *Delikt en Delinkwent*, 4, 321-366.
1550 Van der Wolf & Mevis (2022), p. 375.
1551 Van der Wolf & Mevis (2022), p. 375.

As provided under the substantive criminal law section, when the clinic finds that a patient continues to be a danger to society despite intensive treatment, the patient may be transferred by the Minister to a *long stay* facility. Here, the intensive treatment for the disorder no longer takes place, and the focus shifts to necessary security and psychological and medical care. Since the *long stay* does not aim at resocialisation within the foreseeable future, the person does not qualify for accompanied leave unless the person only needs a low security level.[1552]

The *long stay* system might be problematic from the ECHR perspective; hence it will be discussed under *Chapter 4*.

5.3.2.2 Execution of the Civil Care Referral (Article 2.3 Wfz)

Article 2.3 Wfz provides the criminal court with the opportunity of a civil care referral. Therefore, the requirements of the civil mental health law have to be fulfilled. The Compulsory Mental Health Care Act ("Wvggz", *Wet verplichte geestelijke gezondheidszorg*) provides these regulations on coercive care, as well as the Wzd.[1553] According to Article 2:1, compulsory care can only be considered as a measure of last resort, in case there are no possibilities for voluntary care anymore; and in order to prevent compulsory care as much as possible, the care provider and the medical director offer sufficient possibilities for voluntary care. When preparing, issuing, implementing, executing, amending, and terminating the care authorization of the compulsory care, the principles of proportionality, subsidiarity, effectiveness and safety of are taken into account.[1554] Furthermore, the conditions necessary to encourage participation of the person concerned in social life shall be taken into account as well.[1555]

Compulsory care may be provided to: a) avert a crisis situation, b) avert serious harm (*ernstig nadeel*),[1556] c) stabilise the mental health of the individual concerned, d) restore the mental health of the individual concerned in such a way that they regain their autonomy as far as possible, or e) stabilise or restore the physical health of the individual concerned

1552 DJI, Straffen en maatregelen: <https://www.dji.nl/justitiabelen/forensische-zorg/straffen-en-maatregelen> accessed 05 May 2024.

1553 For relevant regulations, *see*. ANNEX 7- Relevant Articles of the Dutch Compulsory Mental Health Care Act.

1554 Paragraph 3 of Article 2:1 of the Wvggz.

1555 Paragraph 4 of Article 2:1 of the Wvggz.

1556 According to paragraph 2 of Article 1:1 of the Wvggz, "serious harm" means the existence of or significant risk of:
a. danger to life, serious physical injury, serious psychological, material, immaterial or financial damage, serious neglect or social breakdown, seriously disturbed development for or of the person concerned or another person,
b. threat to the safety of the person concerned whether or not due to him becoming under the influence of another;
c. the situation that the person concerned provokes aggression from others through hindering behaviour;
d. the situation that the general safety of persons or goods is endangered.

in the event that their behaviour as a result of their mental disorder leads to serious harm for it.[1557]

The types of compulsory care to be authorized consist of: a) administering fluids, food and medication, as well as performing medical checks or other medical actions and therapeutic measures, to treat a mental disorder, or because of that disorder, to treat a somatic condition; b) restricting the freedom of movement; c) confining; d) exercising supervision over the individual concerned; e) examining clothing or body; f) searching the housing or accommodation area for behaviour-influencing substances and dangerous objects; g) checking for the presence of behaviour-influencing substances; h) placing restrictions on the freedom to organise one's own life that result in the person concerned having to do or refrain from doing something, including the use of means of communication; i) restricting the right to receive visitors; j) admitting to accommodation; k) depriving the individual concerned of their freedom by transferring them to a place suitable for temporary residence.[1558] When issuing a civil care referral, the criminal court has to specifically authorize the types of care required. In a way the internal legal position is therefore part of the care authorization.

According to Article 2:1 of the Wvggz, while applying the coercive care, the wishes and preferences of the individual concerned must be recorded and honoured, unless the person concerned is not capable of a reasonable appreciation of his interests in this respect, or there are risks. The court authorises the care.[1559] However, there is no appeal against the decision on granting the authorisation for care.[1560] The public prosecutor shall proceed with the implementation of the care authorisation without delay, but no later than two weeks after its issue by the court.[1561]

5.3.2.3 Types of Facilities

As stated in the previous subsection, there are three different systems in which forensic care can be administrated: a) the penitentiary system that is governed by the Pbw, b) the TBS system that is governed by the BVT, and c) the (forensic) mental health system which is governed by civil (mental) health laws.[1562] All three systems have their own special facilities. The penitentiary system has Penitentiary Psychiatric Centres ("PPC"), the TBS-system consists of Forensic Psychiatric Centres (Forensisch Psychiatrisch Centrum "FPC"), and the forensic mental health system has Forensic Psychiatric Clinics (Forensisch psychiatrische kliniek "FPK"), and Forensic Psychiatric Departments in psychiatric hospitals ("FPA").[1563]

As stated before, the Dutch Penitentiary Institutions ("PI", *Penitentiaire Inrichting*) also accommodate inmates with psychiatric problems. Penitentiary Psychiatric Centres ("PPC")

1557 Article 3:4 of the Wvggz.
1558 Article 3:2 of the Wvggz.
1559 Article 6:1 of the Wvggz.
1560 Article 6:3 of the Wvggz.
1561 Article 8:1 of the Wvggz.
1562 Van der Wolf & Mevis (2022), p. 372.
1563 Van der Wolf & Mevis (2022), p. 372.

in the Netherlands provide comprehensive care for detained patients.[1564] In order to enhance the quality of care for the detainees with mental disorders, the Judicial Institutions Department ("DJI", *Dienst Justitiële Inrichtingen*) has four PPCs. PPCs are located in four Penitentiary Institutions ("PI", *Penitentiaire Inrichting*): PI Haaglanden, PI Vught, Justitieel Centrum Zaanstad, and PI Zwolle.[1565]

As it is explained earlier, a TBS-order is a security measure of *'entrustment'* (*Terbeschikkingstelling*) for mentally disordered persons executed in high-security forensic mental health facilities, mainly FPC's and FPK's.[1566] There are currently seven FPC's in the country.[1567] The Centre for Transcultural Psychiatry, in FPC Veldzicht is an important centre that treats foreign TBS patients, next to regular TBS patients and TBS patients who need intensive care.[1568] There are 10 places for regular patients, 40 for foreign nationals, and 15 for intensive care.[1569] Treatment of foreign nationals aims at reducing their chances of committing another crime, and when justified, return to the country of origin takes place.[1570]

The care provided under the TBS-order has different stages. In the *transmural leave* phase, detainees may be transferred under the responsibility of the FPC to less secure facilities, such as a forensic addiction clinic, a forensic psychiatric ward (FPA), a long-care facility, or a forensic Regional Institution for Protected and Supported Living (RIBW).[1571] In cases where the security needs are not adequately reduced, patients may be transferred to another treatment clinic or ultimately transferred to the Long-Term Forensic Psychiatric Care (*Langdurige Forensisch Psychiatrische Zorg*), formerly known as long stay.[1572] Long-term forensic psychiatric care provides a long-term highly secured stay with less pressure for treatment and rehabilitation.

In between TBS-clinics and long stay care, there are also alternative *long-care* facilities. At such a facility, treatment and supervision is provided less intensive, while maintaining the necessary risk management.[1573]

1564 *See.* Kwaliteitsstatuut Penitentiair Psychiatrisch Centrum, <https://www.dji.nl/justitiabelen/documenten/publicaties/2020/10/27/kwaliteitsstatuut-penitentiair-psychiatrisch-centrum> accessed 17 January 2024, p. 4.

1565 *Ibid,* p. 6.

1566 Van der Wolf & Mevis (2022), p. 359.

1567 *See.* < https://tbsnederland.nl/klinieken/> accessed 17 January 2024.

1568 *See.* <https://www.ctpveldzicht.nl/voor-wie/tbs-patienten-reguliere-tbs-vreemdelingen-tbs-en-tbs-intensievezorg> accessed 17 January 2024.

1569 *Ibid.*

1570 *See.* <https://www.ctpveldzicht.nl/voor-wie/tbs-patienten-reguliere-tbs-vreemdelingen-tbs-en-tbs-intensievezorg/afdeling> accessed 17 January 2024.

1571 RSJ (2020), p. 6.

1572 RSJ (2020), p. 7.

1573 RSJ (2020), p. 24.

5.3.2.4 Prolongation and Termination of the Measures and Discharge

As explained in *Section 3* on the substantive criminal law, there are two types of TBS-order: TBS-order with compulsory care (*Tbs met dwangverpleging*, Article 37b) and TBS-order with conditions (*Tbs met voorwaarden*, Article 38). The conditional TBS-order is the non-custodial form of TBS, where the offender is obliged to comply with certain conditions. The total term of the conditional TBS-order cannot exceed 9 years.[1574] A TBS-order with compulsory care cannot exceed a period of 4 years, unless this order has been imposed for a serious offence against or endangering the physical integrity of one or more persons. The TBS-order with compulsory care always terminates on probation, hence the offender must comply with agreements with the probation service, after the measure for at least one year. Article 38j states that in the case of conditional termination of the compulsory treatment, the entrustment order may be extended for a period of one year or two years at each time. Therefore, the probational termination of TBS has no maximum term.[1575]

The TBS-order with compulsory care is aimed at motivating the patient to participate in the treatment plan of the hospital,[1576] and is imposed in a specialised high security forensic psychiatry hospital (FPC or FPK). This TBS-measure is for 2 years, and after 2 years, the TBS-measure can be extended by the court with 1 or 2 years, each time.[1577] When deciding on extension, the court is advised by the forensic clinic and/or the probation service, and sometimes by independent experts. After 4 years, 2 independent experts must advise on a possible extension. In practice, however, the measure can last for life.[1578] Especially due to having the indeterminate duration and treatment, TBS-order was increasingly considered the *most invasive criminal sanction* possible.[1579] A detained person only returns to society when the judge is of the opinion that the risk of recidivism has been reduced to an acceptable level and the safety of others or the general safety of persons or property no longer demands it. When the patient is placed in a long stay facility by the Minister, the long stay status is also assessed every two years, with independent evaluators advising on the matter. A multidisciplinary advisory committee exists for placement on long-term wards. The placement and continued placement require independent multi-disciplinary forensic assessment, however at the end, the Minister decides on it.[1580] Appeal to this decision is possible to the Council for the Administration of Criminal Justice and Protection of Juveniles.[1581]

To summarise the maximum duration of the TBS-orders, it can be said that the term of the detention under TBS-order is for 2 years, according to Article 38d of the DCC, and it

1574 A variety of deprivation-of-freedom conditions may be attached to conditionality, including inpatient admission. The measure can last up to nine years. *See*. Article 38e/2 of the DCC.

1575 *See*. <https://www.rijksoverheid.nl/onderwerpen/tbs-en-overige-forensische-zorg/tbs/soorten-tbs> accessed 04 May 2024.

1576 De Ruiter, p. 271.

1577 Article 38d of the DCC.

1578 RSJ (2020), p. 6.

1579 Van der Wolf & Herzog-Evans (2014), p. 202.

1580 Van der Wolf, Van Marle & Roza (2022), p. 209.

1581 Van der Wolf, Van Marle & Roza (2022), p. 209.

can be extendable for a period of either 1 or 2 years at a time. However, there are two exemptions to this rule: Article 38e or Article 38j. Article 38e/1 regulates that a TBS-order with compulsory care cannot exceed a period of 4 years, unless this order has been imposed for a serious offence against or endangering the physical integrity of one or more persons. Article 38e/2 regulates that, in conditional TBS-order cases, the total term cannot exceed 9 years. According to 38e/3, if the total duration of the placement is not limited in time, the period of the placement may be extended each time the safety of others or the general safety of persons requires such extension.[1582] Lastly, Article 38j states that in the case of conditional termination of the compulsory care, the TBS-order may be extended for a period of 1 year or 2 years each time.

The DCCP also has a regulation regarding foreigners detained in the TBS clinics. According to Article 6:2:18, the Minister may terminate the TBS-order with order for coerced care in respect of a foreign national who does not have lawful residence in the Netherlands within the meaning of Article 8 of the Foreigners Act 2000 (*Vreemdelingenwet*). Application of this regulation may only be made in respect of a foreign national for whom a suitable provision has been arranged by the Minister in the country of origin, aimed at, at least reducing the disorder and the related risk of recidivism, and who has actually been deported from the Netherlands. The termination will be subject to the condition that the foreign national leaves the Netherlands and does not return to the Netherlands.

The ISD-order was also mentioned in *Section 3* on the substantive criminal law, Article 38n of the DCC regulates that the ISD can be imposed for a maximum of 2 years. The court may, ex officio, at the request of the public prosecutor, or at the request of the accused or their counsel, at or after the imposition of the measure, decide on an interim assessment of the necessity of continuing the implementation of the measure. Article 6:2:20 of the DCCP regulates that The Minister may also terminate the order for habitual offenders (*stelselmatige daders*) at any time.

Placement, transfer, and relocation of forensic titles in general are regulated under Articles 6.1 to 6.9 of the Wfz. According to the regulations, after placement of the forensic patient, the care provider is obliged to provide the indicated care and security. The placement shall include: a. the requirements of the protection of society against the dangerousness of the forensic patient for the safety of others than the forensic patient or the general safety of persons or property; b. the requirements of the provision of forensic care to the forensic patient given the nature of the mental disorder or intellectual disability diagnosed; c. the forensic care needs and security level as included in the indication. In connection with the requirements referred to in a., the Minister of Security and Justice may set conditions at the time of placement or transfer, with which provision of forensic care to the forensic patient must comply. The Minister may grant an authorization to the head of the institution to terminate the treatment and discharge the forensic patient from the institution, if:

1582 Article 38e/3 of the DCC.

a). the working period of the forensic title has ended;
b). a forensic patient has not been coerced and he has requested termination of admission;
c). the termination of treatment and discharge relate to persons who have been discharged and on whom the judge has imposed a condition pursuant to Article 38, paragraph 1, of the Criminal Code, persons who have been discharged and on whom the judge has imposed a condition pursuant to Article 14c, Article 38g and Article 38p of the Criminal Code and one of the following circumstances occurs:
   1° the mental disorder or mental disability of the forensic patient has diminished to such an extent that, also taking into account the safety of others than the forensic patient or the general safety of persons or property, it is justified to allow them to return to society;
   2° the continuation of the forensic patient's stay in the institution poses a danger to the maintenance of order or safety in the institution or the treatment of other patients and placement elsewhere is provided for;
   3° the interests of the forensic patient dictate that their treatment be continued elsewhere and placement elsewhere is provided for;
   4° the treatment of the forensic patient shows insufficient results and placement elsewhere is provided for.

If the interests of the safety of others or the general safety of persons or property so require, the Minister may determine that a forensic patient be temporarily placed for a period not exceeding seven weeks in an institution other than the institution in which the forensic patient has been placed, in order to ascertain whether a transfer is necessary for safety reasons or when different treatment is necessary. If the temporary placement does not result in the transfer of the forensic patient to another institution, they shall return to the institution where they were placed after the expiration of the period not exceeding seven weeks. The Minister may, if this is necessary, extend the observation period by a maximum of four weeks.

The civil care referral by the criminal court (Article 2.3 Wfz) is made for a maximum of 6 months, after which it can be prolonged by a civil court. At any time before the maximum period, the head clinician can take the initiative to terminate the admission, but in referrals made by the criminal court, needs the approval of the Minister of Justice and Security.

5.3.2.5 Aftercare and Medical Follow-up

The TBS-system has developed a system of gradual return to society. Additional liberties are granted in phases, such as *accompanied leave*, *unaccompanied leave*, and *'transmural' leave* and all phases have to be warranted by the Minister.[1583] An independent multidisciplinary advisory committee assesses the application for leave, and advices the Minister on either or not to grant such a warrant.[1584] As mentioned, the TBS—order with compulsory care, always ends with at least one year of conditional termination and supervision. In theory,

1583 Van der Wolf, Van Marle & Roza (2022), p. 209.
1584 Van der Wolf, Van Marle & Roza (2022), p. 209.

an imposed behaviour influencing and freedom restricting measure may be executed after either a prison sentence or a TBS-order. Aftercare after custodial sentences is the responsibility of municipalities.

During the execution, the decisions on the deprivation of liberty, for instance the prolongation or (conditional) termination of the TBS-order or changing conditional sentences to unconditional sentences, shall be determined by the judiciary authority.[1585] The Penitentiary Chamber, formed of three judicial members and two behavioural scientific members, is the appeal mechanism for many of these decisions.

5.3.3 Stay of Execution Due to Mental Disorder

According to Article 6:2:3 of the DCCP, if the convict, after the final judgment but before the enforcement of a final verdict or judgment or sentencing to deprivation of liberty, has begun to suffer from mental disorder, the court may order suspension of enforcement. The suspension shall be ordered either at the request of the public prosecutor or at the request of the convict's legal counsel. After the rehabilitation of the convict, at the request of the public prosecutor, the order of suspension shall be revoked by the same court.

SECTION 6: CONCLUSION OF THE COMPARISON AND INTEGRAL ANALYSIS

In general, each criminal justice system has its own various regulations and issues. It is clear that each compared system has its own unique system to protect both society and mentally disordered offenders by imposing security measures (hospital orders) or disposals to offer treatment and care to the offender, instead of or next to a punitive sentence. In this section, the aim is to summarise and underline key differences in order to provide an integral analysis. This section will follow the main structure of Chapter 3; thus, general information on three criminal justice systems, substantive criminal law, criminal procedure law and execution law will be summarised and discussed, respectively.

As it is well put: *"Comparing criminal justice systems is like shooting rabbits on a fair: you always shoot too high or too low, you always hit another rabbit than the one you were aiming at, and if you hit one in the belly, you are under the illusion that you shot the whole rabbit"*.[1586] Hence, this section will try and attempt to hit the correct rabbit, even though the quote suggests that being entirely correct is somewhat pretentious. Below, the analysis will be provided on the concepts of criminal responsibility, diminished responsibility, dangerousness, the role of the expert, weight of the expert evidence, and the dilemma between punishment and security measures. It must be reminded that this study does not deal with the criminological aspects of these concepts and intends to abstain from

1585 Van der Wolf, Van Marle & Roza (2022), p. 209.

1586 Van Koppen, P., & Penrod, S.D. (2003). Adversarial or inquisitorial: Comparing systems. In: P.J. van Koppen & S.D. Penrod (red.), *Adversarial versus inquisitorial justice: Psychological perspectives on criminal justice systems* (pp. 1-20). New York: Plenum, p. 2.

discussions in academia, as stated in the introduction chapter. Considerations and reflections are offered only when deemed necessary to highlight differences between the criminal justice systems.

6.1 General Introductory Information

Out of the comparison of *general introductory information* associated with the three chosen criminal justice systems, the first and key finding, of course, is their belonging to the civil or common law jurisdiction. In brief, civil law systems have the law made by legislations, while in common law systems it is made by the judicial decisions as well.[1587]

Common law systems are commonly known to be distinguished by adversarial proceedings between two parties, and civil law systems are inquisitorial in nature.[1588] Inquisitorial systems depend more on written dossier evidence, instead of oral arguments; and depend on a court's comprehensive oversight in truth finding, instead of a jury's trial.[1589] National systems *may* be characterized as inquisitorial and accusatorial systems, yet the difference is not always clear-cut.[1590]

It shall be duly noted that accusatorial versus inquisitorial, and adversarial versus inquisitorial are different concepts. In accusatorial systems, after accusing the defendant, the state must prove its allegations by an adversary process, by gathering evidence for both parties.[1591] In the adversary process each party presents its persuasive arguments and evidence to the judge or jury.[1592] The concepts of active versus passive judge may define the distinction between adversarial and inquisitorial best.[1593] National systems, therefore, can be characterized as inquisitorial or adversarial systems. However, inquisitorial systems can differs significantly from each other, as each national system keeps changing constantly, both in law and in practice.[1594] The same can be said for adversarial criminal justice systems. Therefore, the line between inquisitorial and adversarial is also not always evident.[1595]

1587 *"Common law is generally uncodified.", "Civil Law, in contrast, is codified.", See.* UC Berkeley School of Law, *The Common Law and Civil Law Traditions*, p. 1, <https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf> accessed 31 May 2024.

1588 Souresh, A. (2019). The Adversarial vs Inquisitorial Dichotomy in International Criminal Law: A Redundant Conversation. *International Comparative Jurisprudence, 5,* 81- 86, p. 81, 82.

1589 Souresh (2019), p. 82.

1590 *"... although there are unquestionably two different traditions, the borrowings between the two have become so extensive that it is no longer possible to classify any of the criminal justice systems in Western Europe as wholly accusatorial or wholly inquisitorial.", see.* Spencer, J. (2016). Adversarial vs inquisitorial systems: is there still such a difference? *The International Journal of Human Rights, 20*, 601-616, p. 601.

1591 Deffains, B., & Demougin, D. (2007). The inquisitorial and the adversarial procedure in a criminal court setting. *Journal of Institutional and Theoretical Economics*, 1-16, p. 9.

1592 Deffains & Demougin (2007), p. 9.

1593 Deffains & Demougin (2007), p. 2.

1594 Van Koppen & Penrod (2003), p. 2

1595 Van Koppen & Penrod (2003), p. 4.

The criminal justice system in England and Wales is a great example of a common law system, whereas the Turkish and Dutch criminal justice systems are of a civil law nature. The procedural system in England and Wales, therefore, is categorised as an adversarial system, and it includes judgment by lay persons. Contrarily, the Turkish system is labelled as inquisitorial and has no lay persons involved in the criminal decision-making procedure, including no concept of a jury. In the Netherlands, however, there are a few exemptions on no lay participation in court proceedings.[1596] The Dutch systeme is, thus, rather characterized as "moderately inquisitorial and predominantly accusatorial" in the Explanatory Memorandum to the Dutch Code of Criminal Procedure 1929, since the suspect in the pre-trial process is subjected to various types of examination, and can also be subjected to quite severe coercive measures.[1597] Being inquisitorial systems, in the Netherlands and Türkiye judges play a significant role in fact-finding by playing an active role in questioning the defendant, witnesses, and expert witnesses. In England and Wales, however, judges have no power on collecting evidence and function more as a referee.

The role of the public prosecution is also important to highlight in these criminal justice systems. In the Turkish criminal justice system, the Public Prosecution Office has a quasi-judicial, quasi-administrative function and all criminal offences are prosecuted in the name of the State. The police do not have the authority to conduct any investigation unless there is a specific order of the Public Prosecutor. Nevertheless, all police forces are authorised to fulfil judicial duties and in the exercise of their judicial duties, the police are under the order of the Public Prosecutor. The prosecutors are tasked with conducting the compulsory investigation to decide whether it is necessary to initiate a public prosecution, and whether there are factual findings which indicate that a crime has been committed. Furthermore, prosecutors are obliged to gather evidence for both parties. In the Netherlands, however, the police mainly conduct the investigation. Only for serious cases, the public prosecutor may provide the police with detailed information, such as reducing or extending the scope of the investigation. Dutch Public prosecutors are the only authority to subpoena the suspect, submit the indictment to the court, and issue a punishment order. In England and Wales, the Crown Prosecution Service ("CPS") cannot direct the police or other investigators; they only play an advisory role to provide advice to the police and other investigators about possible reasonable lines of investigation, evidential requirements, and the overall investigation strategy. In this manner, the Turkish system distinguishes itself from those in the Netherlands and England and Wales.

1596 Lay persons in the Netherlands are non-legal experts; hence, they do not represent the democratic legitimacy. E.g., the Parole Appeals Division of the Arnhem Court of Appeal; *See.* Bal & Koenraadt (2007), p. 14.

1597 Bal & Koenraadt (2007), p. 14.

6.2 Substantive Criminal Law

The very first difference that is immediately apparent is the terminology adopted in the three chosen criminal justice systems related to the relevance of mental disorder for substantive criminal law. As described in *Section 1: Overarching Terminology,* in Türkiye, the TCC mentions that the inability to perceive the legal meaning and consequences of the act they have committed, or the inability to control one's behaviour in relation to that act has been significantly decreased due to having a mental disorder. The doctrine refers to this as "imputability" (*isnat yeteneği)*. The word *isnat* literally translates as imputing a crime to someone and "yetenek" as ability. Therefore, the criminal law intends to assess whether the person has ability to be imputable for the crime committed. If this is not the case, then according to Article 32 of the TCC, these persons are exempted from punishment, yet instead, they are subjected to a security measure.

In the Netherlands, the concept is akin to that which exist in Türkiye. Article 39 of the DCC regulates the concept of "non-attributability"[1598] (*ontoerekenbaarheid),* which *exempts* a person *from punishment* when a crime cannot be attributed to them on the grounds of a mental disorder.[1599] In academia, the concept of "*criminal responsibility"* is also used.[1600]

However, differently in England and Wales, the terminology employed for this concept is the "insanity defence". This term has been increasingly regarded as potentially off-putting or even offensive, leading to the use of alternative terms such as *criminal liability* and *being exempted from criminal liability*.[1601] Nevertheless, the Criminal Procedure (Insanity) Act 1964 and academic literature continue to utilise the term *insanity*.

Sentencing possibilities also differ from system to system. For mentally disordered offenders, in the Turkish system, both penalties, such as imprisonment, and security measures are applicable. Security measures specifically intended for mentally disordered offenders are similar to hospital orders in that the offender shall be placed in a highly secure institution to receive treatment to protect themselves and society.

In England and Wales, disposals and sentencing are two different concepts. The *disposals* are the options of the court when a person is found to be unfit or found not guilty by reason of insanity, and the facts are proved. The *sentencing,* in the two-phase trial done by the sentencing court, is for the cases where the defendant is fit to plead and has the capacity to stand trial and either pleads guilty or is found guilty in the trial of fact. Sentences specifically intended for mentally disordered offenders could be interim hospital order, hospital order with restriction order, hybrid order: imprisonment with

1598 Bijlsma, J. (2016). *Stoornis en strafuitsluiting: Op zoek naar een toetsingskader voor ontoerekenbaarheid.* Oisterwijk: Wolf Legal Publishers, p. 295.

1599 Emphasis added to the translation made by Johannes Bijlsma. *See.* Bijlsma (2016), p. 295

1600 Van der Wolf, Van Marle, & Roza (2022), p. 200.

1601 *See.* The Law Commission (2013). *Criminal Liability: Insanity and Automatism A Discussion Paper – Summary for non-specialists.* Retrieved 30 January 2023, from https://www.lawcom.gov.uk/app/uploads/2015/06/insanity_discussion_summary.pdf, p. 3.

hospital direction and limitation order, custodial sentences, guardianship order, community order, and suspended sentence orders and fines.

In the Dutch criminal justice systems, the sanction types are penalties such as imprisonment, or measures such as the TBS-order, ISD-order, freedom-restricting order or a disposal called the civil care referral (Article 2.3 Wfz). Many combinations of these sentences are possible, in case of diminished responsibility especially the combination sentence of imprisonment and TBS-order is relevant.

After this brief summary, the substantive criminal law concepts of intent, criminal responsibility, diminished responsibility, dangerousness, penalty and security measure will be analysed integrally.

6.2.1 Intent versus Criminal Responsibility : Their Relationship with Mental Disorder

One of the main outcomes of the comparison is the relationship between mental disorder, crime and punishment. This matter is not only different in the three compared criminal justice systems, but also leads to debates within doctrine in the countries themselves. Even though it is stated in the introduction chapter that this thesis will not and cannot dive into every academic debate, the relation between intent and criminal responsibility is highly relevant and important to this research and thus needs to be discussed.

As a general statement, it can be said that it is traditional to divide the system of constituting a crime into two elements: *actus reus* and *mens rea*. The former meaning that a 'bad' act has to be committed, and the latter meaning that *an act is not necessarily a guilty act unless the accused has the necessary state of mind required for that offence*.[1602] They are combined in the maxim *actus non facit reum nisi mens sit rea*.[1603] *Actus reus* is Latin for guilty act,[1604] and *mens rea*[1605] is Latin for guilty mind.[1606] It shall be noted that the distinction between these two elements is not absolute and strict.[1607] The constitution of each crime, therefore, can be split into an actus reus (also known as objective element) and mens rea (also known as subjective element).[1608] *Generally*, the actus reus of an offence consists of *conduct, consequences,* and *circumstances*.[1609] The mens rea element consist of

1602 Padfield (2016), p. 21.

1603 *See.* A Dictionary of Law, Oxford Univeristy Press: <https://www.oxfordreference.com/display/10.1093/acref/9780198802525.001.0001/acref-9780198802525-e-80> accessed 25 April 2024.

1604 *"Actus reus means more than just 'guilty acts'. It also includes a range of other behaviour requirements, defined in each criminal offence."*, Cross (2010), p. 16.

1605 *"Mens rea is a collection of subjective offence elements and principles that regulate the application of these elements."* Blomsma (2012), p. 43.

1606 Padfield (2016), p. 21.

1607 Keiler, J. (2019). Actus Reus and Mens Rea: The Elements of Crime and the Framework of Criminal Liability. In J. Keiler, & D. Roef, *Comparative Concepts of Criminal Law* (pp. 107-120). Cambridge: Intersentia, p. 108.

1608 Keiler (2019), p. 108.

1609 Keiler (2019), p. 109.

variations of fault: direct intent, indirect intent, dolus eventualis, recklessness, conscious negligence, and unconscious negligence.[1610]

In common law, however, the term mens rea can be understood in a descriptive sense (different variations of fault) and in a normative meaning (being legally capable of committing an offence[1611]).[1612] The latter requires crucial attention, because in this sense, the mens rea includes culpability and blameworthiness.[1613] In common law, criminal law only punishes the guilty, and being guilty is linked to *being morally blamed for their wrongdoing*.[1614] Therefore, the principle of punishing the guilty provides a perspective on criminal liability: no one can be guilty in the moral sense, if they are not legally capable of committing an offence.[1615] If mens rea is used in this sense, it carries the overtones of *culpability* and *blameworthiness*.[1616] In England and Wales, the insanity defence excludes the guilt, and thus *mens rea* element cannot be met.[1617] As well known, in case of insanity, the verdict would be *not guilty by reason of insanity*. However, in other countries, the discussion goes further to determine whether and under which conditions the person cannot be found guilty.

In Türkiye, criminal law is the compendium of legal norms that prescribes unlawful acts (crimes) that are prohibited with penal consequences that may vary according to the individual personality of the offender.[1618] The concept of *crime* (*suç*) has three constituent pillars: actus reus – material element (*maddi unsur*), mens rea – moral element (*manevi unsur*), unlawfulness (*hukuka aykırılık*).[1619] Hence, criminal courts are obliged to analyse actus reus and mens rea, and to check the existence of lawfulness reasons to decide on whether the accused is guilty or not. However, imputability (*isnat edilebilirlik*) is a separate issue from *mens rea*.[1620] The imputability is a quality that must be present in the offender in order to be made the addressee of the criminal sanction; therefore, the absence of imputability is only a personal reason for exemption from the criminal sanction.[1621] Hence the establishment of the crime and its punishment are separated. Consequently, it can be stated that mens rea is different than criminal responsibility in the Turkish criminal justice system; the former is related to the constitution of the crime, while the latter is a criterion of *punishability*. Mentally disordered offenders who have no imputability receive a security measure as a verdict, hence they cannot be acquitted.

1610 Keiler (2019), p. 112.
1611 Fletcher (1998), p. 99.
1612 Keiler (2019), p. 113.
1613 Keiler (2019), p. 114.
1614 Fletcher (1998), p. 99.
1615 Fletcher (1998), p. 99.
1616 Keiler (2019), p. 114.
1617 Peay (2011), p. 3.
1618 Toroslu & Toroslu (2018), p. 17.
1619 Hafızoğulları, Z., & Özen, M. (2010). *Türk Ceza Hukuku Genel Hükümler*. Ankara: US-A Yayıncılık, p. 193-326.
1620 Artuk et al. (2021), p. 392.
1621 Hafızoğulları & Özen (2010), p. 409.

In the Netherlands, just like in many civil law systems, assessing criminal liability is again different than in the other systems. In the prevalent *triparte structure of crime*, the assessment has three stages: 1) fulfilment of the offence definition (actus reus & mens rea), 2) wrongdoing, 3) blameworthiness.[1622] This structure is also reflected in the DCCP. According to Article 350 of the DCCP, the criminal court shall ask four questions before sentencing: 1) whether it has been proven that the offence was committed by the accused, and if so, 2) which offence the proven conduct constitutes under the law, – and if it is considered that the offence is proven and punishable, the court shall then deliberate on–, 3) whether the offender bears criminal responsibility, and 4) the imposition of punishment or measure determined by law. If the court finds the offence charged proven to be a punishable offence and the accused therefore criminally responsible, it shall impose the penalty or measure fitting for the offence and the offender.[1623] If the court does not find that the accused has committed the offence they have been charged with, the court shall acquit the accused.[1624] In case the court finds the offence proven, but not constituting an offence or the accused not punishable because of it, the court shall, also, acquit the accused (even though in Dutch this is called differently, literally 'discharge of all prosecution'); however, in cases as referred to in Article 39 of the DCC, the court may also impose a security measure.

Discussions have taken place on how the court could consider intent in cases of no criminal responsibility, as criminal responsibility and intent both relate to the human psyche.[1625] Normally, cases regarding mentally disordered offenders should not be discussed under *intent*, however there is an exemption for *extreme* cases. Hence, lifting the intent is highly exceptional in the Dutch case law; in only few cases it was adopted when the mind and act were in a sense disconnected and thus the accused had no insight into the scope and possible consequences of their actions.[1626] As these judgments generally do not relate to common mental disorders like psychosis or paranoid schizophrenia, this insight criterion gives the behavioural expert a more limited advisory role.[1627]

Considering the relationship between crime and punishment, *generally* intent is an element of the crime, and criminal responsibility is of the punishment/sentence. The 'not guilty' and 'acquittal' verdicts related to the absence of intent in England and Wales and in rare cases in the Netherlands respectively, as a result, prevent the application of security measures, although civil commitment option is possible. In the Turkish criminal justice system, as stated earlier, imposing a security measure is a type of verdict; hence the person with no criminal responsibility does not receive 'acquittal' or 'conviction', after it is proven

1622 Keiler (2019), p. 115.

1623 Article 351 of the DCCP; *See*. ANNEX 5: Relevant Articles of the Dutch Code of Criminal Procedure.

1624 Article 352/1 of the DCCP.

1625 Van Dijk, A. (2008). *Strafrechtelijke aansprakelijkheid heroverwogen: Over opzet, schuld, schuld-uitsluitingsgronden en straf*. Apeldoorn: Maklu-Uitgevers, p. 299.

1626 Stevens & Prinsen (2009), p. 117-118.

1627 Stevens & Prinsen (2009), p. 117-118.

that they committed the alleged crime. Adapting such an option for a verdict prevented similar discussions on this matter in Turkish criminal justice system.

6.2.2 Concept of (No) Criminal Responsibility

One of the main differences when comparing *substantive criminal law* is the concept of criminal responsibility. In the Turkish criminal justice system, mental disorder is the mental state of a person who *lacks the ability to perceive the legal meaning and consequences of the offence* having *considerably lost the capacity to control their actions* due to having a mental disorder (*akıl hastalığı*). In the Turkish doctrine, the imputability is defined as a combination of having *"ability to perceive"* (*anlama yeteneği*) and *"ability to will" (isteme yeteneği).* The *ability to perceive* is knowing the value of the act for the society and the incompatibility with the conditions of living together; however, it does not mean that the person has to know that the act is against the criminal law. The *ability to will* is having the capacity to want to do the act, in other words, being able to act autonomously. In order to be imputable, a person is required to have both; ability to perceive and ability to want, or in other words, the cognitive and volitional components. If one of them is missing, that person should be accepted as not imputable. The TCC provides no further information on neither the definition of mental disorder nor its criteria. Criminal courts are, as a result, always in need of the discipline of psychology.[1628] In practice, there is a case-based approach that involves evaluating criminal responsibility of the person for the offence committed while seeking and establishing the temporal intersection of and causal link between mental disorder and criminal behaviour.[1629]

The legal basis for criminal responsibility in England and Wales is derived from the common law system. Acquittal by reason of *insanity* is based on the *M'Naghten Rule*. According to the principles, everybody is presumed to be sane unless the contrary is proven; and in order to establish the insanity defence, it must be proven that at the time of the committing of the act, the defendant was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act they were doing; or, if they did know it, that they did not know what they were doing was wrong. The term *"disease of the mind"* is very broadly defined in England and Wales, it includes epilepsy and *hyperglycaemia* seizures or diabetes. In that respect, it is quite similar to the Turkish approach to the definition of mental disorder. In England and Wales, like in the Netherlands, patients with only substance-related disorders cannot be incarcerated under the mental health legislation,[1630] while the Turkish system does not have such an exclusion. In the Turkish criminal justice system, substance abuse is a mental disorder,

1628 It is stated that in practice, *the Rorschach Inkblot Test, Minnesota Multiphasic Personality Inventory,* and *Wechsler Adult Intelligence Scale* are prominent psychometric testing instruments, along with several other tools to evaluate intelligence and neurocognitive functions. *See.* Balcıoğlu et al. (2023), p. 7.

1629 Balcıoğlu et al. (2023), p. 7.

1630 Senn et al. (2020), p. 2.

as well, and therefore these persons can also receive security measures specifically for mentally disordered offenders.

In the Dutch criminal justice system, Article 39 of the DCC regulates that any person who commits an offence for which they cannot be held responsible by reason of mental disorder (*psychische stoornis*), psychogeriatric disorder (*psychogeriatrische aandoening*), or intellectual disability (*verstandelijke handicap*) is not punishable. The question of criminal responsibility (*toerekenbaarheid*), hence, is a legal question. Thus, criminal courts have their own discretion and are not bound by the advice given by experts.

Hence, in Türkiye the imputability is defined as the combination of having *"ability to perceive"* (cognitive capacity) and *"ability to will"* (volitional capacity), and in England and Wales the N'Naghten test includes *not knowing* the nature and quality of the act, or *not knowing what the act was wrong*. As can be read, the *M'Naghten Rules* only covers the "knowing" element and does not include the "control over actions". [1631,1632] Hence, cognitive capacity is valued while omitting the volitional capacity.[1633] However, the criteria for diminished responsibility regulated under Section 2 of the Homicide Act 1957 mention both cognitive and volitional capacities. The Sentencing Council's guideline also underlines that a manslaughter conviction by the reason of diminished responsibility means that the person's ability to *understand the nature of the conduct*, ability to *form a rational judgment*, and/or ability to *exercise self-control* was significantly impaired.[1634] Hence, the volitional capacity, the ability to exercise self-control, is only for the diminished responsibility (which is only applicable for murder), and not for the general insanity defence. Even though, the Law Commission has suggested to add the capacity "*to control his or her physical acts in relation to the relevant conduct or circumstances*" to the insanity defence.[1635]

1631 The "*M'Naghten Rules*" were pronounced in the House of Lords in 1843: "*to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong*".

1632 *"There's very little agreement about the insanity defense. … The one thing that many writers do seem to agree on is this: There is no room for a volitional or control branch in an insanity defense."* See. Corrado, M. (2009). The case for purely volitional insanity defense. *Texas Tech Law Review, 42(2),* 481-512, p. 482.

1633 Please note that the cognitive capacity is also called "C-insanity" and volitional capacity "V-insanity". V-insanity recognises that a mental disorder can make self-control impossible. *See.* Bastani & Gavaghan (2016), p. 545.

1634 Sentencing Council, The Guideline on Manslaughter by reason of diminished responsibility, *See.* <https://www.sentencingcouncil.org.uk/offences/crown-court/item/manslaughter-by-reason-of-diminished-responsibility/> accessed 08 May 2024.

1635 The Law Commission (2013), para. 85.
It was also suggested to have a *'sophisticated capacity test'* to look beyond the cognitive capacity to address the cognition (knowing), emotion(evaluating), and volition (acting). *See.* Heginbotham & Kinton (2007), p. 72-84.

There is, however, no similar standard for responsibility (*een standaard voor ontoerekeningsvatbaarheid*) in the Dutch legislation, although it was created by the case law. Before, Dutch scholars have suggested to have both the control (volitional) and understanding (comprehension) component in a criminal responsibility standard.[1636] Recently the *Hoge Raad* has actually set the jurisprudential standard for non-responsibility that includes a cognitive capacity (*begrip,* understanding the unlawfulness) and the volitional capacity (in Dutch literature described as *controle*, control instead of will and phrased by the Hoge Raad as 'to act in accordance with that understanding').In the prominent *Thijs H.* case, the court further explains that the *cognitive element* distinguishes between understanding and being able to understand, while the nature of the act involves both the qualification impermissible and unlawful. The justification for holding the defendant not responsible or diminished responsible for their conduct is inability to form their understanding (*begrip*) and control (*controle*), regardless of the cause.[1637] The cognitive and/or volitional inability of the suspect, therefore, are at the core of establishing criminal responsibility. Consequently, according to the court, what is ultimately most relevant for answering the question of the degree of criminal responsibility is not so much the disorder itself, even though it is also required, but the degree of impairment, and more specifically the degree of their incapacities.[1638] This explanation matches the Turkish regulations precisely.

To conclude, it can be said that criminal responsibility *generally* has two components: cognitive capacity (ability to understand) and volitional capacity (ability to control their actions) – with the insanity test in England and Wales omitting the latter. In cases where one of them is lacking, the criminal responsibility should be lifted. The mere presence of a mental disorder is not enough, the causal link between the mental disorder and crime should exist. The authority to rule on criminal responsibility is the court (or the jury).

6.2.3 Degrees of Responsibility: Concept of Diminished Responsibility

Another significant difference to be underlined related to the substantive criminal law section is the concept of diminished responsibility. In the Dutch and Turkish criminal justice systems, diminished responsibility exists for each and every crime to reduce the sentence and/or to impose a security measure, whereas in England and Wales diminished responsibility exists *solely* for the offence of murder.

In England and Wales, diminished responsibility is a partial defence that can lead to a mitigation of the charge from murder to manslaughter. According to Section 2 of the Homicide Act 1957, the accused must prove that they suffer from an *'abnormality of mental functioning'* arising from a *'recognised medical condition'* that substantially impairs their cognitive and volitional capacities, and that this medical condition has causal link to the murder.

1636 Meynen (2022), p. 285; Meynen (2016b), p. 143; *See also.* Meynen (2013), p. 1384-1390.
1637 *Thijs H. case,* para. 3.6.
1638 *Thijs H. case,* para. 3.6.

In Türkiye, Article 32 of the TCC provides the levels of the criminal responsibility –or *imputability* (*isnat yeteneği*)–: full responsibility, diminished responsibility, and no responsibility. The distinction between the diminished responsibility and no responsibility depends on the effect of the mental disorder on the abilities of the person. If the mental disorder does not sufficiently align with Article 32/1, but rather falls in Article 32/2, it is classified as diminished responsibility.

In the Netherlands, diminished responsibility is not included in the DCC, however in practice, it has played a major role for a long time already and is used as a mitigating factor. In the past, 5 degrees (or gradations) of criminal responsibility were explicitly acknowledged: full criminal responsibility (*toerekeningsvatbaar*), slightly diminished responsibility (*enigszins verminderd toerekeningsvatbaar*), diminished responsibility (*verminderd toerekeningsvatbaar*), severely diminished responsibility (*sterk verminderd toerekeningsvatbaar*) and no criminal responsibility (*ontoerekeningsvatbaar*). In an NVvP Guideline on Psychiatric Examination and Reporting in Criminal Cases (*Richtlijn Psychiatrisch Onderzoek en Rapportage in Strafzaken*) from 2012[1639] the number of gradations was reduced to three: (1) full responsibility, (2) diminished responsibility, and (3) no responsibility. As provided above, in the Dutch academia, this change and its consequences were thoroughly discussed. Therefore, a recent new guideline leaves room again for using the former five gradations.[1640]

It seems scientifically sound to accept different degrees of criminal responsibility, as it is not quite possible to draw a thick line between criminally responsible and not responsible. Looking from a multinational perspective, most criminal justice systems have diminished responsibility in place either as a partial defence or as a degree or gradation of irresponsibility.[1641] However, limiting the possible application of diminished responsibility to cases of murder, like in England and Wales, seems to be a negation of that scientific perspective, potentially leading to harsher punishment for many mentally disordered offenders than deserved.

6.2.4 Concept of Dangerousness

Persons with mental disorders who enter the criminal justice system are often represented as high-risk.[1642] However, the concept of risk and dangerousness have multiple dimensions. Criminal justice systems, naturally, focus on prevention of re-offending, and mental health law focuses additionally on the risk to self and others, and the mandatory treatment.[1643]

1639 *See.* Nederlandse Vereniging voor Psychiatrie (2012).

1640 Nederlandse Vereniging voor Psychiatrie (2024).

1641 A comparative study states that diminished responsibility exists in Brazil, Chile, China, Czechia, Finland, France, Germany, Greece, Italy, Japan, Luxembourg, Poland, Portugal, Russia, Spain, Switzerland, Taiwan and Türkiye. *See.* Johnston et al. (2023), p. 2.

1642 Rose, D. (2016). Drugs, Mental Disorder and Risk. In C. Trotter, G. McIvor, & F. McNeill, *Beyond the Risk Paradigm in Criminal Justice* (pp. 92-107). Croydon: Palgrave, p. 92.

1643 Rose (2016), p. 92.

The term *dangerous* can be defined as *"able or likely to inflict injury or harm"*[1644] in general. The concepts of dangerousness, dangerous offender, high-risk offender, violence risk, recidivism or reoffending risk have been debated terms in behavioural sciences for decades.[1645] Being a subject of international and interdisciplinary debate, not only criminal justice scholars and psychology-psychiatry experts have reflected on dangerousness and risk assessments, but also forensic experts, criminologists, philosophers, cognitive scientists, and epistemologists.

Dangerousness is a criterion in mental health law in the majority of developed countries and entails that mentally disordered persons may be subjected to coercive commitment and/or treatment when they are deemed to pose a risk to others or to themselves.[1646] From an international law point of view, the Council of Europe (CoE) points out that dangerousness *"is not a clear legal concept. It is also vague in scientific terms, in so far as the assessment of criminological dangerousness and individual risk of reoffending in the long term lacks sufficient supporting evidence to ensure an accurate measurement of dangerousness"*.[1647] Whereas, the term *high-risk offender* was defined as: "*someone (violent/sexual offender) who presents a high probability to commit crimes, which may cause very serious personal, physical or psychological harm*", however not every legal system has the same definition for such offenders.[1648]

However, in academia there are some approaches claiming that it is not quite possible to predict future violence with any reasonable degree of certainty.[1649] It was -even- claimed in academia that the dangerousness criterion should be removed as being unnecessary and wrong from the ethical point of view.[1650] This opinion argued that dangerousness creates unfair discrimination against mentally disordered offenders; both in the terms of accessibility to treatment and carriage of risk to the community; hence, dangerous criterion, shall be abandoned.[1651] However, regulated dangerousness criteria in criminal

1644 *See.* <https://www.merriam-webster.com/dictionary/dangerous> accessed 19 April 2024.

1645 *See.* for example: Bloom, J. (1989). The character of danger in psychiatric practice: Are the mentally ill dangerous? *The Bulletin of the American Academy of Psychiatry and the Law, 17*(3), 241-255.

1646 Large, M., Ryan, C., Nielssen, O., & Hayes, R. (2008). The danger of dangerousness: why we must remove the dangerousness criterion from our mental health acts. *Law, ethics and medicine, 34*, 877-881, p. 877.

1647 *Commentary to recommendation CM/Rec 2014(3), paragraph 7.* <https://pjp-eu.coe.int/documents/41781569/42171329/CMRec+%282014%29+3+concerning+dangerous+offenders.pdf/cec8c7c4-9d72-41a7-acf2-ee64d0c960cb> accessed 26 October 2023.

1648 A. Barbu (2016)., Managing high-risk offenders – from sharing experiences to drafting better national laws and European tools, in F. Dünkel, J. Jesse, I. Pruin, & M. Von der Wense (Eds.), *European Treatment, Transition Management, and Re-Integration of High-Risk Offenders*, p. 99.

1649 *"We cannot afford to delude ourselves that we can predict future violence in a given case with any reasonable degree of scientific or professional certainty.", See.* Hart, S. (2003). Violence Risk Assessment. In M. Vanderhallen, G. Vervaeke, P. Van Koppen, & J. Goethals, *Much Ado About Crime* (pp. 209-230). Brussel: Politeia, p. 227.

1650 Large et al. (2008), p. 880.

1651 *"A dangerousness criterion holds that mentally ill people may be given treatment without consent if they are deemed to be a risk to themselves or others.", "Dangerousness criteria unfairly discriminate against*

justice systems are not exclusively for mentally disordered offenders, even if the dangerousness assessment includes an assessment of the presence of a mental disorder.

To summarise the differences between the chosen three criminal justice systems, it could be said that all dangerousness criteria are different, but all are along the same line; in the sense that all three systems do not have a definition of what constitutes dangerousness, but somehow attempt to provide a criterion for assessment. In this sense, they are similar in that they do not have one concept of dangerousness.

In the Turkish criminal justice system, the imposition of security measures to a person depends on the existence of four conditions: the offence shall constitute a danger for society; the security measure shall be imposed after the offence has been committed; the security measure must be regulated by the law; and the security measure shall be ordered by the judge or court. The first criterion -constituting a danger to society- relates to the probability of committing new crimes. However, there is no definition of the term *dangerous*, it is, thus, reserved to the experts to decide. In the Turkish practice, the dangerousness assessment focuses on the future, instead of the past. The court orders the security measure in proportion to the degree of dangerousness of the perpetrator. Where the convict is not found criminally responsible, their release depends on the report of the medical board of the institution on that dangerousness is no longer present or has significantly decreased.

In England and Wales, since 1890, *danger* has had a place in the mental health legislation. S.11(1) Lunacy Act 1890 reads *"for the welfare of a person ... or for the public safety"*. Mental Health Act 1959 s.25 also had a similar frame: *"in the interests of his own health and safety, or with a view to the protection of other persons"*. MHA 1983 also refers to harm to self or others, yet there is no definition provided. More recently, dangerousness has also become an important criterion in sentencing. The subsequent dangerousness assessment is regulated under s.308 of the SA 2020. According to that section, the court *may* take into account any information available about any pattern of behaviour; and *may* take into account any information available to the court about the offender. Hence, the dangerousness assessment does not require a professional expert to give evidence; however forensic psychologists still play an essential part as advisors to the court to determine the likelihood to be a danger to society. In their assessment of dangerousness, *current offence, nature of current offence, criminal record, history of criminality, family background, social background, childhood experiences and any oddities* are taken into account. To order a hospital order, dangerousness also plays a role. If the court considers that the offender poses a great risk to the public and therefore the release and detention of the offender, it may order the further restrictions of s.41(3).

the mentally ill, as they represent an unreasonable barrier to treatment without consent, and they spread the burden of risk that any mentally ill person might become violent across large numbers of mentally ill people who will never become violent.", "Dangerousness criteria should be removed from mental health legislation and be replaced by criteria that focus on a patient's capacity to refuse treatment."; See. Large et al. (2008), p. 877.

As provided in great detail, in the Dutch criminal justice system, dangerousness is also an important concept within sentencing law; and the concepts differs for imposition of the TBS-order with or without compulsory care, extension of the TBS-order, imposition of the GVM-order, ISD-order, freedom restricting measure, and the extension of probation on conditional release, et cetera. This spectrum of dangerousness criteria in the Dutch sanctioning law is defined as a "hotchpotch" (*ratjetoe*), as they are not clearly delineated or explicitly related to the extent to which a sanction intervenes in the person's life, since the legislator has not designed an unambiguous and coherent system of substantive dangerousness criteria.[1652] Article 37a/1 of the DCC regulates that the safety of others (*veiligheid van anderen*) or the general safety of persons or goods (*algemene veiligheid van personen of goederen*) requires the imposition of TBS-measure. This dangerousness criterion (*gevaarscriterium*) of the TBS-order is intended to demonstrate that the person involved represents a serious danger to their surroundings, either a direct danger to more individually determined persons in the vicinity of the person involved (safety of others), or a wider and undirected circle of persons (general safety), but in any case, always directed at other persons or their property. In practice, however, the dangerousness criteria for compulsory case are higher, because it concerns a danger that cannot be controlled without coercion. As an aid for the court's assessment, the regulations mention that the severity of the offence and the frequency of prior convictions and other information concerning the person(ality) of the offender are taken into account. The expert may be asked to determine the level of the re-offending risk, the nature and severity of the disorder, whether treatment is necessary, and which legal framework would be suitable for the person. Guidelines require that clinically structured risk assessment instruments -in which the mental disorder is only one of many factors- are used by behavioural experts for this purpose, both for imposition and prolongation of the TBS-order. For the civil care referral however, it is required that the risk is completely constituted by the mental disorder.

Overall, it should be underlined that dangerousness is a legal concept -in these three criminal justice systems-, therefore it shall be decided by the court (or the jury) either or not based on an expert opinion. Hence, just like the concept of criminal responsibility, the court has discretion on following the expert's advice on this matter. In order to reach a decision, the court can make use of every type of assessment regarding determining on the offender's dangerousness to the society or recidivism risk. For purposes of legal certainty and equality, it would be beneficial to establish consistent criteria for dangerousness and a legal framework for risk-assessment.

6.2.5 Penalty versus Security Measure – Sentencing Offenders with Diminished Responsibility

The last issue to be analysed is the distinction between penalty and security measures. The prevention of crime has taken up a central position in the agendas of governments

1652 Struijk & Van der Wolf (2018), p. 946.

around the world.[1653] Sanctions applicable to mentally disordered offenders are different in each criminal justice system, but for more severe offences, the alternatives are usually imprisonment or hospital order (security measure). Before the discussion, the summary of possible sanctions should be reiterated.

As provided under the overarching terminology section, this dissertation uses the terminology sentence or "*sanction*" to refer to all possible reactions from the criminal (sentencing) court to the offence committed by a mentally disordered individual. In most criminal justice systems, there are different types of sanctions: such as penalties and security measures; and different types of penalty; such as imprisonment and judicial fine.

There are different theories regarding punishment; retributive, utilitarian or consequentialist and hybrid theories.[1654] Retributive theories generally mention the concepts of free will, being responsible, guilt, culpability, blameworthiness, and proportionality, while utilitarian theories underline prevention, risk, and causes of crime: biological factors, psychological factors, social factors. There are two types of hybrid theories, the first one uses retribution as a general justification for punishment leaving the possibility not to impose punishment open.[1655] This hybrid theory type strongly dominates the continental doctrine, including the Netherlands.[1656] The second type states that a person can only be punished if they are found guilty, and punishment must be proportionate to the seriousness of the crime and the culpability of the offender, and this second type dominates the Anglo-Saxon doctrine.[1657]

In the studied inquisitorial criminal justice systems, there are also security measures applicable instead of or next to the penalties. However, security measures do not pursue the purpose of punishing the offender; generally, the aim is to eliminate or reduce the risk or consequences of criminal activities.[1658] However, the boundaries between security measures and penalties can be unclear.

In the Turkish criminal justice system, offenders who are found *imputable* shall receive imprisonment or a judicial fine, and when the offender is found to have no criminal responsibility, then they cannot be subject to any punishment; only security measures can be imposed.

In England and Wales, responsible offenders receive imprisonment, a fine, or community order. As also repeated under the substantive criminal law section, diminished responsibility is only possible for murder charges which may be reduced to manslaughter.

1653 Caianiello, M. (2013). Detention as Punishment and Detention as Regulation. In M. Caianiello, & M.L. Corrado, *Preventing Danger: New Paradigms in Criminal Justice* (pp. xxv-xxxiii). Durham: Carolina Academic Press, p. xxv.

1654 *See*. Claessen, J. (2019). Theories of Punishment. In J. Keiler, & D. Roef, *Comparative Concepts of Criminal Law* (pp. 11-34). Cambridge: Intersentia, p. 19-26.

1655 Claessen (2019), p. 25.

1656 Claessen (2019), p. 25.

1657 Claessen (2019), p. 25.

1658 Chankseliani, M. (2012). Punishment and Other Penal Measures. *European Scientific Journal* 8(2), p. 98-108, p. 104.

Mentally disordered offenders who are found to have no criminal responsibility may be sentenced to hospital orders with or without restrictions, hybrid orders (where hospital and limitation directions are coupled with a prison sentence), guardianship orders, community orders with or without mental health treatment requirement attached, or just a prison sentence. Absolute discharge is also possible.

In the Netherlands, offenders who are fully responsible may be sentenced to the combination of prison sentence and supervision order (*combination sentence*), and offenders who are not responsible can be sentenced to a TBS-order if they meet the criteria of committing a severe offence and are considered (very) dangerous. When they are considered less dangerous, also the civil care referral (Article 2.3 Wfz) is an option. Other sentencing options in general are imprisonment, ISD-order, freedom restricting orders, and all sorts of conditional variants of these sanctions.

In case of diminished responsibility, in Türkiye, the court has the discretion to opt for sentence reduction or partial or full security measures. According to Article 32/2, the first option is to sentence twenty-five years imprisonment instead of aggravated life imprisonment, to twenty years imprisonment instead of life imprisonment, or in other cases, one-sixth of the punishment to be imposed may be reduced; and the second option is to impose the entire or part of the sentence as a security measure specifically intended for mentally disordered persons, while the sentence period remains the same. If the security measure will be applied partly, there is no regulation for which one is going to come first: imprisonment or security measure. It would make more sense to prioritise the implementation of the security measure; instead of the imprisonment, as the person stays in a highly secured institution while getting treatment and rehabilitation, the purpose of the protection of society is secured anyways.

In England and Wales, diminished responsibility is only possible for murder charges which may be reduced to manslaughter.

The Dutch system, however, requires more attention. Just like in Türkiye, the offender with diminished responsibility may receive the combination of imprisonment and a TBS-order. However, in the Netherlands there is a clear practice related to which one will be executed first. In case a person with diminished responsibility is sentenced to both imprisonment and TBS-order with compulsory treatment, the prison sentence is imposed first, followed by the TBS sentence. The rationale behind it is provided as the aim of a prison sentence is stated as to exclude someone from society, and the aim of a TBS-order is resocialisation, a return to society, therefore the treatment follows the prison sentence.[1659] However it is criticised that the offenders are punished first and treated after, since from the point of view of social safety, it makes much more sense to treat first.[1660] Furthermore, it is to be expected that executing the prison sentence first will generally result in a certain deterioration of the psychologically vulnerable detainee as they have

1659 *See*. <https://tbsnederland.nl/faq/, and https://www.vanmesdag.nl/faq/> accessed 24 March 2024.
1660 *See*. Medisch Contact. (2014). Behandeling tbs'er begint te laat: <https://www.medischcontact.nl/actueel/laatste-nieuws/artikel/behandeling-tbser-begint-te-laat> accessed 24 March 2024.

to wait longer for the start of the necessary treatment, probably also hindering the swiftness of treatment progress and release within the TBS-order.[1661] Combining a long prison sentence with the TBS-measure is also found to be an internally contradictory statement of the court.[1662] Hence, this combination sentence is criticised for being the double lock put on the door (*dubbel slot op de deur*), as it is to ensure that the person is removed from society for as long as possible.[1663] Courts can only give an advice on earlier placement in a TBS-clinic, but this is hardly done.

Currently, even long prison sentences are combined with the TBS-order.[1664] In one case, the offender committed several crimes including violent manslaughter (*doodslag*)[1665] of his partner and brutal rape and murder (*moord*) of 15-year-old stepdaughter.[1666] The Court of Appeal agreed with the district court that the accused had diminished responsibility in respect of the proven murder of the partner. The other offences could be fully attributed to the accused, and to that extent the accused has been found criminally liable.[1667] The court ordered 30-year imprisonment and a TBS-order in order to provide maximum security to society and argued that it was necessary to prevent this person from re-joining society without the treatment that the TBS clinic would provide.[1668] Therefore, this *double lock* analogy[1669] reflects the current issue, accurately.

Hence this problematic issue requires a further discussion to determine which one should come first: the punishment or the measure. Since the imprisonment aims at retribution (*vergelding*) and the person should appreciate this; it can be claimed that the person first should be healed, so that they could understand why they are in prison and appreciate this retributive aim.[1670] Persons with diminished responsibility have *limited* understanding and thus may not comprehend fully why their acts were against the law, why they are in prison, et cetera. It is also foreseeable that the existing mental disorder can only worsen

1661 Lindhout et al. (2011), p. 347.

1662 Same opinion, *see*. Knoester & Bokse (2020), p. 246.

1663 Knoester & Bokse (2020), p. 246.

1664 Meynen (2022), p. 278.

1665 In the Dutch criminal justice system *doodslag*, which is translated to English as manslaughter, is the deliberate, but not premeditated, deprivation of the life of another person. Thus, the difference between *doodslag (manslaughter)* and *moord (murder)* is that *doodslag* does not involve an actual premeditated plan to kill; however, there is still intent. In Türkiye and in England and Wales, manslaughter is defined differently to refer a conduct that was grossly negligent given the risk of death and resulted in death. Hence the intent differs.

1666 Gerechtshof Arnhem-Leeuwarden, 13-11-2017, ECLI:NL:GHARL:2017:9826.

1667 Gerechtshof Arnhem-Leeuwarden, 13-11-2017, ECLI:NL:GHARL:2017:9826, *Strafbaarheid van de verdachte.*

1668 Gerechtshof Arnhem-Leeuwarden, 13-11-2017, ECLI:NL:GHARL:2017:9826, *Oplegging van straf.*

1669 Knoester & Bokse (2020), p. 246.

1670 In the *Hutchison Reid v. the United Kingdom* judgement ECtHR ruled that "*it would be prima facie unacceptable not to detain a mentally ill person in a suitable therapeutic environment*" under Article 5. *See. Hutchison Reid v. the United Kingdom*, op. cit., §55. This issue will be further elaborated on in Chapter 4.

in the prison conditions,[1671] and long imprisonment cannot contribute to a successful TBS treatment.[1672] Even though there is an opportunity for detainees to be treated in the prison environment, the penitentiary psychiatric centres do not have the treatment methods to adequately treat the complicated and serious psychological problems of a TBS patient.[1673]

However, in the Netherlands, the TBS clinics are designed to prepare the person to return to society. As mentioned earlier, there are *transmural leave* stages before the discharge where they move increasingly into society by coming into contact with other persons. If the person goes to prison after the TBS-measure, it would be only a waste of effort, time, and money.

From another point of view, the TBS-clinics are already secured places, therefore, the TBS-order also restricts the offender. Therefore, this two-track system[1674] ought to be criticized. It is understandable that persons with diminished responsibility who commit serious crimes are held accountable. In addition, it is expected from the courts to secure and satisfy the public conscience by punishing the person. Imposing the TBS-measure might not sound harsh *enough* and therefore the courts might prefer to order imprisonment and TBS-order together. However, considering the cases where the offenders do not cooperate with the forensic experts to obtain the expert report, and lawyers advise their clients not to cooperate to the procedure; it suggests that offenders prefer prisons over TBS-centres, because the TBS-measure may be renewed indefinitely.

Criminal courts in the Netherlands currently make an internally contradictory statement by combining TBS-measure with a long prison sentence.[1675] Therefore, combining retributive sentence and preventive security measure does not go well together in practice.[1676] It might be appropriate, in closing, to come up with a proposal to change this the characteristics of this twin-track system.

6.3 Criminal Procedural Law

In the Turkish and Dutch criminal justice systems the *guilty plea* is unknown. The Court is the only authority to decide on guilt; furthermore, confessing the crime is just a piece of evidence in the dossier. Whereas in England and Wales, defendants may desire to plead guilty of all or some of the charges, during the investigation. The Crown Prosecutor should only accept the plea when: a) the court is able to pass a sentence that matches the seriousness of the offending, particularly where there are aggravating features; b) it

1671 Lindhout et al. (2011), p. 347.

1672 Knoester & Bokse (2020), p. 246.

1673 *See*. Medisch Contact. (2014). Behandeling tbs'er begint te laat: <https://www.medischcontact.nl/actueel/laatste-nieuws/artikel/behandeling-tbser-begint-te-laat> accessed 24 March 2024.

1674 The Turkish criminal justice system is also characterised by the two-track system in which a distinction is made between punishments and security measures.

1675 Same opinion, *see*. Knoester & Bokse (2020), p. 246.

1676 Knoester & Bokse (2020), p. 246.
See also. Schuyt, P. M. (2006). Levenslang en TBS: een LAT-relatie. *Sancties, (3)*, 143-148, p. 144.

enables the court to make a confiscation order in appropriate cases, where a defendant has benefitted from criminal conduct; c) it provides the court with adequate powers to impose other ancillary orders, bearing in mind that these can be made with some offences but not with others. The decision to accept the plea rests with the prosecutor, however, it must be made clear to the court on what basis any plea is advanced and accepted.

The concepts of fitness to plead and fitness to stand trial are also different in the three criminal justice systems. Fitness to plead refers to the ability of a defendant to participate in a trial.[1677] In England and Wales, the unfitness to plead doctrine is regulated. It shall be determined as soon as it arises; and the question of fitness to be tried shall be determined by the court, without a jury. If a person is later fit to plead, the Secretary of State now has the power to remand them back for trial. It should be also underlined that very few persons are found to be unfit to plead, as the threshold for being found unfit is high.

In the Netherlands, there is also includes a test for unfitness to stand trial, which is quite remarkable to in an inquisitorial system.[1678] According to Article 16 of the DCCP[1679], if the defendant suffers from such a mental disorder, psychogeriatric disorder, or intellectual disability to such an extent that they lack the capacity to understand the meaning of the prosecution initiated against them, the court shall suspend the prosecution, irrespective of the stage of prosecution; and the suspension shall be revoked as soon as the recovery of the defendant has been proven. As the threshold for unfitness is indeed also very high, it is seldom reached. More recently courts adopt the threshold of 'effective participation' from the ECtHR, possibly lowering that threshold somewhat. Another option is that those that are less fit due to a mental disorder are fully represented by counsel.

There is no fitness to plead or fitness to stand trial claims in Türkiye. Thanks to the concept of *mandatory advocacy (zorunlu müdafilik)*, when a suspect or a defendant who does not have an appointed lawyer and is incapable of defending themselves, an attorney shall be assigned without their request, free of charge. Hence, the presence of a lawyer is always ensured to protect the person's rights during the pre-trial the trial phase.

When comparing the criminal procedure rules of the three criminal justice systems, it is important to highlight the role of the expert and the weight of the expert evidence.

The criminal justice systems of Türkiye and the Netherlands are inquisitorial; hence, in contradiction to the criminal justice system in England and Wales, judges play a significant role in fact-finding. The most important consequence of the inquisitorial system is that forensic psychiatric expert witnesses officially do the assessment on behalf of the court. In England and Wales, however, expert witnesses prepare their expert reports on behalf of the parties for whom they are hired. The expert could be employed by the court when

1677 Brown (2019), p. 187.
1678 Van der Wolf & Mevis (2022), p. 364.
1679 *See*. ANNEX 5: Relevant Articles of the Dutch Code of Criminal Procedure.

necessary.[1680] Moreover, in England and Wales, all evidence must be presented and discussed at the (jury or sentencing court) hearing. In contrast, in Türkiye and the Netherlands, the expert provides an oral testimony only when the court requests further clarification.

When there is a suspicion or claim that the suspect or offender might have a mental disorder, in Türkiye and in England and Wales, there shall be a mandatory assessment conducted. However, in the Netherlands, the assessment is only mandatory in cases where compulsory treatment is to be imposed.

The number of experts also varies. In Türkiye, a medical board which usually consists of at least 3 psychiatrists shall conduct the report, in England and Wales, it is at least 2, and in the Netherlands, it can be 1 to 3 depending on the type of assessment. The parties may also bring their own report to object to the official expert report.

All three criminal justice systems have the regulation in order to remand a person in a observational or medical hospital to diagnose the mental disorder, if any, and issue the expert report, when it is necessary. The observation period differs. In Türkiye, the period of stationing in a medical centre to conduct a mental health examination shall not exceed three weeks; however, if that time is not sufficient an extension which is not exceeding 3 weeks each may be given; and in any case, the sum of the terms shall not exceed 3 months. In England and Wales, a person may be placed in a hospital up to 28 days at a time; and the time to be spent in remand can be extended by the court up to a maximum of 12 weeks. In the Netherlands, it may not exceed 7 weeks, however, the examining magistrate may extend the order once by a maximum of 7 weeks.

One of the problematic issues of this stay -and also of the following treatment period- is that the life of the detainee may be limited due to language barriers, customary rules, religious practices, and dietary habits.[1681] Choosing a language for psychiatric assessment and treatment may become a complicated problem, when dealing with foreigners and migrants. Language plays quite an important role in influencing the expression and personal perception; and words also have cognitive meaning or denotations.[1682] Translating these words, phrases, or even emotions in between languages are, therefore, not an easy task. It is stated that the number of misdiagnoses may be alarmingly high in the absence of cross-cultural approaches.[1683] The added anxiety to speak in a second language must also be taken into consideration.[1684] For these reasons, it is found logical to conduct the examination in the common language, without an interpreter.[1685] Yet, this can also be problematic, as both the assessor and the person being assessed have to speak in a different language. As cultural attitudes differ, responses might be understood differently. Thus, when possible, hiring a bilingual, immigrant or expat employee may help better in this sense.

1680 The regulations set forth in CrimPR, r.28.8 and r.28.9 pertain to the issuance of medical reports for the purpose of sentencing.
1681 *See*. Koenraadt & Van Deutekom (2007), p. 118-119.
1682 Westermeyer (1990), p. 745.
1683 Westermeyer (1990), p. 745.
1684 Westermeyer (1990), p. 745.
1685 Westermeyer (1990), p. 745.

Generally, the law does not regulate how to weigh the expert evidence. However, in many common law jurisdictions, the judge has the duty to warn the jury about the evidence.[1686] In England and Wales, the trial is in two phases, meaning that the evaluation is done either to establish insanity or to inform the sentencing court. In England and Wales, therefore, the question whether this defendant is the offender has been answered positively before the evaluation. In the two inquisitorial countries, however, while composing the report on criminal responsibility, experts should never conclude that guilt has been established; instead, conditional phrases should be used to state 'if charges are proven', as the defendant may eventually be acquitted.[1687] In none of the three countries, the court is obliged to adhere to the expert report and the advice of behavioural experts, and in England and Wales the jury is not obliged to take the expert opinion into consideration. However, it has been stated that the courts have become more dependent on scientific and other expert evidence.[1688]

6.4 Execution of Verdicts

In every studied criminal justice system, there is a unique concept of secured institutions. In England and Wales, the institutions have centuries-long history. The Dutch TBS clinics are also internationally known. In Türkiye, however, the new concept of YGAP Hospitals have recently been established. It is important, therefore, to highlight these facilities.

In England and Wales, there is no strict separation between forensic and non-forensic hospitals, however all forensic mental health institutions are part of the National Health Service, and there are no forensic hospitals in the prison system, although there are hospital wings.[1689] Within the United Kingdom all treatments regulated for mentally disordered offenders are entirely free of charge and paid for by the National Health Service (NHS), not only in the National Health Service hospitals, but also in private hospitals.[1690] In the UK, forensic secure services are provided at high, medium and low levels of security.

In the Netherlands, there are three different systems in which forensic care can be provided: a) the penitentiary system that is governed by the Pbw, b) the TBS system that is governed by the BVT, and c) the (forensic) mental health system which is governed by civil (mental) health laws. All three systems, therefore, have their own special facilities. The penitentiary system has Penitentiary Psychiatric Centres ("PPC"), the TBS-system consists of Forensic Psychiatric Centres (Forensisch Psychiatrisch Centrum "FPC"), and the forensic mental health system has Forensic Psychiatric Clinics (Forensisch psychiatrische kliniek "FPK"), and Forensic Psychiatric Departments in psychiatric hospitals ("FPA").

1686 Anderson, T., Schum, D., & Twining, W. (2009). *Analysis of Evidence*. Cambridge: Cambridge University Press, p. 227.
1687 Meynen (2022), p. 280.
1688 Anderson et al. (2009), p. 270.
1689 European Commission (2005), p. 122.
1690 European Commission (2005), p. 128.

As stated above, in Türkiye, the new concept of the Highly Secured Forensic Psychiatry Hospitals ("YGAP", *Yüksek Güvenlikli Adli Psikiyatri Hastanesi*) has recently been established. The concept of *highly secured health institutions*[1691] was regulated in the Turkish Criminal Code of 2005, however constructions started 2018 within the scope of the application. Currently there are 6 YGAP Hospitals: the very first highly secured health institution was opened inside the Adana City Hospital in 2018, later other YGAPs were established in Kayseri, Elazığ, Eskişehir, Bursa, and Ankara, respectively.[1692]

In England and Wales, the healthcare system is (almost entirely) responsible for the enforcement of a hospital order issued by a criminal court.[1693] Thus, the separation of prison system and the forensic psychiatric system seems the clearest. However in Türkiye, services are currently carried out in accordance with the relevant articles of the TCC and protocols between the Ministry of Justice and the Ministry of Health, and the security is provided by the Ministry of Interior. In the Netherlands, a combination of a hospital order and a prison sentence is possible, therefore, the responsibility for forensic psychiatry is shared between the judicial authorities and the healthcare system.[1694] Here it is important to underline the fact that in the Netherlands, criminal courts may issue a civil care referral (Article 2.3 Wfz), it is not called *forensic* care and is not funded by the Ministry of Justice and Security.

Another emphasis should be given to the fact that it is also possible to combine this civil care referral (Article 2.3 Wfz) with other sentences. In practice, the combination with suspended prison sentences is most common,[1695] however the combination with an acquittal is possible. In the Turkish criminal justice system, the division between civil and criminal hospital orders is extremely clear; only civil courts can order the civil orders.[1696] In England and Wales, civil order is also possible under common law. However, the main difference is that judgment from a judge or court is not required.[1697]

1691 The naming of the *"highly secured health institutions"* is a one-to-one translation of the terminology used in the TCC. According to the law, the health institution has to not only have high security to keep people in, but also have physical, electronic, and security equipment in order to protect them from harming each other or employees.

1692 The opening dates are 01 July 2018 in Kayseri, 18 August 2018 in Elazığ, 21 February 2019 in Eskişehir, 11 November 2019 in Bursa, and 22 March 2021 in Ankara.. *See.* ANNEX 9- Opening Dates and Bed Capacities of YGAP Hospitals.

1693 De Kogel et al. (2006), p. 321.

1694 De Kogel et al. (2006), p. 321.

1695 Van der Wolf & Mevis (2022), p. 377.

1696 Even though this dissertation does not cover the civil treatments, it is better to explain the Turkish civil hospital order briefly. Article 432 of the Turkish Civil Code regulates that any adult person who poses a danger to the society due to mental illness, mental retardation, addiction to alcohol or narcotics, infectious disease, or vagrancy may be placed in a suitable institution for treatment, education or rehabilitation or may be detained if their personal protection cannot be provided in any other way. The person concerned shall be removed from the institution as soon as their condition permits.

1697 Zinkler, M., & Priebe, S. (2012). Hospitalization and Civil Commitment in England and Wales. In A. Felthous, & H. Saß, *International Handbook on Psychopathic Disorders and the Law* (Vol. II: Laws

The procedures for prolongation of the security measure also differ in these three criminal justice systems. In Türkiye there is no periodic review for prolongation. Article 57/2 of the TCC regulates that *a mentally disordered person may be discharged from the health institution if the report prepared by the health commission of the institution states that their release carries no risk to the community, or if there is a risk that it is considerably diminished.* In cases falling under Article 32/1 of the TCC, the period to be spent in a mental health institution is not determined by the court in sentencing.[1698] In accordance with the medical report from the institution which demonstrates significant reduction or complete disappearance of the patient's dangerousness the execution judge may rule on the discharge. However, the absence of a regulatory framework governing the execution of security measures results in the absence of automatic or periodic reviews by the institution or renewal assessments by the judicial authority. Consequently, the judicial review is contingent upon the initiative of the hospital. Given that the security measure imposed on mentally disordered offenders with no criminal responsibility may be infinite, this could give rise to a human rights issue, which will be elaborated on in *Chapter 4*.

According to the MHA 1983 Part V s.65, there is a Mental Health Review Tribunal for Wales and First-tier Tribunal for England, and the Tribunals play the role in when a patient is admitted to a hospital for assessment or treatment, is received into guardianship, or is transferred from guardianship to a hospital. S.37 order can be renewed for a further 6 months; afterwards, extensions can be made for 1 year at a time. S.37/41 order lasts until the person is discharged by the Tribunal or by the responsible clinician with the permission from the Secretary of State, therefore no prolongation is needed. S.38 states that an interim hospital order can be extended 28 days at a time up to a maximum of 12 months, and S.47 can be renewed for 6 months, and then 1 year at a time. When a person is sentenced to a life or extended sentence, they can only be released on the direction of the Parole Board.

In the Netherlands, according to Articles 37a-38j of the DCC, a TBS-order can be imposed in cases of severe offences, dangerousness, and mental disorder at the time of the offence; and it may be prolonged by the court of imposition. During the execution, the decisions on the deprivation of liberty, for instance the prolongation of the TBS-order or changing conditional sentences to unconditional sentences, shall be determined by the judicial

and Policies, pp. 21-34). West Sussex: John Wiley & Sons, p. 33.

According to s.3 of the MHA 1983, an application for admission for treatment must be founded on the written recommendations in the prescribed form of two registered medical practitioners. Under section 3, a person can be detained for up to six months, and it could be renewed for a further six months and then for periods of one year at a time. These renewals can be done by the responsible doctor. The person is entitled to appeal to the Mental Health Tribunal once, in every period of detention and to Mental Health Act Managers at any time during the detention. In cases where a person does not appeal within the first six months and the detention gets renewed, the case will be automatically referred to the Mental Health Tribunal. The person can be discharged at any time by the responsible clinician, the Mental Health Tribunal, the Mental Health Act Managers, or the nearest relative. *See.* Oxford Health NHS Foundation Trust <https://www.oxfordhealth.nhs.uk/support-advice/getting-help/your-rights/section-3/> accessed 28 April 2024.

1698 Yargıtay 3. Ceza Dairesi, 19/09/2018, 5035/13163.

authority.[1699] The Penitentiary Chamber, formed of three judicial members and two behavioural scientific members, is the appeal mechanism for many of these decisions. As explained under the substantive criminal law section, there are two types of TBS-order: TBS-order with compulsory treatment (*Tbs met dwangverpleging*, Article 37b) and TBS-order with conditions (*Tbs met voorwaarden*, Article 38). A TBS-order with compulsory treatment cannot exceed a period of 4 years, unless this order has been imposed for a serious offence against or endangering the physical integrity of one or more persons. In these cases, the total term cannot exceed 9 years. The TBS-order with compulsory treatment (*Tbs met dwangverpleging)* can be imposed for 2 years, and after 2 years, the TBS-measure can be extended by the court with 1 or 2 years, each time. The court decides on the extension, and while deciding, the court is advised by the forensic clinic and/or the probation service, and sometimes by independent experts. In theory, this means that the measure can last for life. When the minister finds that a patient continues to be a danger to society despite treatment, the patient may be transferred to the long stay facility.

6.5 Comparative Tables

In the previous subsections, the summary of fundamental differences between three criminal justice systems and integral analysis of important concepts were provided. Under this subsection, the main differences, that are revealed, are highlighted in tables below. For the purpose of the compliance assessment with the ECHR test in Chapter 4, it seems logical to limit it to the sentences specifically aimed at mentally disordered offenders, as a large part of the test relates to Article 5/1(e) and is only applicable to such schemes.

TABLE 4: Fitness to Stand Trial and Criminal Responsibility

Criminal Justice System	Fitness Test to Stand Trial	CR: Legislative or Judicial Standard	Levels of Criminal Responsibility
Türkiye	No	Legislative: Article 32 of the TCC	3
England and Wales	Yes	Judicial: M'Naghten Rules	2 [Diminished responsibility is only valid for murder.]
The Netherlands	Yes	Combined: Legislative: Article 39 of the DCC Judicial: *Thijs H.*	3*

*The NVvP advised on 31-01-2024 for the diminished responsibility cases that the forensic experts can make use of the old terminology in their reports.[1700] In that sense, it can be claimed that there are still 5 levels of criminal responsibility.

1699 Van der Wolf, Van Marle & Roza (2022), p. 209.

1700 *"Aanbeveling-6: Indien passend kan gebruik gemaakt worden van eerdere terminologie, zoals enigszins en sterk verminderd, zonder hiermee een exact natuurwetenschappelijke benadering te beogen."*, *See.* https://richtlijnendatabase.nl/richtlijn/psychiatrisch_onderzoek_en_rapportage_in_strafzaken/het_advies_over_toerekenen.html, accessed 11 June 2024.

TABLE 5: Forensic assessment

Criminal Justice System	Mandatory Assessment	Stationary Mental Examination	Number of Experts	Binding Nature of the Expert Report
Türkiye	Yes, in case of suspicion of a mental disorder	Exists • Initially 3 weeks. • Can be extended. • Maximum stay is 3 months.	3 (a medical board is usually comprised of at least three psychiatrists,)	Not binding
England and Wales	Yes (Parties bring their own reports)	Exists • Initially 28 days. • Can be extended. • Maximum stay is 12 weeks.	2	Not binding
The Netherlands	No (Only in cases when compulsory treatment is to be imposed)	Exists Initially 7 weeks. • Can be extended. • Maximum stay is 14 weeks.	1-3 (depending on the type of assessment)	Not binding

TABLE 6: Results of Being Mentally Disordered Offender – Verdict

Criminal Justice System	Verdict
Türkiye	• Guilty: imprisonment • Guilty but not criminally responsible (judgment of not imposing a penalty) • Security measure • Guilty but diminished responsibility
England and Wales	• Guilty: imprisonment • Not guilty by reason of insanity • Manslaughter – diminished responsibility (only for murder charges)
The Netherlands	• Guilty: imprisonment • Guilty but not criminally responsible – dismissal of all charges – OVAR* • TBS-order (hospital order) or civil care referral • Combination sentences in case of diminished responsibility

Please note that all three criminal justice systems have a range of other verdicts that apply to all offenders, including acquittal, dismissal, judicial fine, community service, and measures relating to assets.

*As discussed earlier, in the Netherlands, there are extremely exceptional cases where the court accepted that the means rea was lifted and acquittal should follow. The dismissal of all charges (*ontslag van alle rechtsvervolging "ovar"*) is not acquittal. It is given when the court finds that the accused did commit the offence charges, however the fact or the accused is not punishable due to certain circumstances.

TABLE 7: Sentencing Framework Related to Responsibility

Criminal Justice System	**Fully Responsible**	**Diminished Responsibility**	**No Responsibility**
Türkiye	Imprisonment or judicial fines	The court has the discretion to opt for sentence reduction or partial or full security measures.	Cannot be subject to any punishment; security measures ***shall*** be imposed.
England and Wales	Imprisonment, fines, and community order	May be convicted of manslaughter (only for murder charges)	Hospital orders with or without restrictions, hybrid orders (where hospital and limitation directions coupled with a prison sentence), guardianship orders, community orders with or without mental health treatment requirement attached, or prison sentence alone. Absolute discharge is also possible. [S.37 MHA 1983 hospital orders cannot be issued for murder, as the mandatory life sentence for murder is fixed by law.]
The Netherlands	Imprisonment, fines, conditional sentences, measures	Combination of a penalty and a TBS-order or a civil care referral (Article 2.3 Wfz)	A TBS-order* or a civil care referral (Article 2.3 Wfz)

* In cases where individuals are deemed to meet the criteria of committing a severe offence and are considered very dangerous.

TABLE 8: Forensic Mental Health Facilities

Criminal Justice System	Security Levels	Placement to the Forensic Facilities	Payment of the Forensic Facilities
Türkiye	1 level* Only high security	The court determines the hospital.**	Free of charge. Services within the YGAP are carried out in accordance with the bilateral protocols between the Ministry of Justice and the Ministry of Health. However, the security is provided by the Ministry of Interior.
England and Wales	3 levels High, medium, and low	The court does not determine the hospital.*** This is determined by the defendant's place of residence and the psychiatrists' opinion on the level of security required.	Free of charge. Paid for by the National Health Service (NHS), not only in the National Health Service hospitals, but also in private hospitals. NHS Hospitals are organisationally under the Department of Health and Social Care
The Netherlands	4 levels High, two levels of medium, and low	The court does not determine the hospital. The Ministry of Justice and Security is in charge of execution including placement.	Free of charge. Paid for by the Ministry of Justice and Security.****

* Since the forensic psychiatric hospitals are new to the Turkish criminal justice systems, currently there is only one level, which is high security.
** In Türkiye, the high security mental healthcare facilities are new concepts, therefore there is currently only one level.
***In England and Wales, the court cannot sentence a person to hospital treatment unless the intended hospital and treating physicians agree to provide a bed for a patient.
**** Civil care referral (Article 2.3 Wfz) is paid by the person's own health insurance company. Here also the agreement of the receiving hospital is needed for placement.

TABLE 9: Prolongation of the Framework for Mentally Disordered Offenders

Criminal Justice System	Need for Prolongation	Responsible Authority for Decision Making	Discharge
Türkiye	• No need for prolongation.	Health commission prepares a report on the dangerousness of the offender, and the execution judge rules on the discharge, accordingly.	Discharge possible by the execution judge when the dangerousness of the offender is significantly reduced or completely lifted. (under Article 32/1) It is not possible to discharge until the requisite period of time has been spent in the institution. (in case of diminished responsibility, under Article 32/2)
England and Wales	• Prolongation required for certain orders, such as S.37 and S.38 interim hospital order. • S.37 order can be renewed for a further 6 months, and extensions can be made for 1 year at a time. • S.37/41 order lasts until the person is discharged by the Tribunal or by the responsible clinician with permission from the Secretary of State.	Mental Health Review Tribunal for Wales and First-tier Tribunal for England play a role in decision making for admission, guardianship, and transfer of patients to hospitals.	Discharge possible by the Tribunal or by the responsible clinician with permission from the Secretary of State.
Netherlands	• Prolongation required for TBS-order. • TBS-order can be prolonged or extended maximum every two years by the court of imposition. • Civil care referral can be prolonged by a civil court after a year	Judiciary authority determines decisions on the deprivation of liberty, such as prolongation of the TBS-order or changing conditional sentences to unconditional sentences. The Penitentiary Chamber, consisting of three judicial members and two behavioural scientific members, serves as the appeal mechanism for many of these decisions.	Discharge possible when the TBS-order is not renewed. Discharge from the Civil care referral by the clinic with approval of the Minister of Justice and Security

CHAPTER 4

ASSESSMENT OF THE COMPATIBILITY OF RELEVANT PROVISIONS AND PRACTICES IN SENTENCING MENTALLY DISORDERED OFFENDERS IN THREE CRIMINAL JUSTICE SYSTEMS WITH THE ECHR FRAMEWORK

CHAPTER 4 **ASSESSMENT OF THE COMPATIBILITY OF RELEVANT PROVISIONS AND PRACTICES IN SENTENCING MENTALLY DISORDERED OFFENDERS IN THREE CRIMINAL JUSTICE SYSTEMS WITH THE ECHR FRAMEWORK**

SECTION 1: INTRODUCTION TO THE CHAPTER

Chapter 4 addresses the sub-question of "*To what extent do these three criminal justice systems comply with the ECHR test*?". The objective of Chapter 4 is to provide a comprehensive analysis of the imposition and execution phases of the three chosen criminal justice systems, with a particular focus on their compliance with the ECHR framework. It can be derived from the phrasing of the sub-questions that the test created in Chapter 2 is applied in Chapter 4 is limited to sentences specifically intended for mentally disordered offenders, whereas Chapter 3 takes the broader context of sentencing into account.

In order to answer the aforementioned question, the ECHR test, as outlined in Chapter 2, is employed. The following sections will assess the compliance of the three criminal justice systems with the ECHR test, as well as any potential and existing instances of non-compliance, in accordance with the order of the test. In this respect, the concept of international cross-fertilisation[1701] will be used to identify and highlight the most effective practices. It is anticipated that the exemplary safeguards established by these national systems will serve as a source of inspiration for the development of similar measures in other jurisdictions. The concluding section will present a summary of the chapter's findings and their implications.

As in this chapter the elements of the ECHR test are connected to relevant issues within the three criminal justice systems, there is indeed ample overlap with Chapter 2 and parts of Chapter 3. This overlap serves the purpose of aiding those readers that restrict themselves to reading Chapter 4, as – given the magnitude of the rest of the book – some are expected to do.

The main research question of this dissertation involves assessing compliance not only of the legal provisions, but also of the (legal) practices. To this latter end, the ECtHR judgments will be used as a primary source of information on the practices of the criminal justice systems. In addition, literature from the respective countries involving potential non-compliances is used as well as the reports drawn up by the European Committee for

1701 In this Chapter the cross-fertilisation method will highlight the significance of effective safeguards, by comparing them to other practices.
" *'Cross-fertilisation' pertains to the understanding of legal utterances relative to other such utterances. The concept assumes that if a legal agent wishes to understand the meaning or significance of a legal utterance, his understanding may profit by bringing the analysis of this utterance to bear on its relationship with other legal utterances. This is to say, legal utterances are dependent for their meaning or significance on their relationship with each other.", See.* Linderfalk, U. (2015). Cross-fertilisation in International Law. *Nordic Journal of International Law 84*, 428-455, p. 454.

the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") will be referenced in order to provide further insight into the practices in question.

While examining the Turkish justice system, the judgments of the Constitutional Court will also be scrutinised. The Constitutional Court (*Anayasa Mahkemesi*), which was established in 1961, constitutes the highest judicial body in Türkiye providing constitutional review. In addition to its existing duties, the Constitutional Court has been granted the authority to establish new commissions for the purpose of examining the admissibility of *individual applications* and issuing rulings on them, through a public referendum held in 2010. One of the most significant considerations in regulating the concept of individual applications was the fact that Türkiye had the highest number of violation judgements rendered by the ECtHR. Consequently, the concept of the individual application represents a means of addressing this unsatisfactory record by granting the Constitutional Court the authority to ultimately examine violations of domestic law. As of 23 September 2012, any individual can submit an application to the Constitutional Court, alleging that one of their fundamental rights and freedoms guaranteed in the Constitution, within the scope of the European Convention on Human Rights, has been violated by a public authority. In light of the requirement to exhaust domestic remedies prior to seeking recourse from the ECtHR, individuals are currently unable to do so without first submitting an individual application to the Constitutional Court. Consequently, the judgements of the Constitutional Court arising from the individual application are important for the scope of this thesis. While it is quite fascinating to observe the efforts to resolve allegations of human rights violations within the domestic system and the opportunity to obtain the same remedies in the applicant's own language, it could be argued that the examination method of the Constitutional Court is identical to that of the ECtHR. It seems inevitable that the ECtHR cases will be cited; however, it is questionable whether the same cover page, sections and headings should be used to deal with cases.[1702] From this perspective, the judgements of the Constitutional Court appear to be a translation of the judgements of the ECtHR.

In order to gain a comprehensive understanding of the criminal justice system of England and Wales, the investigation reports of the Prisons and Probation Ombudsman ("PPO") are being examined. The PPO is a completely independent entity, appointed by and reports directly to the Secretary of State for Justice.[1703]

And finally, in the absence of sources that have ascertained the compatibility of provisions and practices to a standard in the test, the assessment will be made on my own accord.

The objective of this chapter is not to point out incompatibilities in order to criticise specific legal systems. Rather, it aims to provide inspiration for criminal justice systems by offering examples of best practice, and to ensure a better protection of human rights, potentially beyond the three chosen systems.

1702 *See.* for instance, *Temur Eskibağ ve Mehmet Rıza Eskibağ Başvurusu*, Anayasa Mahkemesi, E. 2014/5098, T. 20/12/2017, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/5098 accessed 24 August 2024.

1703 Prisons & Probation Ombudsman. (2016). *Learning from PPO investigations: Prisoner Mental Health.* London.

SECTION 2: RATIFICATION AND INTERNALISATION OF THE ECHR

As previously stated in Chapter 1, all three criminal justice systems are High Contracting Parties to the ECHR. Consequently, the ECHR was chosen as a comprehensive international human rights framework for this dissertation.

The ECHR was signed by Türkiye on 20/03/1952, ratified it on 10/03/1954,[1704] and published as Act no. 6366 in the Official Gazette on 19/03/1953. As the ECHR is an international agreement concerning fundamental rights and freedoms, according to Article 90/5 of the Constitution of the Republic of Türkiye[1705], its articles prevail over national regulations. Hence, the analysis of this chapter, which concerns compliance with the ECHR, is of paramount importance for the Turkish criminal justice system. This analysis will enable the identification of problems and legal gaps, as well as the formulation of recommendations for improvement.

The United Kingdom was among the first states to ratify the ECHR.[1706] Although the UK accepted the right of individual petition and the jurisdiction of the ECtHR in 1966, in England and Wales, the ECHR was not incorporated into domestic law until the Human Rights Act ("HRA") 1998. Prior to the incorporation of the ECHR into the national law by the HRA 1998, which came into force in 2000, the ECtHR had already begun influencing domestic rulings.[1707] It is important to note that this statute does not empower judges to repeal legislation; rather, it allows them to issue a declaration when a statutory provision is deemed to be incompatible with the ECHR.[1708]

The ECHR was signed by the Netherlands on 04/11/1950 and ratified on 31/08/1954.[1709] According to Article 94 of the Constitution of the Kingdom of the Netherlands: *"Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions".* In other words, binding treaty provisions and resolutions by international

1704 *See.* https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005, (accessed 22 October 2024.)

1705 According to Article 90 of the Constitution of the Republic of Türkiye:
"1. The ratification of treaties to be concluded with foreign states and international organisations on behalf of the Republic of Türkiye shall be subject to adoption by the Grand National Assembly of Türkiye by a law approving the ratification.
5. International treaties that have been duly put into effect shall have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds of unconstitutionality. In the event of a discrepancy between the provisions of international treaties on fundamental rights and freedoms that have been duly put into force and those of domestic legislation, the former shall prevail."

1706 The United Kingdom signed the ECHR on 04/11/1950 and ratified it on 08/03/1951. *See.* https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005, (accessed 22 October 2024.)

1707 Padfield (2016), p. 14.

1708 Padfield, N. (2016, December). Legal Constraints on the Indeterminate Control of 'Dangerous' Sex Offenders in the Community: The English Perspective. *Erasmus Law Review, 9*(2), 55-66, p. 64.

1709 *See.* https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005, (accessed 22 October 2024.)

institutions, including those concerning human rights, take precedence over national legislation. Therefore, the penal concept of (preventive) detention is subject to the directly applicable and legally binding framework set out in Articles 3 and 5 of the ECHR, which must be consulted in order to ascertain the legitimacy of the detention and the humane treatment of the individual concerned.[1710]

Both the common law and the ECHR are in a state of constant evolution and adaptation.[1711] In the context of the Convention, the term "living instrument" denotes a dynamic and evolving entity, contingent upon the interpretations of the ECHR by the ECtHR. Furthermore, the Court endeavours to interpret the Convention in light of current circumstances and social standards of the present era, rather than to appraise the intentions of the Convention's drafters from70 years ago. In 1978, for instance, the ECtHR delivered a landmark ruling that the birching of a schoolboy at the order of a juvenile court constituted a "degrading punishment" contrary to Article 3 of the Convention. This was despite the fact that corporal punishment had previously been regarded as a standard sanction.[1712]

The discretionary power of High Contracting Parties, which are bound by the ECHR, in applying the ECHR or the ECtHR case law shall be discussed here. The answer to the question whether such parties have a margin of appreciation in the application of the abovementioned instruments is affirmative. However, this discretion is not unlimited. The margin of appreciation provides the necessary flexibility while protecting overarching human rights. This concept acknowledges that national authorities are often better placed to assess the needs and conditions of their own societies.[1713]

This is closely linked to the principle of subsidiarity, which holds that national authorities, particularly courts, are the primary means of protection for human rights and should be given some latitude in their interpretation and application of the Convention rights. In this regard, when enacting legislation or policies to comply with the ECHR,

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1710 Struijk & Mevis (2016), p. 104.

1711 Padfield (2012), p. 65.

1712 *Tyrer v. the United Kingdom*, App no 5856/72, (ECtHR, 25 April 1978).

1713 The ECtHR rules that Contracting States have a margin of appreciation, for instance, for Article 8 and 10.
The ECtHR states: *"The Court points out that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State when determining any case under Article 8 of the Convention. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wide.", See. A, B and C v. Ireland,* App no 25579/25, (ECtHR, 16 December 2010), §232.
The ECtHR also rules that Article 10/2 of the ECHR leaves the Contracting States a margin of appreciation. This margin is, however, not an unlimited power of appreciation. *See. Handyside v. the United Kingdom,* App no 5493/72, (ECtHR 07 December 1976), §48-49; *The Sunday Times v. the United Kingdom*, App no 6538/74, (ECtHR, 26 April 1979), §58-59.

Contracting Parties can tailor their approaches in a manner that aligns with their legal systems and societal contexts. Nevertheless, the ECtHR supervises the application of the ECHR by Contracting Parties and eventually ensures that the margin of appreciation is not exploited to subvert the safeguarding of fundamental rights.

Moreover, as set forth in Article 46 of the ECHR, the final judgments rendered by the ECtHR are binding upon the High Contracting Parties. The Committee of Ministers supervises the execution of these final judgments. In the event that a Contracting Party fails to comply with a final judgment, the Committee of Ministers may issue formal notice and may refer the matter to the Court to determine whether the Contracting Party has failed to fulfil its obligations. Consequently, the ECtHR monitors the execution of its judgments until the requisite measures have been taken. In this regard, there is no leeway for the Contracting Parties.

SECTION 3: EXAMINING COMPLIANCE WITH THE ECHR TEST

In this section, the ECHR test will be applied to the compared criminal justice systems in order to ascertain their degree of compliance. The controversial issues that have been, or may potentially be, the source of compliance concerns will be discussed in detail. For the purposes of analysis, the sequence of the ECHR test, as established in Chapter 2, will be followed. As a result, the gravity of the potential non-compliance issues is not reflected in the sequence of the subsections.

In accordance with the provisions set forth in Article 5/1(e), the issue of proving a mental disorder will be addressed in the first subsection. Detention rules according to Article 3 and 5/1(e) will be examined under the second subsection. The third subsection will investigate the positive obligations and safeguards outlined in Articles 2, 3, 5, 6, and 14. The final subsection will present a summary of the conclusions of this chapter.

Prior to this, it is reiterated that the threshold for positive obligations is heightened in instances where the state acknowledges that a person is vulnerable within the justice system. Thus, to prevent repetition under each and every subsection, a general statement is made that the States should proactively take precautions to protect vulnerable persons. In this respect, the acknowledgement of vulnerability constitutes a pivotal element in the enhancement of protection.

3.1 Lawfulness of the Detention under Article 5/1(e)

According to the case law of the ECtHR[1714] and the established ECHR test, when issuing a detention order for mentally disordered offenders:

a). the individual must be reliably shown, by objective medical expertise, to be of unsound mind, unless emergency detention is required. A true mental disorder

1714 *See. Section 2* of *Chapter 2*.

must be established before a competent authority on the basis of objective medical expertise;

b). the individual's mental disorder must be of a kind or degree warranting compulsory confinement. The deprivation of liberty must be shown to have been necessary in the circumstances;

c). the mental disorder, verified by objective medical evidence, must persist throughout the period of detention.

This subsection examines these three components. First, it will be reiterated briefly how the three criminal justice systems regulate the *true mental disorder,* that may also lift or (diminish) criminal responsibility, and how it can be reliably shown that the mental disorder requires compulsory confinement, in order to assess and determine whether they comply with the ECHR test.

3.1.1 "Reliably Showing" that "True Mental Disorder" Requires "Compulsory Confinement" Through "Objective Medical Expertise" and Establishing It Before a "Competent Authority"

As previously reiterated, according to the ECHR test, when issuing a detention order for mentally disordered offenders which is also on the establishment of their disorder, the individual must be *reliably shown* to be of unsound mind, unless emergency detention is required. A *true mental disorder* must be established before a competent authority on the basis of *objective medical expertise*. Furthermore, the individual's mental disorder must be *of a kind or degree warranting compulsory confinement*, and the deprivation of liberty must be shown to have been necessary in the circumstances.

Hence, the concept of *true mental disorder* must be mentioned first. The aspect of how this true mental disorder can be reliably shown and proven will be discussed next, followed by explaining how to establish the true mental disorder before a competent authority based on objective medical expertise. The problems in practice will also be presented along with these explanations. Given that these central notions cannot be separated by fine lines because they are intricately intertwined, it is hard to divide them into separate subsections for examination. Bearing this in mind, an attempt will nevertheless be made to discuss current controversial issues and potential non-compliance issues, in separate subsections.

The relevant frameworks from the respective countries to be assessed here – as they are (also) based on the mental disorder – are the security measure specific to the mentally disordered offenders in Türkiye, the hospital order in England & Wales, the TBS-order and the civil care referral by the criminal court (Article 2.3 Wfz) in the Netherlands. Of these frameworks, the TBS-order of the Netherlands and the commitment to a mental hospital for treatment of England and Wales are considered by the ECtHR to be justifiable under both sub-paragraph (a) (conviction) and sub-paragraph (e) (persons of unsound mind) of Article 5.[1715]

1715 *X v. the United Kingdom*, op. cit., §38-39; *Morsink v. the Netherlands,* op. cit., 61; *Constancia v. the Netherlands* (dec.), op. cit., §29.

3.1.1.1 *True Mental Disorder*

In order to assess compliance, the terminology of *true mental disorder* should be reminded first. According to the ECtHR case law on Article 5/1(e), which is explained under *Section 2 of Chapter 2* in detail, an individual cannot be considered to be of unsound mind and deprived of their liberty unless they are reliably shown to be of unsound mind, that is to say, *a true mental disorder must be established* before a competent authority on the basis of objective medical expertise.[1716] Hence, the detention order must, in principle, be based on a report that reliably demonstrates a true mental disorder by objective medical expertise. As any terminology used in the ECHR, *true mental disorder* also has an autonomous meaning; this concept may be different from the notion of *mental disorder* as referred to in national legal orders.[1717] Although, the objective medical expertise constitutes a safeguard, there is no definition or further explanation of what constitutes a *true mental disorder* in the ECtHR case law. However, the Court considers that the mental disorder must be of a *certain gravity* in order to be considered a *true mental disorder*.[1718] In this sense, the ECtHR has repeatedly stated, for instance, that there are doubts as to whether a person's dissocial personality or dissocial personality disorder could solely be considered sufficient enough to qualify as a "true mental disorder" for the purposes of Article 5/1(e).[1719]

According to the Court, no definitive interpretation of "persons of unsound mind" can be given, as its "*meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread*".[1720] Hence, it is important for criminal justice systems to adapt or provide the opportunity to adapt to the changing societal norms and the developments in psychology, as they may also influence the (assessment of the) concept of criminal responsibility..

National criminal law regulations do not usually define what constitutes criminal responsibility, but instead, provides criteria that define which cases or mental conditions can *negate* the criminal responsibility of the defendant.[1721] Careful consideration should be given to clarify the relevance of mental disorders to criminal responsibility, given the philosophical, legal, and medical premises involved in this discussion.[1722] As was noted in Chapter 3, not all frameworks of detention for mentally disordered offenders in the three respective countries require the establishment of (diminished or) non-responsibility.

1716 *Winterwerp v. the Netherlands*, op. cit., §39; *M.B. v. Poland* op. cit., §63.

1717 *Petschulies v. Germany,* op. cit., §74-78.

1718 *Glien v. Germany,* op. cit., §85.

1719 *Petschulies v. Germany,* op. cit., §77; *Krastanov v. Bulgaria,* App no 50222/99, (ECtHR, 30 September 2004), §78-79; *Glien v. Germany,* op. cit., §88.

1720 *Winterwerp v. the Netherlands*, op. cit., §37.

1721 Emphasis added, Gröning, L. (2023, December). Regulating criminal unaccountability – From concepts to defensible legal standards. *Bergen Journal of Criminal Law and Criminal Justice*, 1-21, p. 2.

1722 Gröning, L., Haukvik, U., Morse, S., & Radovic, S. (2022). Remodelling criminal insanity: Exploring philosophical, legal, and medical premises of the medical model used in Norwegian law. *International Journal of Law and Psychiatry, 81*, 1-7, p. 5.

Nevertheless, for some frameworks it is relevant, while in all three countries the concept has traditionally been closely related to specific frameworks for detention. Therefore, the concept will also be discussed here.

As stated in *Section 6 of Chapter 3*, one of the main differences when comparing *substantive criminal law* is the concept of criminal responsibility. In the Turkish criminal justice system, imputability is defined as a combination of having the *"ability to perceive"* (*anlama yeteneği*) and the *"ability to will" (isteme yeteneği),* hence, in order to be imputable, a person is required to have both enough cognitive and volitional capabilities. The TCC provides no further information on either definition of mental disorder or its criteria. Criminal courts are, therefore, always in need of the discipline of psychology and/or psychiatry.[1723] In practice, there is a case-based approach that involves evaluating the criminal responsibility of the person for the offence committed while seeking and establishing the temporal intersection and causal link between mental disorder and criminal behaviour.[1724] As the establishment of the mental disorder that negates imputability is also the establishment of the mental disorder as a basis for detention, this approach complies with the ECHR test. Studies demonstrate that for the classification of the diagnoses in Türkiye, the DSM-5 is in use.[1725]

The legal basis for criminal responsibility in England and Wales is derived from the common law system. Acquittal by reason of *insanity* is based on the *M'Naghten Rule*. According to the principles, everybody is presumed to be sane unless the contrary is proven; and in order to establish the insanity defence, it must be proven that at the time of the committing of the act, the defendant was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act they were doing; or if they did know it, that they did not know what they were doing was wrong. In order to diagnose the person, the ICD-11 and DSM-5 are widely used classification and diagnostic tools in England and Wales.[1726] As mentioned in Chapter 3 a hospital order can be imposed on someone considered legally 'insane', however it can also be imposed on convicted offenders considered responsible (enough), when they meet the criteria for a hospital order.

1723 It is stated that in practice, *the Rorschach Inkblot Test*, *Minnesota Multiphasic Personality Inventory*, and *Wechsler Adult Intelligence Scale* are prominent psychometric testing instruments, along with several other tools to evaluate intelligence and neurocognitive functions. *See.* Balcıoğlu et al. (2023), p. 7.

1724 Balcıoğlu et al. (2023), p. 7.

1725 DSM-IV-TR (for cases diagnosed before 2013) or DSM-5 (after 2013); *see.* Balcıoğlu, Y.H., Doğan, M., Kaya, İ. & Saygılı, S. (2024). Criminal responsibility and profile of Turkish firesetters with schizophrenia. *International Journal of Law, Crime and Justice*, 1-11, p. 3; Meral, O., & Ayaz, N. (2020). The Effect of Psychiatric Consultations on Forensic Reports Process. *The Bulletin of Legal Medicine*, 25(3), 161-176, p. 161.

1726 Perkins, D., & Hughes, S. (2021). Forensic Mental Health Assessments. In J. M. Brown & M. A. H. Horvath (Eds.), *The Cambridge Handbook of Forensic Psychology* (pp. 388–417). Cambridge: Cambridge University Press, p. 393.

In the Dutch criminal justice system, Article 39 of the DCC regulates that any person who commits an offence for which they cannot be held responsible by reason of mental disorder (*psychische stoornis*), psychogeriatric disorder (*psychogeriatrische aandoening*), or intellectual disability (*verstandelijke handicap*) is not punishable. Non-responsibility used to be a criterion for the order of placement in a psychiatric hospital until 2020, however for the current civil care referral by the criminal court (Article 2.3 Wfz) is no longer required. The offender just needs to meet the criteria for the civil care referral. Whether the concept of responsibility is relevant for imposition of the TBS-order is under ample debate.[1727] In the same evaluation mental disorder and the degree of responsibility are assessed. It is standard jurisprudence that both in establishing non-responsibility and the criteria for the TBS-order the court is not restricted to the concept of mental disorder in the DSM.[1728] Evaluators are however obliged to (also) state their diagnostic conclusions in terms of the DSM.[1729]

Even though the ECtHR does not define what is to be considered a *true mental disorder*, it rules that a mental disorder must be of a *certain gravity*.[1730] However, no further elaboration has been provided. Therefore, it can be stated that all three criminal justice systems have the relevant regulations in their domestic law, emphasising that there should be a certain level of gravity for detention. The question of how to reliably show that a true mental disorder requires compulsory confinement through objective medical expertise will be addressed below.

3.1.1.2 *Reliably Showing* That A True Mental Disorder Exists *Through Objective Medical Expertise*

As explained in detail in Chapter 3, in all three criminal justice systems forensic mental health experts play a crucial role in assessing mental disorder (and criminal responsibility). However, apart from general criticism on the quality of these assessments (for example from a scientific point of view),[1731] the Netherlands and England and Wales appear to have a long-standing and well-established system for undertaking these assessments, whereas in Türkiye, the new system still lacks administrative rules.

To prove that a true mental disorder is present as grounds for a certain detention framework, the provisions require an objective medical expert report in all three criminal justice systems. The mentioned standards of Article 5 are mostly based on cases of a civil commitment, as was the case of *Winterwerp*. In such cases objectivity refers first and foremost to independence: not having the intended treating facility providing the expertise but also an independent psychiatrist, as certain improper (financial) interests

1727 Van der Wolf, Van Marle & Roza (2022), p. 212-213.
1728 *Thijs H. case,* para. 3.2 and para. 5.4.1.
1729 Ronhaar (2007), p. 138. Even though the cited source mentions DSM-IV and ICD-10, DSM-5 and ICD-11 are released after the publication day.
1730 *Glien v. Germany,* op. cit., §85.
1731 *See.* Pouls et al. (2022), p. 1.

could otherwise come into play.[1732] In criminal cases, in which such commitment is at stake, there is generally a forensic evaluation in place (also directed at criminal responsibility), which in principle qualifies as the required medical expertise if following detention is based on it (even though also psychologist may have played a role). In the Dutch case of *Constancia*, who refused to cooperate with the evaluation, the ECtHR has even accepted that the court established the mental disorder for TBS-imposition when the experts could not.[1733] Therefore, as such evaluations are required for imposing such detention framework, before starting discussing the issues in practice, it must be noted that the regulations in all three criminal justice systems comply with this rule.

The concept of *objective* medical expertise is not defined by the ECtHR, especially not in relation to a forensic evaluation. Below, this issue is discussed along two lines: adequate quality and – in relation to that – disputability (also in relation to partiality). As disputability may also be an issue of equality of arms between the parties, it may also be related to Article 6 of the ECHR.

In terms of adequacy, a lot of literature argues that conclusions of the experts are interpretations, therefore, forensic behavioural experts are the interpreters.[1734] Their interpretation, surely, has limits, but their findings should be reproducible. In the communication between courts and psychiatrist, the quality of the conclusions are depending on the validity of tests used, the expert's reliability, and expert's experience with the tests used.[1735] Therefore, responsible professional organisations should prepare guidelines about the quality of the report; including the content of the report, the required validity, and objective symptomatology.[1736]

In order to use a medical expertise report fruitfully, the presented expert report should be adequate to be understood by the criminal court or by the jury. One of the problems in practice in Türkiye is the scope of expert reports. As stated in Chapter 3, the appointed expert shall be informed in writing of the determination of the investigation, clearly indicating its limits and the questions the expert shall answer in accordance with Article 51 of the Expert Regulations. Although there is a clear regulation, in practice some courts do not specify which questions should be answered. The letter of assignment sometimes

1732 *Winterwerp v. the Netherlands*, op. cit.; *See.* Van der Wolf, M. (2022). Gedragskundige rapportage in historisch perspectief. In H.J.C. van Marle, P.A.M. Mevis, S.J. Roza, M.J.F. van der Wolf, *Gedragskundige rapportage in het strafrecht* (pp. 147-179). Deventer: Kluwer, p. 171.
When the order of commitment given by a criminal court is completely based on the civil criteria (as for example the Dutch civil care referral by the criminal court (Article 2.3 Wfz)) the forensic evaluation can only replace the independent expertise of a psychiatrist in exceptional circumstances. *See.* Hoge Raad, 09-04-2021, ECLI:NL:HR:2021:534.

1733 This issue will be discussed later in *3.1.3.4 Relation between Expert and Court in Deciding on Mental Disorder.*

1734 Van Marle, H. (2008). Facing the interface: forensic psychiatry and the law. *Erasmus Law Review*, 3, 23-40, p. 40.

1735 Van Marle (2008), p. 28.

1736 Van Marle (2008), p. 28.

only states "referring the case to the expert and asking to receive their opinion", without further elaboration.[1737] Receiving inadequate expert reports is another problem in practice; first-instance courts are obliged to ask for a supplementary report in order to clarify the issue or to appoint another expert. If they fail to do so, the supreme courts accept this as a reason to annul the judgment.[1738] In 1991, the Yargıtay determined that the report of an expert is not a piece of evidence, but the explanation thereof; thus, the main duty of the expert is to enlighten the court technically and scientifically.[1739] There should be, therefore, adequate explanation in the expert report.

In Türkiye, when a physical injury case is referred to a medical expert, the expert can only examine the patient to give their professional opinion on the wound. However, if the case is referred to an expert who shall determine the mental state of the suspect or the defendant, merely examining the patient will not be sufficient; the expert must also study the case file *ad verbum* to be able to analyse the background and the facts of the case.[1740] This leads to difficulties in practice. The assize courts generally have cases consisting of big files and the experts are obliged to take the original files to their offices or to their homes to examine. In practice, they make an elimination to select the most important ones to carry. It has been argued that this may cause misjudgements.[1741] Thanks to the new developments in technology, the Ulusal Yargı Ağı Bilişim Sistemi (UYAP, National Information System of Judicial Network) allows experts to read entire case files online. With the widespread use of the UYAP, this problem will hopefully disappear in the near future. Nevertheless, reaching the entire file online for an expert may cause another complication, since the evidence possibly collected illegally can also be found in the case file. It has been argued that as the expert will be influenced by the illegal evidence while composing their report, the report will also be illegal. It is the judges' responsibility to go through the file and remove the information and documents in order to avoid misjudgements.[1742]

Experts who accept being an expert as their main profession were identified as another problem in Türkiye.[1743] They rent premises and employ assistants for this work. As a result, they receive more files than their capacity allows, and, unfortunately, while assistants write the expert's report, the actual expert often only signs it.[1744] In general, being an expert is not accepted as a separate profession; after all, one has to have a profession with experience to be chosen by a court as an expert.[1745] The Presidency of the İstanbul Justice Commission conducted a study in 2012, which found that cases were always referred to

1737 Çağa, T. (1988). Hava Taşıyıcısının Sınırlı ve Sınırsız Mesuliyetine Dair. *Ticaret Hukuku ve Yargıtay Kararları Sempozyumu* (pp. 177-217). Ankara: Banka ve Ticaret Hukuku Araştırma Enstitüsü, p. 123.

1738 Yüksel, C. (2012). *Tıbbi Uygulama Hatalarında Bilirkişilik*. İstanbul: Kadir Has Üniversitesi Sosyal Bilimler Enstitüsü. Retrieved March 05, 2021, from https://tez.yok.gov.tr/, p. 38-39.

1739 Yargıtay 1. Ceza Dairesi, 01/03/1991, 391/559.

1740 Dinçtürk Şenel, (2015) p. 140.

1741 Dinçtürk Şenel (2015), p. 141.

1742 Dinçtürk Şenel (2015), p. 141.

1743 Dinçtürk Şenel (2015), p. 24.

1744 Dinçtürk Şenel (2015), p. 24.

1745 Dinçtürk Şenel (2015), p. 25.

the same experts, and that some experts were consequently appointed three times more than average.[1746] This causes workload for the experts, and it delays the court decisions. Another study conducted by the Istanbul Bar Association shows that 63% of the expert list could not even secure one duty as an expert.[1747]

In order to determine the problems with appointed experts in practice, a study was conducted in Türkiye. The same questionnaire was given to the lawyers and judges about the cases they worked or were still working on. Lawyers stated that in general, one to three experts are appointed in the cases they worked for, experts submit their reports after more than three months, most of the cases are sent to the Forensic Medicine Institute, and in 9% of the cases the expert is called to the hearing. Lawyers also stated that 51% of their cases is referred to a legal expert, even though it is against the TCCP.[1748] According to the results of the questionnaire of judges who work in criminal courts; in general, three experts are appointed, experts submit their reports within three months, most of the cases are sent to the Forensic Medicine Institute, in 62% of the cases the expert is called to the hearing. Judges also stated that 43% of their cases was referred to a legal expert.[1749] Another research studied all cases in 2009 and 2010 of three criminal courts in İstanbul demonstrates that out of 513 cases, 2% was referred to a legal expert; and reports arrived at the court, within 1-3 months.[1750] Even though these studies demonstrate that experts conduct their report in approximately three months, it does not happen this quickly all the time. According to the *Oruç v. Türkiye* judgment, the expert report did not reach the court, which caused adjournment for almost sixteen months.[1751] The ECtHR ruled that it is a violation of Article 6/1 of the ECHR, since the length of the criminal proceedings exceeded the reasonable time requirement. Moreover, in *Aksoy v. Turkey* judgment, the ECtHR ruled on a violation of Article 3 and 13 due to the inadequacy of the medical examinations.[1752] These rulings show that issues related to forensic behavioural expertise are not solely ascertained under the standards of Article 5.

Another study conducted in Türkiye, examining the cases between 01-01-2018 to 01-01-2021 at the Department of Forensic Medicine of Atatürk University, demonstrated that there was a total of 206 cases in which a criminal court requested a forensic mental health report of the suspect, and the reports were issued within 2.4 months on average.[1753]

1746 Karaman, N. (2013, 01 01). *20 milyon liralık bilirkişi vurgunu*. Retrieved 07 2021, from http://www.sabah.com.tr/Gundem/2013/01/01/20-milyon-liralik-bilirkisi-vurgunu.

1747 *See.* Dinçtürk Şenel (2015), p. 36.

1748 Article 63 of the TCCP regulates that no expert shall be appointed on matters that can be concluded with general knowledge or experience or with the legal knowledge required by the profession of a judge. Persons with a law degree shall not be appointed as an expert unless they certify that they have a separate expertise outside the field of law.

1749 Dinçtürk Şenel (2015), p. 186-204.

1750 Dinçtürk Şenel (2015), p. 216-259.

1751 *Oruç v. Turkey, App no 33620/02, (ECtHR, 21 December 2006),* §31.

1752 *See. Aksoy v. Turkey*, App no 21987/93, (ECtHR, 18 December 1996), §47.

1753 Yoğurtçu, E. (2021). *Türk Ceza Kanununun 32. Maddesi Kapsamında Adli Tıp Anabilim Dalında Değerlendirilmesi Yapılan Olguların Retrospektif Olarak İncelenmesi*, Erzurum: Atatürk Üniversitesi Top Fakültesi Adli Tıp Anabilim Dalı, p. 33.

5% of the cases was issued within more than 6 months.[1754] This period may be considered reasonable considering the nature of the report. However, in some cases, missing legal or medical documents in the dossier may cause repetitive correspondence, which may prolong the report process. These issues can be eliminated to a significant extent by providing the forensic medical expert with the relevant documents of the case, and if any, the medical documents and social investigation reports of the person.[1755] It was further stated in the study that the referrals from criminal courts were made late, and consequently late evaluations caused difficulties in the decision-making process.[1756] Since there can be acute flare-ups or remission periods after the committed crime, in order to best assess the medical condition at the time of crime committed, the patients should be examined as soon as possible after the incident.[1757]

According to Article 64 of the TCCP, an expert is appointed from the regional expert list.[1758] The court *may*[1759] appoint an expert ex officio, by the motion of the public prosecutor, the intervening party, their representative, the suspect or the accused, their defence counsel, or their legal representative.[1760] The expert report on criminal responsibility of a person should be written by and submitted to the court by a *medical board*, which usually consists of at least three psychiatrists.[1761] In the absence of sufficient clarity in the expert report, the judge may request an additional report from the expert or a re-examination conducted by the previous expert or the expert to be re-selected. This is to ensure that the truth is established. In the event that the judge is not persuaded by the findings of the mental evaluation report or has reservations, they may refer the case to the General Assembly of the Institution of Forensic Medicine, which serves as the highest decision-making authority. When there is a contradiction between the expert reports, a decision cannot be made until the contradiction is resolved.[1762] It is noteworthy that within the Turkish criminal justice system, the expert is not empowered to determine or

1754 Yoğurtçu (2021), p. 3, Table 3.

1755 Yoğurtçu (2021), p. 58.

1756 Yoğurtçu (2021), p. 47.

1757 Yoğurtçu (2021), p. 47.

1758 For detailed information, *see.* 4.1.2.1.1 Expert Selection in *Chapter 3*.

1759 Despite the TCCP referring to this as an 'option', the gathering of an expert report is a mandatory requirement when an expert diagnosis is necessary, particularly in the case of a stationary mental examination.

1760 Accordig to Article 67 of the TCCP, parties may bring their own expert report prepared by an expert who is not officially appointed by the court. These experts are, then, called a "*specialist*" (*uzman*) and their report is"*specialist opinion*" (*uzman mütalaası*), in order to emphasise the difference with the official expert report.

1761 In accordance with the ruling of the *Yargıtay*, the report on the mental state of the defendant at the time of crime can only be from three authorised institutions: from the relevant specialisation board of the Forensic Medicine Institute, or from the fully-equipped Mental Health and Neurological Diseases Hospital or from the Committee of a Medicine Faculty. It thus follows that a single psychiatrist report cannot be deemed valid in the context of criminal proceedings. *See.* Yargıtay 3. Ceza Dairesi, 04/03/2015, 29900/8120.

1762 *See.* Yargıtay 1. Ceza Dairesi, 27/06/2018, 403-3087.

advise the judge on the person's imputability or legal responsibility. This decision rests solely within the purview of the judge.

Unlike in Türkiye, in the adversarial justice system of England and Wales, the expert reports are brought by the parties. The Crown Prosecution Service (CPS) may select a forensic expert to provide evidence that supports the prosecution's case. The defence may select its own forensic expert to challenge the prosecution's evidence or to provide an alternative analysis that supports the defence's case. The court may order a psychiatric evaluation if there are concerns about the defendant's mental health or fitness to plead. Regardless of who selects the expert, their primary duty is to the court, not the party that hired them. Forensic psychiatric expert reports are less commonly used in Magistrates' Courts, which handle less serious offences. In Crown Courts, which deal with more serious crimes, the use of forensic psychiatric reports is much more frequent. These reports are often crucial in cases involving violent offences, where the defendant's mental status is a key issue, and in determining whether a defendant is fit to plead or to be held criminally responsible. These reports could lead to alternative sentencing options, such as hospital orders. It could be also pivotal for the diminished responsibility claims.[1763]

Although parties in the criminal justice system of England and Wales are entitled to bring their own expert reports, there are several safeguards to ensure that these reports remain *objective*. Safeguards include the expert's duty to the court, the possibility of cross-examination, the use of joint or court-appointed experts, professional standards and judicial oversight. These mechanisms work together to promote impartiality and the fair administration of justice. Since parties present their own expert reports to the court, it may not seem objective in this context. However, a payment relationship between the offender and the chosen expert may affect impartiality, but not the objectivity. The reason for this is that the experts shall follow the standards and the Code of Ethics and Conducts, as explained in *Chapter 3* under the subsection *4.2.2.1.1 Expert Selection*. Expert are expected to have respect, competence, responsibility, and integrity.[1764]

One of the problems with the expert opinions in England and Wales that was found in 2009, is particularly concerning when there is no available expert in the same field who can be called by the opposing party to effectively evaluate the evidence of the expert in question.[1765] Some cases have shown that there is a real and persistent problem where expert evidence is sometimes admitted too readily without another opinion, even though in a number of court cases successfully discussing the reliability of expert evidence happened nonetheless.[1766]

1763 The scope of matters in which expert psychological testimony might be deemed valuable extends beyond the credibility of confessions and witness statements. It also encompasses the assessment of fitness to stand trial and the determination of risk and treatment needs in sentencing. Grounds & Padfield (2022), p. 37.

1764 British Psychological Society (2018). *Code of Ethics and Conduct*. Leicester: British Psychological Society.

1765 The Law Commission (2009), p. 9.

1766 The Law Commission (2009), p. 10.

In the Netherlands, the legislator provides liberty to courts to choose by whom to be advised from the Netherlands Register of Court Experts (*Nederlands Register Gerechtelijk Deskundigen,* "NRGD"). The intention is that, in principle, the court should employ these registered experts. If the chosen expert is not one of them, the court must give reasons in the judgment.

Whereas in adversarial justice discussion is seen in terms of improvement of reliability, in the Dutch inquisitorial system it is sometimes viewed as a problem that the behavioural experts reporting for the criminal courts can come to quite different opinions in the same case.[1767] In the well-known *Baflo* case in the Netherlands, all experts came up with a whole range of different answers to the questions about the presence of mental disorder, the degree of the criminal responsibility, and treatment advice.[1768] This case involves a tragic incident that occurred in 2011, in Baflo, a small town in the Netherlands. Expert reports played a crucial role in the *Baflo* case in assessing various aspects of the incident, particularly regarding the criminal responsibility of the offender. A complicating factor was the question if a psychosis had come about through lowering the doses of antidepressants. In different instances of this case, all kinds of experts were questioned, and they came up with a whole range of different answers to the questions on the presence of mental disorder, the degree of culpability and treatment advice. In the end, the accused was not found responsible for the killing of his girlfriend and (partly) responsible for the killing of the policeman and other offences, so he was given a combination of six years' imprisonment and TBS on appeal.[1769]

While this case is exceptional, it should not be found surprising that behavioural experts come to different answers in answering the criminal court's questions.[1770] Behavioural science is not a hard science, hence, when assessing the mental health status, the experts may have methodological problems such as using different measures or lacking measures. In order to reach better agreement on diagnoses and improve communication, standard frames of reference, such as DSM-V and ICD-10, have been adopted by most clinicians, and more accurate diagnostic criteria and tools became the norm.[1771] The use of a common frame of reference can indeed help to improve objectivity and reliability.[1772] This is incorporated in ethical and disciplinary guidelines (for example from the NIFP and NRGD).

However also in the Dutch inquisitorial system, some – especially lawyers – believe that conflicting opinion may be good for the quality of decision making. A study showed, however, that many behavioural experts are unwilling to establish forensic reports if the

1767 Drees, M., Huisman, C., de Jong, J., Olde Keizer, M., Rodenboog, S., van Tongeren, P., de Wildt, K., & van der Wolf, M. (2020). De gedragskundige contra-expertise in straf- en tbs-zaken: problemen en oplossingen. *Expertise en Recht, 2020*(5), 178-187.

1768 Hoge Raad, 13-12-2016, ECLI:NL:HR:2016:2838 (*Baflo case*).

1769 Drees et al. (2020), p. 178.

1770 Drees et al. (2020), p. 178.

1771 Kendell R., & Jablensky, A. (2003). Distinguishing between the validity and utility of psychiatric diagnoses. *American Journal of Psychiatry* 160, 4-12, p. 4.

1772 Kendell & Jablensky (2003), p. 10.

assignment comes from the defence.[1773] Experts sometimes feel the guiding context of the client, as the second opinion is requested when there is dissatisfaction with the outcome of the first report.[1774] Moreover, the defence teams often ask the same experts to draft a report, who therefore fear that they would be labelled as party-experts.[1775] It was stated that one of the other reasons for this withdrawal was the approach of the NIFP.[1776] The NIFP did not encourage reporting for the defence in 2014, but after objections, the NIFP revised its opinion in 2018. Despite this change, however, the number of willing behavioural counter experts is still low.[1777]

A counter examination is the most important tool for the defence to have equality of arms. Moreover, a different perspective could always help the court better understand both the defendant and the case. Given that the number of experts in this expertise is limited, it would be advisable to create awareness among them. A study demonstrated that out of 18 cases with different expert opinions, the court followed the first report in 9 cases, used the counter expert report in 7 cases, and gave its own (third) opinion in 2 cases.[1778] Thus, although this is only one study, the counter expert opinion does have an impact in criminal cases.

3.1.1.3 True Mental Disorder *Requiring Compulsory Confinement*

According to the ECtHR, to prove an unsound mind, there should be a true disorder that must be *of a kind or degree warranting compulsory confinement*.[1779] Hence, a mental disorder must be severe enough to necessitate confinement in an appropriate institution to be considered as a *"true mental disorder"* within the meaning of Article 5/1(e).[1780] Besides the requirement of a *certain gravity*[1781] the criterion of being *of a kind or degree warranting compulsory confinement* also includes the concept of dangerousness. Although the Court emphasises that dangerousness must be sufficiently proven,[1782] the relationship between

1773 Drees et al. (2020), p. 181.
1774 Drees et al. (2020), p. 181.
1775 Drees et al. (2020), p. 181.
1776 Drees et al. (2020), p. 181.
1777 Drees et al. (2020), p. 181.
1778 Drees et al. (2020), p. 183.
1779 *In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority – that is, a true mental disorder – calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder. Winterwerp v. the Netherlands*, op. cit., §39; *M.B. v. Poland,* App no 60157/15, (ECtHR, 14 October 2021), §63.
1780 *Bergmann v. Germany*, App no 23279/14, (ECtHR, 07 January 2016), §113; *Winterwerp v. the Netherlands*, op. cit., §39; *Glien v. Germany*, Application no. 7345/12, (ECtHR, 28 November 2013), §85.
1781 *Glien v. Germany*, op. cit., §85.
1782 *Trajče Stojanovski v. the former Yugoslav Republic of Macedonia*, App no 1431/03, (ECtHR, 22 October 2009), §35; *X v. Russia*, App no 3150/15, (ECtHR, 20 February 2018), §41-42.

dangerousness and mental disorder, its degree and connection, remains controversial.[1783] The Court, for instance, doubts whether having a dissocial personality alone could be classified as a *true* mental disorder for the purposes of Article 5/1(e).[1784]

In deciding whether a mental disorder is *of a kind or degree warranting compulsory confinement,* the expert plays a significant role. Without an opinion of a medical expert, a judgment on deprivation of liberty would be arbitrary.[1785] The forensic behavioural expert conducts a *risk assessment* in order to assess dangerousness.[1786] Directions on how such assessments should be done, for example which tools to use, may be present in guidelines.[1787]

As given in Chapter 3 (*see.* Tables), criminal justice systems have different regulations for the expert reports. In the Turkish criminal justice system, the expert report on criminal responsibility of a person should be written by and submitted to the court by a *medical board,* which usually consists of at least three psychiatrists.[1788] Article 63 of the TCCP regulates that the expert opinion *may* be requested by the competent court, however, according to the *Yargıtay* judgements, requesting a psychiatric report becomes mandatory in cases where there is a claim of having mental disorder or reduced imputability.[1789] When a court decides on its own without consulting an expert or ignores the claims on reduced imputability, the *Yargıtay* overturns the case and sends it back to the competent court.[1790]

Unlike in Türkiye, in England and Wales, the expert reports are brought mainly by the parties. However, in accordance with s.232 of the SA 2020, in instances where the offender exhibits indications of a mental disorder at the time of sentencing, the (sentencing) court is obliged to obtain and evaluate a medical report[1791] prior to imposing a custodial sentence, with the exception of those fixed by law. Expert witnesses provide information

1783 *See*. Szwed (2020), p. 10.

1784 *Glien v. Germany,* op. cit., §88; Petschulies v. Germany, op. cit., §77.

1785 *Ruiz Rivera v. Switzerland,* op. cit., §59; *S.R. v. the Netherlands,* op. cit., §31; *Varbanov v. Bulgaria,* op. cit., §47.

1786 Discussion on the concept of *dangerousness* was provided in Chapter 3, under the subsection *6.2.4 Concept of Dangerousness*.

1787 Van der Wolf, M. (2022). Comparative Analysis. In M. van der Wolf (Ed.), *Safeguarding the Quality of Forensic Assessment in Sentencing a Review Across Western Nations* (pp. 230-257). Routledge, p. 244-245.

1788 Balcıoğlu et al. (2023), p. 7.

1789 Yargıtay 19. Ceza Dairesi, 08/11/2018, 5696/11552; Yargıtay 4. Ceza Dairesi, 06/02/2017, 34969/3212; Yargıtay 4. Ceza Dairesi, 13/01/2016, 32727/269.

1790 Yargıtay 10. Ceza Dairesi, 12/02/2008, 21336/2196; Yargıtay 1. Ceza Dairesi, 23/01/2008, 4558/246; Yargıtay 10. Ceza Dairesi, 19/03/2007, 7922/3159; Yargıtay 4. Ceza Dairesi, 19/02/2007, 10741/1675; Yargıtay 11. Ceza Dairesi, 06/07/2006, 2718/6432.

1791 According to Section 232 of the SA 2020, "medical report" means a report as to an offender's mental condition made or submitted orally or in writing by a registered medical practitioner who is approved for the purposes of s.12 of the MHA 1983, as having special experience in the diagnosis or treatment of mental disorder.

to courts and tribunals, via their reports and testimonies. Moreover, the expert reports are presented not only to courts, but also to juries, which consist of lay persons, therefore, they should be written without complicated terminology. Usually, one psychiatric expert is sufficient to prepare a report for the court. However, the specific circumstances of the case may lead to the appointment of more than one expert.

In the Netherlands, Article 37a/3 of the DCC regulates that in order to impose a TBS-order at least two behavioural experts from different disciplines, including a psychiatrist, who examined the person concerned shall write a reasoned, dated, and signed opinion. However, this paragraph does not apply when the person refuses to cooperate with the investigation.[1792] Regulations then require at least a report about the refusal in order to still fulfil the formal criterion to be able to impose a TBS-order when dangerousness requires so. In the past decade, after a lot of attention due to high profile cases, regulations and policies have been changed in multiple ways to increase the possibility of imposing the TBS-order, even when it is (nearly) unfeasible for the expert to diagnose a mental disorder. This issue is discussed later under subsection *3.1.3.4 Relation between Expert and Court in Deciding on Mental Disorder*. Both for the TBS-order and the civil care referral by the criminal court (Article 2.3 Wfz), necessity, proportionality and subsidiarity principles apply in order to judge if the disorder requires confinement.

3.1.1.4 Establishing It Before a *Competent Authority*

As reiterated above, a true mental disorder must be established before a *competent authority* on the basis of objective medical expertise. In Türkiye, the security measure for mentally disordered offenders has to be ordered by a competent criminal court. Any problem with this standard, therefore, is not in the regulations, but in the implementation of the laws. With regard to the "expert" mechanism problematic issues have been elaborated on above. An Honorary Member of the Yargıtay has put it well: The regulations on criminal and civil proceedings are universal rules that are the product of the experience and knowledge of several centuries; therefore, when they are applied meticulously and sensitively, it is not possible for an 'expert' as a concept to work improperly.[1793]

The hospital order in England and Wales is ordered by a court. However, as a ruling of 'insanity' may predispose for a hospital order, the jury plays a part in this process. The question is how well-equipped lay persons are in terms of training or experience to assess the reliability of technical or complex expert evidence, especially evidence of a scientific nature.[1794] Consequently, there is a real danger that juries will simply rely on the opinion of the specialist called to give expert evidence. It might be also possible for juries to focus on the presumed indications of reliability; such as expert's title or professional status.[1795]

1792 Article 37a/4 of the DCC.

1793 Aşçıoğlu, Ç. (2004, December). Bilirkişi Odaları'nın Kurulması Çözüm Olabilir Mi? *Madencilik Bülteni*, 24-25. Retrieved 2021 July, from https://www.maden.org.tr/resimler/ekler/dcb2f5c7b071143_ek.pdf, p. 24.

1794 The Law Commission (2011), p. 4.

1795 The Law Commission (2011), p. 4.

However, to a lesser extent such arguments may also apply to judges, who are generally lay persons with regard to behavioural science.

In the Netherlands, both the TBS-order and the relevant civil care referral (Article 2.3 Wfz) are decided on by a competent criminal court. The difference between order and authorisation however is that detention has to be carried out versus is allowed to be carried out. This distinction is not relevant for the safeguards of article 5 as in both cases of detention, a court decision has allowed it. As stated in Chapter 3, there has been a lot of debate – as a consequence of several high-profile cases – on the relation between the expert and the court in establishing mental disorder and other medico-legal concepts. This will be discussed further in *3.1.3.4 Relation between Expert and Court in Deciding on Mental Disorder* subsection below.

3.1.2 Mental Disorder Persisting Throughout the Period of Detention

As ruled in the *Winterwerp Criteria*, the mental disorder, which caused the detention, must persist throughout the period of detention in order to guarantee a lawful detention according to Article 5/1(e). Initially, the division between Article 5/1(a) and Article 5/1(e) shall be reminded here. Article 5/1(a) and Article 5/1(e) of the ECHR both pertain to the deprivation of liberty in different contexts. In cases where the period of detention is determined by the competent court as a conviction, the justification of the detention will be Article 5/1(a). However, the Court ruled that the deprivation of liberty may fall within the scope of both sub-paragraphs (a) and (e)[1796] for mentally disordered offenders, thus the applicability of one ground does not necessarily preclude another.[1797] Hence, a conviction that finds the guilt can be considered as lawful detention under sub-paragraph (a); yet, at the same time, being satisfied that the applicant is suffering from a mental disorder warranting the confinement in a mental facility for receiving treatment is also considered as lawful detention under sub-paragraph (e). Hence, persisting mental disorder is a condition of sub-paragraph (e). As can be seen from the references, this dual legitimation has been established for the commitment to a mental hospital for treatment in England & Wales and the TBS-order in the Netherlands. This is also of significance for this standard related to continued detention, for example when the conditions required for the (e) ground are no longer met, detention may still be legitimized under the (a) ground and vice versa.

Since "*the refusal to order a fresh psychiatric assessment*"[1798] amounts to a violation of Article 5/4, as Article 5/4 provides detained persons with the right to actively seek a judicial review of their detention, the *medical assessment* must be sufficiently recent to allow the authorities to assess the current situation of the person concerned at the time the application for discharge is examined.[1799] This will be examined later under the subsection *3.3.3 Long Detention – Possibility of Review (Articles 3, 5/1(e), and 5/4)*, where also

1796 *X v. the United Kingdom*, op. cit., §38-39.
1797 *Morsink v. the Netherlands*, op. cit., 61; *Constancia v. the Netherlands* (dec.), op. cit., §29.
1798 *Ruiz Riviera v. Switzerland*, op. cit., §66.
1799 *Ruiz Riviera v. Switzerland*, op. cit., §60.

the frequency of review will be discussed. Here, issues will be discussed related to the procedural and substantive similarity between the initial and prolongation decision.

As demonstrated in *TABLE 1: Chronological Evolution of the Winterwerp Criteria* this criterion was ruled by the Court as that the validity of continued confinement depends upon the persistence of such a disorder, and this criterion has not changed since 1979. Even though the ECtHR rules that an "objective medical expertise" is required to prove the true mental disorder for the initial detention, the question remained whether this is similarly required for prolonged detention. In 2021, the Court stated clearly that the mental disorder warranting compulsory confinement should be *reliably shown* at the date of detention and throughout the detention.[1800] In relation to the question of how the link between the initial and prolonged decision should be made, the ECtHR ruled that in assessing the persistence of mental disorders, authorities are not obliged to take into account the nature of the acts committed by the person that gave rise to their enforced detention.[1801]

In Türkiye, there is no regulation governing the procedure for renewing security measures specific to the mentally disordered offenders, nor for assessing the dangerousness of such offenders during the period of their detention. Consequently, there is no safeguard in place to assess the persistency of the mental disorder throughout the period of detention. This raises a question regarding the requirements of Article 5/1(e). This issue will be further discussed under subsection *3.3.3.1 The Absence of Regulations on Review, and the Situation of Offenders with Diminished Responsibility in Türkiye.*

In England and Wales, the question came up, for a second time,[1802] whether for renewal of detention 'medical' expertise was needed. Section 12 of the MHA 1983 requires at least one recommendation from a *registered medical practitioner*, and the MHA 2007 mentions *multi-professional approved clinicians* who may act as the patent's *responsible clinician*. The Draft Mental Health Bill 2022 of the government concerning reforms to the MHA 1983 of England and Wales regulates that the *approved clinicians* who did not study medicine but other relevant studies for mental health could renew the detention. It was argued that not only the initial detention, but also the continued confinement on the grounds of Article 5/1(e) requires *objective medical expertise*, by mentioning the *Winterwerp* case.[1803]

1800 *M.B. v. Poland,* op. cit., §64.

1801 *Denis and Irvine v. Belgium*, op. cit, §169.

1802 Joint Committee on Human Rights. (2007, February 4). *Legislative Scrutiny: Mental Health Bill, Fourth Report of Session 2006-07*. Retrieved 2024 July, from https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/40/40.pdf, p. 11. The UK Parliamentary Joint Committee on Human Rights ("JCHR") also discussed the same issue in 2007: whether prolongation shall also be based on objective medical expertise, if initial detention shall be based on objective medical expertise. The main reason behind the discussion is the same: the Bill proposes that the treatment of the detainee will be a responsibility of the responsible clinician who need not be medically qualified, and no longer the responsible medical officer who must be a doctor. According to the Bill; *"The RC may be any [approved clinician] who has been approved for that purpose. Approval need not be restricted to medical practitioners, and may be extended to practitioners from other professions, such as nursing, psychology, occupational therapy and social work."*, JCHR (2007), p. 11.

1803 Taylor, J. L., & Burrell, C. (2024). Extending section 12 approval under the Mental Health Act to professions other than medicine. *BJPsych Bulletin*, 1–4. doi:10.1192/bjb.2024.7, p. 1.

Following this approach, the claim was made that the draft Mental Health Bill would *likely* be found non-compliant by the ECtHR, as the government's proposal concerns the approval of *non-medically but highly qualified mental health professionals with the relevant competencies as approved clinicians with the power to renew detention*.[1804] Even though similarity between requirements for initial and prolonged detention seem logical, this issue is still unresolved in light of the ECtHR case law cited above.

In the Netherlands, with regard to the civil care referral by a criminal court the main difference in the regulations between initial and prolonged decision is that for prolongation competency shifts to a civil court. This is not an issue from the perspective of legal protection, but has been mentioned as a problem from the perspective of public protection. This may even lead the criminal court to not warrant the civil care referral in the first place, but choose the much more intrusive TBS-order instead.[1805] Because of this intrusiveness, for prolongation of the TBS-order many legal safeguards have been put in place. Concerning the expertise, the most interesting one is a statutory mandatory counter-expertise every four years. That should be a reasoned, dated, and signed opinion of two behavioural experts from different disciplines, including a psychiatrist. The conducting behavioural experts, both at the time the advice is issued and at the time the investigation is carried out, may not be affiliated with the institution where the detainee is being confined. This means that for the regular prolongation the expertise is being provided by the treatment facility. This has not so much been debated in light of the standard of 'objective medical expertise', maybe due to the TBS-order's dual legitimation, but rather from the perspective of professional secrecy.[1806]

3.1.3 Issues Regarding Lawfulness of Detention

The preceding subsections addressed the general application of the test. In this section some more elaborate discussions related to tensions with this part of the ECtHR framework related to article 5 are discussed. As the adequacy and quality of the Turkish expert involvement, fundamental in sentencing mentally disordered offenders, is discussed extensively above, it is understandable that there is less debate about specific issues. Therefore, debates from England and Wales and The Netherlands are focused on in this section. Initially, combining an order related to the mental disorder with imprisonment is discussed. Subsequently, relevant debates related to preventive detention will be explained. Then, discussions about treatability criteria follow. Finally, the relation between expert and court in establishing mental disorder and criminal responsibility is discussed, all in light of the ECtHR framework.

1804 Taylor & Burrell (2024), p. 2.

1805 *See. Chapter 3*, subsection *3.3.5.5 Article 2.3 Wfz – Civil Care Referral.*

1806 Van der Wolf, M., & Raes, B.C.M. (2022). Terbeschikkingstelling (tbs) met dwangverpleging. In H. Van Marle, P. Mevis, & M. Van der Wolf, *Gedragskundige rapportage in het strafrecht* (pp.493-564). Deventer: Kluwer, p. 547.

3.1.3.1 Combination Sentences or Hybrid Orders

The ECtHR, generally, approaches cases by reviewing the final judgments of the domestic courts. In cases where the applicant was found guilty, the Court considers it under Article 5/1(a),[1807] and in the cases where the applicant was found not criminally responsible by the domestic courts, it considers it under Article 5/1(e)[1808]. This difference determines the ECtHR's approach towards to the case, as it also determines whether there is a 'conviction' or not. However, as mentioned, for the Dutch TBS-order sub-paragraphs (a) and (e) both apply. With these judgments, therefore, the ECtHR reiterated that the applicability of one ground does not necessarily preclude another.[1809] These judgements were made in relation to cases in which TBS-patients had to wait in prison due to a lack of capacity in TBS-facilities. As that was considered an infringement of their human rights, it is remarkable that one of the most prominent debates regarding the TBS-order is about another feature of placement in prison before the order takes effect.

As it was explained in *Chapter 3*, subsection *6.2.5 Penalty versus Security Measure – Sentencing Offenders with Diminished Responsibility,* when a person with diminished responsibility is sentenced to both imprisonment and TBS-order with compulsory treatment, the prison sentence is imposed first, followed by the TBS sentence. The historical background, objectives of this application, and relevant criticisms were explained as well. It was further criticised that the criminal courts in the Netherlands combine TBS-measure with a long prison sentence. However, the discussion did not include the human rights point of view, as it was saved for Chapter 4. This present subsection examines the issue of executing the prison sentence prior to the commencement of treatment with reference to the ECHR framework.

In the Netherlands, the threshold for issuing a TBS-order is high. Consequently, mentally disordered offenders who receive a combined sentence of imprisonment and TBS-order must have been found to present a significant danger to public safety, and must have committed a serious offence while suffering from a mental disorder. Some courts may consider that the TBS measure is insufficient from a retributive perspective and may therefore prefer to order imprisonment and a TBS order in combination.

In accordance with the ECHR framework, in instances where an offender is found to have a true mental disorder that requires compulsory confinement by the competent court with the aid of objective medical expertise, in order to ensure lawful detention, this offender shall be placed in an appropriate therapeutical environment where adequate medical care is provided. Once the necessity for care has been established by the competent criminal court and the TBS-order is issued, the question rises how it can be justified from a human rights' perspective that the person is initially placed in a prison environment, since this is otherwise not considered an appropriate facility.

1807 *Bizzotto v. Greece,* op. cit.

1808 *Aerts v. Belgium*, op. cit., §45.

1809 *Morsink v. the Netherlands,* op. cit., 61; *Constancia v. the Netherlands* (dec.), op. cit., §29; *Nelissen v. the Netherlands,* op. cit., §59.

In *Brand v. the Netherlands* judgement, the ECtHR stated that *"A significant delay in admission to a custodial clinic and thus the beginning of the treatment of the person concerned will obviously affect the prospects of the treatment's success within the statutory two-year time-frame for the initial validity of a TBS order. Moreover, the chances of having to prolong the validity of the TBS order will, correspondingly, be increased"*.[1810] In *Morsink*, the Court also ruled that the delay in the admission to a custodial clinic affects the prospects of the success of the treatment.[1811] This is an argument that is also used frequently against the combination sentence.

The same issue was also discussed in the *Nelissen* judgment, which was concerned with a patient suffering from paranoid schizophrenia who continued to remain in prison when he was supposed to be in a TBS clinic, after serving the prison sentence imposed on him.[1812] The ECtHR found no material difference between the cases of *Brand* and *Nelissen*, hence it found that waiting for admission for more than one year was a violation of Article 5/1.[1813] According to the Dutch regulations, persons pending admission to a custodial clinic are not released but held in pre-placement remand detention.[1814] The Breda Court also ruled in 2005 that this capacity shortage became structural, instead of a special circumstance, since it then had existed for more than 20 years,[1815] and after a relatively short period of overcapacity, now exists again. According to the Breda Court, this shortage remains as a government responsibility.[1816] This issue will be discussed further under the *3.2.2.2 Appropriate Admission Time – No Significant Delay* subsection below.

The 2004 *Morsink* judgement examined the combination sentence, ruled for the diminished criminal responsibility.[1817] There the ECtHR defines that *"A TBS order with confinement to a custodial clinic is not intended to have a punitive effect, but to protect society from any risk posed by the person concerned"*,[1818] and stated that the TBS-order falls within the scope of sub-paragraphs (a) and (e).[1819] In the 2004 *Brand* judgement, the applicant was also sentenced to a combined sentence; fifteen months of imprisonment and TBS-order.[1820] The Court further states that even though the TBS-order is not intended to have a punitive effect, in practise, it is imposed in cases regarding murder, manslaughter, rape and other

1810 It will be examined further below under subsection *3.2.2.2 Appropriate Admission Time – No Significant Delay*.

1811 *Morsink v. the Netherlands*, op. cit., §68.

1812 *"...his pre-placement detention had exceeded six months ..., he was offered compensation in a total amount of EUR 3,075 for the time spent in pre-placement detention between 13 August 2006 and 20 March 2007."*, *Nelissen v. the Netherlands*, op. cit., §17.

1813 *Brand v. the Netherlands*, op. cit., §58-65; *Nelissen v. the Netherlands*, op. cit., §60.

1814 *Nelissen v. the Netherlands*, op. cit., §23.

1815 Rechtbank Breda, 23-09-2005, ECLI:NL:RBBRE:2005:AU9742, para. 3.7.

1816 Rechtbank Breda, 23-09-2005, ECLI:NL:RBBRE:2005:AU9742, para. 3.7.

1817 *"...he could only be held responsible for these offences to a limited degree, the Regional Court sentenced the applicant to fifteen months' imprisonment in combination with an order for his confinement in a custodial clinic"*, *Morsink v. the Netherlands*, op. cit., §9.

1818 *Morsink v. the Netherlands*, op. cit., §27.

1819 *Morsink v. the Netherlands*, op. cit., §62.

1820 *Brand v. the Netherlands*, op. cit., §10.

serious violent crimes or sexual offences.[1821] However, in both cases the court does not look at the execution of imprisonment, probably because it falls under the sub-paragraph (a), solely.

As ruled in *Aerts* judgment, the detention of a mentally disordered offender would only be *lawful* within the meaning of Article 5/1(e), if effected in a hospital, clinic, or other appropriate institution.[1822] But in a prison, even though the name is *psychiatric wing,* if the mentally disordered offender cannot receive either regular medical attention or a therapeutic environment; the detention of the applicant would never be lawful and it would breach Article 5/1(e).[1823] However, in *Morsink,* the Court did not discuss the prison settings for this person whose true mental disorder was reliably shown by objective medical expertise and the competent court determined that this true mental disorder required compulsory confinement.

The court takes a very formalistic approach in this matter. It only looks at the grounds for detention and not so much to the individual; since the prison sentence is not based on the mental disorder, prison can be an appropriate facility for someone who was already judged to be mentally disordered. Only when the detention based on the mental disorder starts, these arguments come into play. The difference with sole imprisonment on the basis of Article 5/1 (a) only, is that in this case the court itself has already established the mental disorder. Nevertheless, it judges this situation in a similar way. The cases where the competent criminal court imposes imprisonment alone on mentally disordered offenders will be addressed in subsection *3.2.2.4 Prison Settings for Mentally Disordered Offenders* below.

However, this is not a phenomenon exclusive to the Netherlands. A similar situation can be observed in the hybrid order of the criminal justice system in England and Wales, as well as in the discretion power of the Turkish criminal courts in cases involving offenders with diminished responsibility.[1824] Nevertheless, they are less utilized than in the Netherlands.

3.1.3.2 Sentences of Preventive Detention

The prevention of crime has become a pivotal concern for governments across the globe.[1825] The necessity to respond effectively to the growing demand for security has prompted the development of new tools and the reassessment of established solutions, such as detaining of individuals who are deemed dangerous to prevent serious criminal acts.[1826] In the context of this research, sentences of preventive detention are those who have a preventive aim, and are therefore of indeterminate duration, but for the imposition of which no

1821 *Brand v. the Netherlands*, op. cit., §24.
1822 *Aerts v. Belgium, op. cit.,* §46.
1823 *Aerts v. Belgium, op. cit.,* §49-50.
1824 *See below.* subsection *3.3.3.1 The Absence of Regulations on Review, and the Situation of Offenders with Diminished Responsibility in Türkiye.*
1825 Caianiello (2013), p. xxv.
1826 Caianiello (2013), p. xxv.

mental disorder is required. Of course, even though no mental disorder is required, many offenders with mental disorders are subject to such sentences – also because they are often considered dangerous because of their disorder. In European criminal justice systems, the distinction between detention as punishment and detention as regulation is somewhat blurred.[1827] In the context of the ECtHR's jurisdiction, the distinction between punishment and preventive detention is further complicated by the fact that both fall under the ground of article 5/1(a), almost rendering the latter may be considered a form of punishment even if it does not have a retributive aim.[1828]

The ECtHR requires not only that the deprivation of liberty by a competent court must occur in a chronological sequence following the conviction, but also that this deprivation of liberty must be the consequence of the conviction.[1829] Consequently, there must be a sufficient causal link between the conviction and the continued deprivation of liberty.[1830] The ECtHR rules that "*(…) with the passage of time the link between the initial conviction and the extension of the deprivation of liberty gradually becomes less strong. The causal link required under sub-paragraph (a) might eventually be broken if a position were reached in which a decision not to release, or to redetain a person, was based on grounds that were inconsistent with the objectives of the sentencing court, or on an assessment that was unreasonable in terms of those objectives. Where that was the case a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with Article 5*".[1831]

As provided under Chapter 2,[1832] in the *M. v. Germany* judgment, it was found that the applicant was still suffering from a serious mental disorder that could no longer be qualified as pathological and did not require medical treatment. Given the expectation that the applicant would commit further spontaneous acts of violence and the consequent danger he posed to the public, the preventive detention was necessary.[1833] However, the grounds for the applicant's preventive detention were not based on the assumption that he was of unsound mind; consequently, the Court ruled that the applicant's detention could not be

1827 Caianiello (2013), p. xxx.

1828 *"Furthermore, having regard to the realities of the situation of persons in preventive detention, the Court cannot subscribe to the Government's argument that preventive detention served a purely preventive, and no punitive, purpose." See. M. v. Germany,* op. cit., §128.

1829 "*…the word "after" in sub-paragraph (a) does not simply mean that the detention must follow the "conviction" in point of time: in addition, the "detention" must result from, "follow and depend upon" or occur "by virtue of" the "conviction. In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue." Weeks v. the United Kingdom,* op. cit., §42.

1830 *Weeks v. the United Kingdom,* op. cit., §42; *Del Río Prada v. Spain,* App no 42750/09, (ECtHR, 21 October 2013), §124; *James, Wells and Lee v. the United Kingdom,* op. cit., §190. Therefore also preventive detention imposed at a later stage cannot be justified under Article 5/1(a), since there is then insufficient causal link between the conviction and the detention. *See.* for example *W.A. v. Switzerland,* App no. 38958/16, (ECtHR, 2 November 2021), §34.

1831 *Del Río Prada v. Spain,* op. cit., §124.

1832 *See. Chapter 2,* subsection 2.4 *Definitions of and Differences Between 'Deprivation of Liberty' and 'Restriction upon Liberty'.*

1833 *M. v. Germany,* op. cit., §12.

justified under Article 5/1(e).[1834] In addition, no causal link was found between the continued detention and applicant's previous conviction. Therefore, the extension beyond a 10-year period was not justified under Article 5/1(a) either, so that a violation was adopted.[1835] Solutions for such a situation related to the German sentence of preventive detention were sought in further detention through a civil hospital order under sub-paragraph (e).[1836] Therefore, as in the Netherlands it was advocated that the TBS-order should no longer be based on a mental disorder, as this was discriminatory and not in line with scientific evidence about the relation between disorder and risk,[1837] it was argued in reaction that losing paragraph (e) would lead to troubles with its indeterminate character (and long stay facilities in particular where there is no longer treatment aimed at risk reduction).[1838]

Preventive deprivation of liberty imposed by a competent court as a sanction in response to a criminal offence may, according to the Court, be brought under Article 5/1(a),[1839] which regulates the lawful detention of a person after conviction by a competent court.[1840] In principle, the ECtHR does not assess whether the imposed sanction is an appropriate or proportionate response to the proven offence.[1841] Consequently, under Article 5/1(a), the Court does not evaluate also whether preventive detention is an appropriate sanction and does not impose any requirements regarding the nature and seriousness of the proven

1834 *M. v. Germany*, op. cit., §103-105.

1835 *M. v. Germany*, op. cit., §97-101.

1836 *See.* Kinzig, J. (2013). The ECHR and the German System of Preventive Detention: an Overview of the Current Legal Situation in Germany. In M. Caianiello, & M.L. Corrado (eds.), *Preventing Danger: New Paradigms in Criminal Justice* (pp. 71-83). Durham: Carolina Academic Press.

1837 Bijlsma, J., Kooijmans, T., De Jong, F., & Meynen, G. (2019). Legal insanity and risk: An international perspective on the justification of indeterminate preventive commitment. *International Journal of Law and Psychiatry 66*, 1-6, p. 4.

1838 Mevis, P.A.M., Struijk, S., & Van der Wolf, M.J.F. (2018). *Juridische haalbaarheid van voorgestelde oplossingen voor de weigeraarsproblematiek omtrent tbs-oplegging.* Den Haag: Boom, p. 13-14; Mevis, P.A.M., Struijk, S., & Van der Wolf, M.J.F. (2020). *Voorlopige tbs-oplegging als bijdrage aan de oplossing van de weigeraarsproblematiek. Een nadere rechtsvergelijkende beschouwing van het Nederlandse en Duitse recht,* Den Haag: Boom, p. 85.

1839 In *Guzzardi* judgment, the Court has ruled that a thorough examination of the circumstances reveals that the compulsory residence order was not a punitive measure imposed for a particular criminal act, but rather a preventive measure enacted on the basis of indications of a potential inclination towards criminality. With regard to Article 5/1(a), this preventive measure did not constitute detention *after conviction by a competent court*. The ECtHR ruled that "*... for Convention purposes there cannot be a 'condamnation' (in the English text: 'conviction') unless it has been established in accordance with the law that there has been an offence... Moreover, to use 'conviction' for a preventive or security measure would be consonant neither with the principle of narrow interpretation to be observed in this area nor with the fact that that word implies a finding of guilt*". *Guzzardi v. Italy,* op. cit., §100.

1840 "*Thus, the Court has previously found that various forms of preventive detention beyond the prison sentence constituted an applicant's detention "after conviction by a competent court". The detention in issue was not part of a penalty in such circumstances, but rather ensued from another "measure involving the deprivation of liberty".*" *Ruslan Yakovenko v. Ukraine,* op. cit., §51. *See also. Grosskopf v. Germany,* App no 24478/03, (ECtHR, 21 October 2010), §46-47; *James, Wells and Lee v. the United Kingdom,* op. cit., §197.

1841 *James, Wells and Lee v. the United Kingdom,* op. cit., §209.

offence in response to which the sanction is imposed. In instances where the deprivation of liberty is solely for preventive purposes, the ECtHR establishes specific requirements for the enforcement of the sanction. Those detained for preventive purposes must be provided with real opportunities for rehabilitation, through which they can demonstrate that they are no longer a danger to society. In the absence of adequate counselling and/or treatment (aimed at risk reduction), the deprivation of liberty may be deemed arbitrary. The causal link between the conviction and the subsequent detention is thereby broken. The ECtHR stated that *"A decision not to release a detainee may become inconsistent with the objectives of the sentencing court's order for that person's detention if the person concerned was placed, and later remanded, in detention as there was a risk that he or she would reoffend, but the person is, at the same time, deprived of the necessary means, such as suitable therapy, to demonstrate that he or she was no longer dangerous".*[1842]

The concept of this aforementioned *suitable therapy* undoubtedly relates to Article 3. Although Article 3 safeguards an absolute right, it has been set by the ECtHR for the right to security of the public to take precedence over the *right to rehabilitation*[1843] of the offender.[1844] The ECHR does not prohibit the imposition of a life imprisonment sentence on an adult offender, nor renders such a sentence incompatible with Article 3.[1845] Nevertheless, the Court has determined that the imposition of an "irreducible life sentence" on an adult may give rise to an issue under Article 3.[1846] This issue may emerge in cases where there is no prospect of release, possibility of review, or a periodic review mechanism for such sentences.[1847] This issue will be discussed under *3.3.3 Long Detention – Possibility of Review (Articles 3, 5/1(e), and 5/4)* subsection below.

Below, the Imprisonment for Public Prosecution (IPP) of England and Wales, and the GVM order of the Netherlands will be examined, with particular consideration of the "causal link" between the conviction and the detention, and the required "necessary means" such as suitable therapy.

An example of a sentence of preventive detention of the three justice systems in this research is the Imprisonment of Public Protection (IPP) from England and Wales. As explained under *Chapter 3*, subsection *3.2.5.2.9 Imprisonment for Public Protection (IPP)*, the sentence of IPP has been abolished in 2012. However, this abolition has not been applied retrospectively. In other words, the sentence can no longer be imposed; but this does not affect those who were already subject to it.

1842 *D.J. v. Germany,* App no 45953/10, (ECtHR, 7 September 2017), par. 58.

1843 For the concept of the *right to rehabilitation, see*. Rotman (1987), 1023-1068; Van Zyl Smit, Weatherby & Creighton (2014), 59–84; O'Loughlin (2024), p. 132-133.

1844 O'Loughlin (2024), p. 133.

1845 *Kafkaris v. Cyprus,* op. cit., §97; *Murray v. the Netherlands,* op. cit., §99; *Khamtokhu and Aksenchik v. Russia,* op. cit., §72; *Sanchez-Sanchez v. the United Kingdom,* op. cit., §79.

1846 *Kafkaris v. Cyprus,* op. cit., §97; *Murray v. the Netherlands,* op. cit., §99; *Khamtokhu and Aksenchik v. Russia,* op. cit., §72; *Sanchez-Sanchez v. the United Kingdom,* op. cit., §79.

1847 *Murray v. the Netherlands,* op. cit., §92, 99; *Vinter and Others v. the United Kingdom,* op. cit., §119-122.

The indeterminate sentence of IPP was to detain offenders who posed a significant risk of causing further serious harm to the public through further serious offences until such time that offenders no longer posed such an imminent risk.[1848] An IPP sentence was/is of an indeterminate duration, with a minimum term, referred to as a *tariff*. Upon release, an individual serving an IPP sentence remains on licence, subject to the conditions thereof. In the event of a breach of the conditions of the licence, the individual may be recalled to prison. Subsequently, the individual is required to remain incarcerated until such time as the Parole Board is satisfied that continued custody is no longer necessary for the protection of the public.[1849]

The enactment of the IPP precipitated profound and far-reaching consequences for the English and Welsh correctional and probation systems.[1850] Since they were initially introduced, IPP sentences have been the subject of substantial criticism, including the argument that they are overly broad and that prisoners are not given the opportunity to demonstrate that they are no longer a risk to the public.[1851] It was subsequently deemed to be the least carefully planned and implemented legislative measure in the history of British sentencing.[1852] In response, the Government initially introduced a higher threshold in 2008[1853] and subsequently abolished the sentence of IPP in 2012. Nevertheless, this amendment was not made retrospective, resulting in 2,892 IPP prisoners remaining in custody as of 31 December 2022.[1854]

In a report published in September 2022,[1855] the House of Commons Justice Committee examined the effectiveness of IPP sentences over the past decade. The report concluded that, while some measures have been taken to reduce the IPP prison population, these efforts have not been sufficient. It was indicated that the population subject to recall is anticipated to exceed the population not yet released.[1856] The report identified several issues, including psychological harm to prisoners caused by the indefinite nature of the sentence, which has resulted in high levels of self-harm and some suicides within the IPP population.[1857]

In the *James, Wells and Lee* judgement, the ECtHR ruled that the continued post-tariff detention of the applicants, who are IPP prisoners, without access to rehabilitative programmes was deemed arbitrary to Article 5/1.[1858] The Court held that "*In the context of Article 5 § 1 (a), a concern may arise in the case of persons who, having served the punishment*

1848 Beard, (2023), p. 4.
1849 Beard (2023), p. 6.
1850 Annison & O'Loughlin (2019), p.170.
1851 *See.* Beard (2023), p. 4.
1852 Jacobson, H., & Hough, M. (2010). *Unjust Deserts: imprisonment for public protection.* London: Prison Reform Trust, p. vii.
1853 Beard (2023), p. 10.
1854 Beard (2023), p. 12.
1855 House of Commons Justice Committee. (2022, September 22). *IPP sentences: Third Report of Session 2022–23.* Retrieved September 2024, from https://committees.parliament.uk/publications/28825/documents/173974/default/
1856 House of Commons (2022), p. 47
1857 House of Commons (2022), p. 17-20.
1858 *James, Wells and Lee v. the United Kingdom,* op. cit., §221-222.

element of their sentences, are in detention solely because of the risk they pose to the public if there are no special measures, instruments or institutions in place, other than those available to ordinary long-term prisoners, aimed at reducing the danger they present and at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences".[1859] In light of the case law, therefore, the preventive detention would be arbitrary under Article 5/1 until the necessary steps were taken to progress the detainees through the prison system by providing them with access to programmes designed to facilitate rehabilitation. In this sense, the right to rehabilitation is a fundamental aspect of the criminal justice process, as it provides prisoners with the opportunity to regain their liberty and to improve their prospects of a positive re-entry into society.[1860] In this context, it can be argued that the rehabilitation right is not merely a right to rehabilitation, but also a duty to actively participate in rehabilitative programs if one wishes to enhance their chances of being released.[1861]

Mental disorders are highly prevalent among the IPP-population, including pre-existing conditions that were used as part of the assessment of dangerousness. Therefore, in this section on article 5/1(e), also the problem of the absence of Article 5/1(e) is discussed as it provides not only legitimacy, but also the right to treatment in an appropriate facility. The relation to lack of perspective as a matter of Article 3 will be addressed in *3.3.3 Long Detention – Possibility of Review (Articles 3, 5/1(e), and 5/4)* subsection below.

Similar concerns as regarding the IPP's have been expresses in relation to the Dutch GVM-order (Behaviour Influencing and Freedom Restricting Measure, *Gedragsbeïnvloedende en Vrijheidsbeperkende Maatregel*). As explained in *Chapter 3*, however it is not a measure of detention, as it is a criminal law measure aimed at restriction of liberty or influencing behaviour of indeterminate – and possibly lifelong – duration.[1862] With the GVM-measure, in accordance with article 38z of the DCC, the offender can, after termination of the compulsory detention order, be supported, guided and monitored by the probation service in a forensic setting.[1863] Hence, this security measure of independent supervision allows supervision to be carried out after the end of a prison sentence and/or TBS-measure. Since it can follow the TBS-order it will certainly pertain to mentally disordered offenders. The dangerousness criterion of the GVM-measure is also similar to that of the TBS-order. However, even though no relationship with a mental disorder is required.[1864] Therefore, even though the dangerousness plays a role, in principle, no psychiatric assessment is needed. The difference with the IPP is of course that it is in principle not detention. However, the violation of conditions may lead to detention.

1859 *James, Wells and Lee v. the United Kingdom*, op. cit., §194.
1860 O'Loughlin (2024), p. 139.
1861 O'Loughlin (2024), p. 139.
1862 Struijk & Van der Wolf (2018), p. 938.
1863 Rechtbank Noord-Holland, 25-04-2019, ECLI:NL:RBNHO:2019:3509. Cited in: Fechner, E., Nagtegaal, M., Schuyt, P., & van der Wolf, M. (2022). De gedragsbeïnvloedende en vrijheidsbeperkende maatregel: wet en werkelijkheid. Delikt en Delinkwent, 2022(1), 68-108, p. 70.
1864 Van der Wolf, Van Marle & Roza (2022), p. 205.

Article 5 of the ECHR is not limited to arrest, detention, and imprisonment, as it can also be applicable to extreme forms of restriction upon freedom of movement. According to the ECtHR, in the *Guzzardi* case, the conditions – he was on an island with strict and constant supervision and severe psychical restrictions – individually did not amount to deprivation of liberty, but together they certainly did.[1865] As the GVM-sentence has only been about since 2018, not many cases have reached execution yet, even though it is imposed more than expected during sentencing.[1866] Therefore it has been argued that the future will show whether the measure is used in a way that would constitute a situation of deprivation of liberty, while it would then be necessary to adhere to the same standards as expressed for sentences of preventive detention in the beginning of this section.

3.1.3.3 Treatability or Efficiency Criteria

For the hospital order in England and Wales, a treatability criterion is in place. The MHA 1983 made a distinction between mental illness, mental impairment, and psychopathic disorder, and deliberately differentiated the mental disorders on whether they were *treatable* when deciding to admit a patient to hospital.[1867] The MHA 1983 regulates this *treatability criterion* (also known as '*treatability test*')[1868] for the treatment of two specific categories of patients. These are the patients with psychopathic disorders or a mental impairment, who can be treated under the MHA, only if the treatment appears likely to alleviate or prevent the deterioration of the patient's state.[1869] However, the other categories of patients are not subject to the treatability criteria, such as persons suffering from a mental *illness* and persons with *severe* mental impairment.[1870] Mental health professionals working under MHA 1983 started asking questions such as: *could psychopaths be treated?*[1871] Furthermore, a debate has started on the *treatability* of personality disorder.[1872] It was, also, suggested that persons with serious mental disorders, who cannot benefit from treatment pose a very challenging problem, to be dealt with under separate legislation.[1873]

S.45(A), which regulates the hybrid order in which a hospital order can be combined with a prison sentence, used to require the decision-maker to make a decision on whether the "*treatment is likely to alleviate or prevent a deterioration of his condition*", however this

1865 *Guzzardi v. Italy*, op. cit., §95-104.

1866 Van den Broek, T., van 't Klooster, S.A.A., & Nagtegaal, M.H. (2022). *Gedragsbeïnvloedende en vrijheidsbeperkende maatregel in 2022* (Cahier 2024-17). WODC, p. 15-16.

1867 Brown (2019), p. 192.

1868 *See.* Pickersgill (2013), p. 33.

1869 Joint Committee on the Draft Mental Health Bill (2005). *Draft Mental Health Bill, Session 2004-05, Volume I: Report, together with formal minutes and annexes*. London: The Stationery Office Limited, p. 49, §137.

1870 JCDMHB (2005), p. 49, §137. Also, alcohol or drug addiction is an exclusion criterion from the provisions of the MHA in England and Wales, but for a different reason. The MHA explicitly states that dependence on alcohol or drugs alone does not constitute a mental disorder under the Act. Section 1, subsection 3 of the MHA 1983, (as amended by the Mental Health Act 2007).

1871 Pickersgill (2013), p. 33.

1872 Pickersgill (2013), p. 38.

1873 JCDMHB (2005), p. 50, §142.

treatment criterion was removed with MHA 2007. Section 4 of the *Amendments to Mental Health Act 1983*[1874] replaces the "treatability test" with *appropriate medical treatment test*. S.3 of the MHA 1983, after this amendment, states that an application for admission for treatment may be made in respect of a patient on the grounds that *"appropriate medical treatment is available for him"*. The aforementioned *Amendments* states: *"The test requires that appropriate treatment is actually available for the patient. It is not enough that appropriate treatment exists in theory for the patient's condition"*.[1875] Seeking for the available appropriate treatment, however, is simply repeating the treatability criteria in other words. They both pose the same question in the end.

S.232 of the SA 2020 also asks the question of whether treatment is available for the offender's mental state in order to pass the sentence. According to the regulation:

3). Before passing the sentence, the court must consider—
   a). *any information before it which relates to the offender's mental condition (whether given in a medical report, a pre-sentence report or otherwise), and*
   b). *the likely effect of such a sentence on that condition and on any treatment which may be available for it.*

The Sentencing Council published the guideline on *Sentencing Offenders with Mental Disorders, Developmental Disorders, or Neurological Impairments* in 2020.[1876] According to its Annex A, where main classes of mental disorders are presented, it is stated that: *"Many aspects of schizophrenia are treatable, but 'cure' is unlikely and deterioration over years quite common. Nevertheless, people with the condition can attain a good quality of life and safety if a full range of relevant treatments can be sustained"*. Hence the Sentencing Council draws a line in between what is *treatable* and what is *curable*. It is stated that most mental disorders cannot be cured, however, they can usually be treated effectively to minimise symptoms and enable the person to be functional in the society.[1877] Therefore, even keeping the person stable and not letting them deteriorate, – although no improvement will occur – should be accepted as *treatment*; hence, every single mental disorder is *in theory* treatable. While the courts have already *loosened* the treatability criteria to include a wide range of interventions, it is still not removed.[1878]

1874 Mental Health Act 2007, Explanatory Notes, Amendments to Mental Health Act 1983; *see.* <https://www.legislation.gov.uk/ukpga/2007/12/notes/division/6/1 > accessed 22 April 2024.

1875 Mental Health Act 2007, Explanatory Notes, Amendments to Mental Health Act 1983; *see.* <https://www.legislation.gov.uk/ukpga/2007/12/notes/division/6/1 > accessed 22 April 2024.

1876 Can be found at: <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/> accessed 21 April 2024.

1877 National Institutes of Health (US); Biological Sciences Curriculum Study < https://www.ncbi.nlm.nih.gov/books/NBK20369/#> accessed 21 April 2024.

1878 Eastman, N. (2007). Retaining a 'Therapeutic Benefit' Test Within the Mental Health Act 1983 < https://publications.parliament.uk/pa/cm200607/cmpublic/mental/memos/ucm6202.htm> accessed 22 April 2024.

In England and Wales, hospital admissions are found appropriate only if the goal is treatment, rather than mere public protection.[1879] The *treatability criteria* currently apply to mentally disordered offenders, under hospital order (s.37), hospital and limitation directions (s.45A), transfer direction for sentenced prisoners (s.47).[1880]

As it is highlighted in *Chapter 2*, the ECtHR in the *Hutchison Reid* judgment clearly stated that the confinement under Article 5/1(e) is possible not only when a *person needs therapy, medication or other clinical treatment to cure or alleviate their condition*, but also when a *person needs control and supervision* to prevent them from injuring themselves or others.[1881] The Court, rightfully, stated that the treatability criteria does not mean that release is mandatory where a danger to public order persists.[1882] Mentally disordered offenders could still derive benefit from the hospital environment, as the symptoms could become worse outside this supportive structure.[1883]

In 2015, the Court of Appeal in *Vowles*[1884] indicated that judges should consider the offender's *treatability* when determining an appropriate sentence.[1885] It has been argued that the new risk-focused concept of *treatability* created in *Vowles* is *much more* stringent, and thus may give rise to inequity for individuals with disorders who are not amenable to readily treatable.[1886] This difference between the test of treatability created in *Vowles* and the "appropriate medical treatment test" as outlined in the MHA 2007 is stated to create potential unfair outcomes and harsh punishment for mentally disordered offenders.[1887] As they will then probably end up in prison, the question rises whether they will receive the necessary care. How legitimate is it that the safeguards of Article 5/1(e), an adequate treatment in an appropriate institution, is taken from them on the basis of treatability? According to the ECtHR, the hospital wings of the prisons would be an appropriate institution, only if the appropriate care is provided in that institution. The ECtHR rules that an appropriate and individualised form of therapy or course of treatment is an important part of the notion of "*appropriate institution*".[1888]

Consequently, the treatability criteria are disadvantageous to defendants as well as public protection,[1889] and abolishment has been argued on these arguments.[1890]

1879 Brown (2019), p. 194.

1880 *See.* House of Commons, Explanatory Notes: Summary of effect of amendments in Chapter 1 of Part 1: https://publications.parliament.uk/pa/cm200607/cmbills/076/en/07076x-a.htm accessed 04 September 2024.

1881 *Hutchison Reid v. the United Kingdom,* op. cit., §52.

1882 *Hutchison Reid v. the United Kingdom,* op. cit., §54.

1883 *Hutchison Reid v. the United Kingdom,* op. cit., §55.

1884 R v Vowles [2015] EWCA Crim 45; [2015] EWCA Civ 56; [2015] WLR (D) 52, at [54(iii)].

1885 O'Loughlin (2024), p. 183.

1886 *Emphasis added.* O'Loughlin (2024), p. 184.

1887 O'Loughlin (2024), p. 184.

1888 *Rooman v. Belgium*, op. cit., § 210.

1889 *For same opinion, see.* O'Loughlin (2024), p. 183-184.

1890 The abolition of this "*treatability test*" in relation to psychopathic disorder was recommended before. *See.* National Institute for Mental Health in England. (2003). *Personality disorder: No longer*

It In the Netherlands, a concept similar to the *treatability criteria* exists in the Netherlands. As stated under the subsection *3.3.5.5 Article 2.3 Wfz – Civil Care Referral* in *Chapter 3*, Article 2.3 of the *Wet forensische zorg* ("Wfz") regulates the civil care referral by the criminal court. It does not carry an "order" status, as it is not immediately executable. One of the principles that has to be taken into account is the existence of efficient treatment for this patient. Moreover, the court is dependent on an institution willing to admit the patient before it can authorize the care. It was revealed that over a third of the civil care referrals that prosecutors begin to prepare are terminated, even before they are submitted to the criminal court.[1891] This occurs in half the cases due to a negative medical statement.[1892] It was reported that general mental health institutions are reluctant to admit Article 2.3 Wfz patients into their institutions.[1893] Therefore, finding a mental health institution willing to admit patients is quite a challenge.[1894] In cases where a designated institution issues a negative advice, there is a lack of clarity about who is responsible for finding a facility to admit a patient with Article 2.3 Wfz.[1895] It was further reported that a great deal of preparations stops at the medical certificate, which requires information about the accommodation that is often unknown at the time.[1896] Consequently, independent doctors often issue a negative medical certificate, or none at all. As applications cannot be submitted without a medical certificate, this leads to gridlock. The consequence is generally a more severe security measure (TBS) or a prison sentence.[1897] This constitutes similar problems as related to the treatability criterion in England and Wales. In Türkiye, such a treatability threshold does not exist.

3.1.3.4 Relation between Expert and Court in Deciding on Mental Disorder

In the Netherlands, two landmark cases for the issue of sentencing mentally disordered offenders were involved with the question how the competencies of the expert and the court are divided in establishing the mental disorder. As the establishment of the mental disorder is relevant for both the assessment of criminal responsibility and imposition of, in these cases, a TBS-order, because of the latter the establishment should also comply with the requirements of Article 5 of the ECHR. Interestingly, the respective legal criteria for mental disorder differ. For (non-)responsibility, as previously explained under Chapter 3, the criterion is relatively new: mental disorder (*psychische stoornis*), psychogeriatric disorder (*psychogeriatrische aandoening*), or intellectual disability (*verstandelijke handicap*).

a diagnosis of exclusion Policy implementation guidance for the development of services for people with personality disorder. London: National Health Service, p. 17, 28.

1891 De Kogel et al. (2021), p. 149.

1892 De Kogel et al. (2021), p. 149.

1893 De Kogel et al. (2021), p. 152.

1894 De Kogel et al. (2021), p. 152.

1895 *"There is a call for a forensic version of section 2.3 Wfz. A forensic version would solve several issues, according to respondents: such a measure could fill the gap that is now experienced between tbs with mandatory hospitalization and the care authorization."*, De Kogel et al. (2021), p. 152.

1896 De Kogel et al. (2021), p. 153.

1897 De Kogel et al. (2021), p. 153.

For the TBS-order the old criterion remained: 'defective development or pathological disorder of their mental faculties'.[1898] The rationale for keeping it was that this definition was not behavioural scientific terminology, and would therefore underline that in the end establishing it is a legal decision by the court.[1899] This was especially done with an eye on the issue of defendants refusing evaluation to avoid the TBS-order through making the establishment of a mental disorder more difficult. This was an important issue in the case of *Constancia*, which was brought before the ECtHR.[1900] In the case of Thijs H. the question was answered how the disorder is established with relation to non-responsibility, and what is required more than establishing disorder in order to reach a conclusion of non-responsibility. This question and the Thijs H. case are addressed here first, after which the case of *Constancia* will be highlighted to explain whether the Dutch approach to these issues complies with the ECtHR.

As explained in *Chapter 3*,[1901] in the criminal justice system of the Netherlands, Article 39 of the DCC regulates that not punishable is the person who commits an offence which cannot be attributed to them by reason of mental disorder (*psychische stoornis*), psychogeriatric disorder (*psychogeriatrische aandoening*), or intellectual disability (*verstandelijke handicap*). However, there was no standard for what capabilities should be affected by the pathology in order for criminal responsibility to be negated. Even though both in literature,[1902] and in legal practice[1903] criteria were advocated related to control (volitional) and understanding (comprehension) components. In the Thijs H. case the *Hoge Raad* was specifically asked to establish such a standard.

To understand the ruling, it is relevant to provide a concise overview of the case. Thijs H. was suspected of murdering three people, who were considered random passersby. The first instance court had imposed a prison sentence of eighteen years and a TBS-order with compulsory treatment (*Tbs met dwangverpleging*).[1904] On appeal, Thijs H. was sentenced to 22 years' imprisonment and a TBS-order with compulsory treatment.[1905] The court's assessment was complicated by the fact that the behavioural experts who examined the defendant came to different conclusions. In the initial report for the decision in first instance, the Pieter Baan Centre concluded that the defendant had suffered from the effects of severe psychotic pathology, during which he lacked opportunities for real consideration or reflection. Accordingly, the experts advised that the offence should not be attributed to the defendant. For the decision upon appeal two extra multidisciplinary reports were available, next to the initial report that was re-admitted. In the second expert

1898 Article 37a of the DCC. *See.* ANNEX 4- Relevant Articles of the Dutch Criminal Code.
1899 Van der Wolf & Bijlsma (2022), p. 266.
1900 *Constancia v. the Netherlands* (dec.), op. cit.
1901 Under the subsection 3.3.2 Mental Disorder as an Exemption.
1902 Bijlsma (2016), p. 19; Bijlsma (2019), p. 809; Meynen (2022), p. 285; Meynen (2016b), p. 143.
1903 For example, Gerechtshof Den Haag, 16-03-2017, ECLI:NL:GHDHA:2017:684.
1904 Rechtbank Limburg 30 juli 2020, ECLI:NL:RBLIM:2020:5621.
1905 Hof Den Bosch 17 March 2022, ECLI:NL:GHSHE:2022:868.

report, two other behavioural experts reached a very similar conclusion as during the commission of the offences the defendant was suffering from a florid psychotic disorder, and therefore, the experts advised that the charges should not be attributed to the defendant because in the period prior to and at the time of the offence he was completely controlled by this delusion. However, the conclusions of a third report were entirely divergent. In the third report, two experts reported that they could not identify any clear indications of a well-defined psychopathology in the defendant. Furthermore, they did not find any indications of schizophrenia. However, the experts did establish a maladjusted personality of a structural nature. The question of the attribution of the offence remained unanswered in the third report. Prior to ruling on the plea of lack of culpability, the Court of Appeal first considered the legal framework of criminal responsibility. This involved an assessment of: whether the defendant, due to a mental disorder or defective development, did not or could not understand the purport, legal and moral wrongfulness, and/or the context of their conduct(s), or were unable to form their will in accordance with that understanding.[1906] Applied to the present case, the Court of Appeal first of all establishes 'on the basis of the three reports, viewed together and coherently' that the defendant suffered from a pathological disorder of his mental faculties during the commission of the proven offence; in other words they established the legal criterion for disorder. But the Court of Appeal did not express an opinion about the nature of this disorder, other than that there was "*something wrong*" (*iets mankeert*) with the defendant.[1907] In that context, the Court further ruled that neither the law nor case law requires that the disorder can be classified according to the DSM-5; the court should determine whether there is a disorder in the legal context (*in juridische zin*).[1908] The court then ruled, on the basis of the contents of the behavioural reports, that before, during, and after the offences, the defendant was able to understand, at least to a certain extent,

1906 "*…of de verdachte door een psychische stoornis of gebrekkige ontwikkeling de strekking, de wettelijke en morele ongeoorloofdheid en/of context van zijn gedraging(en) niet heeft (kunnen) begrijpen, dan wel niet in staat was om overeenkomstig dat begrip zijn wil te vormen*." Hof Den Bosch 17 March 2022, ECLI:NL:GHSHE:2022:868, para. 3.2.

1907 The Court of Appeal ruled that neither the law nor case law requires that the disorder be classified according to the DSM-5 and that it should be established by (a) behavioural expert(s). Therefore, the criminal court must determine whether there is a disorder and/or defective development in the legal sense (*in juridische zin*). Hof Den Bosch 17 March 2022, ECLI:NL:GHSHE:2022:868, para. 3.6, *Het oordeel van het hof*.

1908 On the basis of the aforementioned opinions from the three reports, the Court of Appeal finds that the experts do not arrive at an unequivocal answer to the question whether there was a defective development or pathological disorder of the defendant's mental faculties, nor do they arrive at an equal classification of the defendant's defective development or pathological disorder. Therefore, the Court cannot establish a specific defective development or pathological disorder of the defendant's mental faculties either. However, neither the law nor case law requires that the disorder be classified according to the DSM-5 and that it should be established by (a) behavioural expert(s). The court must determine whether there is a disorder and/or defective development in the legal sense (*in juridische zin*). *See*. Hof Den Bosch 17 March 2022, ECLI:NL:GHSHE:2022:868, para. 3.6, *Het oordeel van het hof*.

the purport, legal and moral impermissibility and context of his conduct and was also to a certain extent able to form his will in accordance with that understanding. Thus, the defendant was not found to be in complete incapacity to act.

The court's judgment raised inter alia the questions in academia – and as complaints in cassation – whether it was sufficient for the court to establish only the legal criterion and in a more behavioural sense only mentioned that there was "*something wrong*" with the defendant and what the standard for non-responsibility should be?[1909]

The much anticipated ruling from the *Hoge Raad* was that specifying 'which' mental disorder existed was not necessary; the court shall only establish whether the defendant was suffering from a mental disorder.[1910] Both the question of criminal responsibility (*toerekenbaarheid*) and the question of establishing grounds for sentencing and determining whether the requisite conditions have been met (in this case for the TBS-order) is a matter reserved for the criminal court, as it is a legal judgment.[1911] The criminal judge may[1912] consider the input of behavioural experts in answering this question; however, it is important to recognise that the criminal court bears its own responsibility and is not bound by the advice provided by experts (nor to a standard from the behavioural disciplines like the DSM-5).[1913] The fear that the new criterion for mental disorder would be formulated too much in behavioural terminology was not actualised, as the *Hoge Raad* adopted a very similar position towards the disorder in the legal sense as it had previously done for the old criterion.[1914]

In light of the particular question addressed in Article 39 of the DCC, it is reasonable for behavioural experts to provide the court with an assessment of the presence of a disorder and its impact on the criminal responsibility of the offender for the alleged offence.[1915] In establishing the facts of the charge and attaching normative conclusions to them, such as criminal responsibility, the court is the competent authority. It is evident that the criminal court should not be obliged to accept the conclusions reached by experts as a result of their evaluation.[1916] It is regular practice for courts to diverge from behavioural advice, and there

1909 Bijlsma, J., Ligthart, S., & Nauta, E. (2022). Gaat de Hoge Raad klare wijn schenken over ontoerekenbaarheid? Twee vragen naar aanleiding van de zaak tegen Thijs H. in rechtsvergelijkend perspectief. *Nederlands Juristenblad, 2022*(1135), 1466-1472, p. 1469-1470; Rozemond, N. (2023). De normatieve grondslagen van de ontoerekenbaarheid. *Nederlands Tijdschrift voor Strafrecht 4*, 178-190; Nauta, E., Ligthart, S., & Meynen, G. (2024). Stoornis en ontoerkenbaarheid. *Nederlands Juristenblad, 2*, 1-8, p. 5. Other literature had already suggested that the finding that the defendant suffers from 'a' disorder is, in principle, sufficient. E.g. Bijlsma et al. (2022), p. 1470. Bijlsma (2016), p. 9-10.

1910 *Thijs H. case,* para. 5.4.1, 5.4.2, and 5.7.1.

1911 *Thijs H case.*, para. 3.2.

1912 The criminal court *should* receive and should consider the behavioural experts' reports, in cases where the TBS-order is going to be imposed.

1913 *Thijs H. case,* para. 3.2 and para. 5.4.1.

1914 *See.*Van der Wolf & Bijlsma (2022), p. 266-267.

1915 Nauta et al. (2024), p. 6.

1916 Nauta et al. (2024), p. 6.

are sound reasons for this.[1917] In addition, the *Hoge Raad* formulated the standard for holding the defendant not responsible or diminished responsible for their conduct is inability to form their understanding (*begrip*) and will (*wil*), regardless of the cause.[1918] The cognitive and/or volitional inability of the suspect, therefore, is at the core of the criminal responsibility. Consequently, according to the court, what is ultimately most relevant for answering the question of the degree of the criminal responsibility is not so much the disorder itself, but the degree of impairment, and more specifically the degree of their inability.[1919]

This judgment was not only discussed in academia, especially related to the question whether the ability to comprehend the unlawfulness (*wederrechtelijkheid*) of their actions was too strict and should be moral wrongfulness,[1920] but also raised concerns in practice. On 17 October 2023, the board of the Department of forensic psychiatry of the Dutch Association for Psychiatry ("NVvP", *Nederlandse Vereniging voor Psychiatrie*) expressed its concerns, following the *Thijs H.* case, about the potential consequences for the role of the behavioural reporting, more specifically the psychiatric assessment within the context of criminal cases.[1921] Psychiatrists expressed concerns that they were not adequately recognised as experts in their field, that there expertise was considered to be mere opinion. Additionally, the board stated its concern about the potential implications that this decision could have for the participation of defendants in *pro Justitia* examinations, as the courts are free to make their own independent judgments on mental disorder (*stoornis*) and criminal responsibility (*toerekeningsvatbaarheid*).[1922] Even though this division of competences had been the legal standard for a long time, the fact that the behavioural advise is seldom not followed renders it understandable that psychiatrists thought their opinion was more influential. Concerns about the quality of the third expert report in the case, that was later deemed inadequate by a Disciplinary Court,[1923] were also part of the indignation. It may take some time for the disciplines to come to terms again.

As previously outlined in Chapter 2 and subsequently discussed in Chapter 4, for the detention to be deemed compliant with Article 5/1(e), which is applicable to the TBS-order, it is essential that the true mental disorder requiring compulsory confinement is reliably shown through objective medical expertise and established before the

1917 *See.* Harte, J.M., & Veurink, G. (2006). Redenen van de rechter om het Pro Justitia advies niet over te nemen', *Nederlands Juristenblad, 35,* 2007-2010.

1918 *Thijs H. case,* para. 3.6.

1919 *Thijs H. case,* para. 3.6.

1920 Ligthart, Kooijmans & Meynen (2018), p. 108.

1921 Nederlandse Vereniging voor Psychiatrie. (2023). *Afdeling forensische psychiatrie uit zorgen over uitspraak Hoge Raad in zaak Thijs H.* Retrieved 2024 October, from https://www.nvvp.net/website/nieuws/2023/afdeling-forensische-psychiatrie-uit-zorgen-over-uitspraak-hoge-raad-in-zaak-thijs-h

1922 Nederlandse Vereniging voor Psychiatrie (2023).

1923 *M.B. v. Poland,* op. cit., §60-64.

competent authority.[1924] If the deprivation of liberty of a person considered to be of unsound mind has been ordered without an opinion of a medical expert, it shall not be deemed in conformity with Article 5/1(e).[1925] The question whether the fact that in the Netherlands the court can establish a mental disorder in the legal sense as grounds for a TBS-order conflicts with the requirement that the disorder has to be reliably shown through objective medical expertise, was brought before the ECtHR in the case of *Constancia*.[1926]

According to the facts of the *Constancia* case[1927] of 2015, the defendant refused to cooperate with the experts during the criminal proceedings, and it had made the situation impossible to draw any definite conclusions. The experts made use of all the information available, including previous mental health assessments, the criminal file, the audio and audio-visual recordings of interrogations; however, they were *unable* to supplement this information with their findings resulting from their own observation, and therefore could not reach a conclusion. The Court of Appeal used the police reports, reports by prison staff and statements of witnesses including close relatives of the defendant to rule that the defendant is described as manifesting unusual behaviour. It reasoned that it is up to the trial court to make the establishment of defective development or pathological disorder of their mental faculties at the time when he committed the act, when behavioural experts reach the limits of what is justifiable within their scientific knowledge. The ECtHR acknowledged the fact that, facing the applicant's complete refusal to cooperate with any examination of their mental state at any relevant time, the Court of Appeal was entitled to conclude from the information thus obtained[1928] that the applicant was suffering from *a genuine mental disorder* which, regardless of its precise nature, was of a nature or degree that warranted enforced confinement.[1929] The Court, therefore, held that the application -alleging that the applicant's rights under Article 5/1(e) had been violated

1924 *Miklić v. Croatia*, op. cit. §62.

1925 *Ruiz Rivera v. Switzerland*, App no. 8300/06, (ECtHR, 18 February 2014), §59; *S.R. v. the Netherlands*, App no 13837/07, (ECtHR, 18 September 2012), §31.

1926 This judgment was briefly presented in *Chapter 3*, subsection *4.3.2.2 Discretion of the Court on the Mental Evaluation Report*.

1927 *Costancia v. the Netherlands*, op. cit., §3-22.

1928 *"...the Court notes that the Arnhem Court of Appeal had recourse to a plurality of reports of earlier examinations of the applicant by psychiatrists and psychologists as well as a report by a psychologist and a psychiatrist commissioned while the proceedings were pending before it based on the criminal file and the audio and audio-visual recordings of interrogations. Although the various psychiatrists and psychologists were unable to establish a precise diagnosis, they did express the view that the applicant was severely disturbed, which view the Court of Appeal found reinforced by its own investigation of the case file, of the applicant's own confused statements especially (see paragraph 16 above). The Court accepts that, faced as it was with the applicant's complete refusal to cooperate in any examination of his mental state at any relevant time, the Court of Appeal was entitled to conclude from the information thus obtained that the applicant was suffering from a genuine mental disorder which, whatever its precise nature might be, was of a kind or degree warranting compulsory confinement.", Costancia v. the Netherlands*, op. cit., §30.

1929 *Costancia v. the Netherlands*, op. cit., §30.

since the applicant had not been diagnosed as mentally unfit- was manifestly ill-founded and declared the application was inadmissible.[1930]

This judgment was also criticised in academia. It was underlined that when behavioural experts refrain from stating a diagnosis, since they were not able to do a proper evaluation of the defendant due to lacking cooperation, it does not mean that the experts were unable to establish a *precise* diagnosis. As the TBS-order is a severe sanction, that is why defendants refuse to cooperate with the evaluation, it was advocated that impositions should be done more carefully.[1931] The question is whether in this case it was apparent that there was a true mental disorder, as there was a lot of information available, but that it could very well be that for future decisions courts feel empowered to impose TBS-orders in less evident cases.[1932] The question is also whether the acceptance of this decision making process extends beyond the situation of unreached conclusions due to refusal, or that it can also be accepted in other situations, like disagreement between experts as in the case of Thijs H. In light of the aforementioned ECtHR judgment, it seems reasonable that in instances where no consensus is reached by the behavioural experts, the precise nature of the mental disorder is inconsequential in determining the true mental disorder within the meaning of Article 5/1(e). Possibly, the later established inadequacy of the third report, could lead to a complaint related to Article 6, even though the reasoning of the court in itself seems to be adequate in light of that test.[1933]

As previously explained in the subsection *3.1.1 Reliably Showing That A True Mental Disorder Exists Through Objective Medical Expertise*, in both the criminal justice systems of Türkiye and of England and Wales, the competent criminal court is the authority to determine the criminal responsibility of the offender. In the event of inconsistencies in the expert reports, the court must refrain from issuing a final decision until the contradiction has been resolved.[1934] However, there is no explicit discussion regarding the necessity of establishing a precise diagnosis in the expert reports, or whether a sufficient conclusion would be to state that the defendant has "*something wrong*".

1930 *Costancia v. the Netherlands*, op. cit., §31-32.

1931 *See*. Kooijmans & Meynen (2017), p. 5: "*This situation, however, differs from cases in which psychiatrists and psychologists are unable to diagnose a disorder whatsoever*.".

1932 Nauta et al. (2024), p. 6.

1933 *Moreira Ferreira v. Portugal (no. 2)*, op. cit., §84.

1934 Yargıtay 1. Ceza Dairesi, 27/06/2018, 403-3087.

3.2 Detention Rules According to Articles 3 and 5/1(e)

According to the ECHR test, during the detention based on Articles 3, 5/1(e), 8:

a). Adequate medical assistance must be provided.
   i). To provide the "adequate medical assistance", it is not enough to only examine and make a diagnosis; it is also essential to provide suitable medical supervision by qualified staff, and
   ii). to provide proper treatment, there should be:
      1). comprehensive therapeutic strategy aimed at treating or preventing aggravation,
      2). treatment aimed at the reintegration into society,
      3). no language barrier blocking the treatment
      4). no coerced (medication) treatment against one's will (Article 8)

b). For someone detained under Article 5/1(e) the place of detention must be an appropriate institution: the title of the institution does not matter for the purposes of Article 5, only the possibility of treatment does.
   i). admission should be done in appropriate time, no significant delay.
   ii). appropriate care should be provided there.
   iii). staffing situation should be similar to a general psychiatric hospital run in the same country.

3.2.1 Issues Regarding Adequate Medical Assistance

As explained and examined under *Section 2 of Chapter 2*, the High Contracting Parties are obliged to provide *adequate medical assistance* to mentally disordered offenders during their detention. Solely examining the offending and diagnosing them are not enough to provide adequate medical assistance. It is essential to provide suitable medical supervision by qualified staff. Furthermore, providing "proper" treatment is only possible by providing a comprehensive therapeutic strategy aimed at treating or preventing the aggravation and by providing treatment aimed at the reintegration into society.

As stated in the *Rooman* case, "*the deprivation of liberty contemplated by Article 5 § 1 (e) has a dual function: on the one hand, the social function of protection, and on the other a therapeutic function that is related to the individual interest of the person of unsound mind in receiving an appropriate and individualised form of therapy or course of treatment*".[1935] In this sense, just providing a safe accommodation would never suffice.[1936]

In this subsection the relevant frameworks in the three justice systems are tested against the standards related to adequate medical assistance in reverse order as presented above.

1935 *Rooman v. Belgium*, op. cit., §210.

1936 *See.* BBC (2021). *100 people held more than 20 years in 'institutions'*, <https://www.bbc.com/news/uk-59388886> accessed on 23 July 2024.

3.2.1.1 Coerced Treatment

Coerced treatment, mainly through forced medicine, raises ethical and legal issues, already in general psychiatry, let alone forensic psychiatry. Respect for personal autonomy is one of the core principles in modern medical ethics; alongside promoting benefit, avoiding or minimising harm, and fairness.[1937] As explained under Chapter 2, right to health is not directly regulated by the ECHR, however the ECtHR combines Articles 2, 3, 5, 8 to provide it. However, in principle, every person also has the right to physical integrity, the right to refuse treatment, and thus, "the right not to get healthy", unless there are grounds for coerced treatment. From an ECHR perspective, this is an issue of a combination of Articles 3. 5/1(e), and 8.

Article 8 regulates the right to respect for private and family life, and the ECtHR rules that *the concept of private life includes a person's physical and psychological integrity*.[1938] The Court further states that medical intervention against someone's will results in a violation of the right to private life, in particular their right to physical integrity.[1939] No matter how minor the intervention is, medical care and treatment without consent raise serious issues under the private life.[1940] The ECtHR rules that the hospital has the authority to regard the patient's psychiatric illness as an absolute incapacity to make decisions for themselves.[1941] Therefore, in cases where the person is uncapable of self-determination due to having a mental disorder, no violation of Article 8 would be found.[1942] In *Storck v. Germany* judgement, for example, the medical *treatment with various medicine* she had received against her will was considered as an interference with her physical integrity, and therefore rendered to be a violation of Article 8,[1943] due to the fact that she was found to have the capacity to consent or object to the treatment.[1944]

Article 3, which provides for the right to be free from inhuman or degrading treatment or punishment, has not yet been found to have been violated by coerced psychiatric treatment. However, in theory, the mental health treatment may engage Article 3,[1945] as the ECtHR makes a distinction between the "*appropriate treatment*" and the "*therapeutically necessary treatment*", while examining the Article 3. As a rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading; however, this medical need should be satisfyingly and convincingly demonstrated.[1946]

1937 Jacobs (2012), p. 38.

1938 *X and Y v. the Netherlands,* op. cit., §22; *Eremia v. The Republic of Moldova,* op. cit., §73.

1939 *X v. Finland,* op. cit., §212.

1940 *Peters v. the Netherlands,* op. cit., p. 4; *Storck v. Germany,* op. cit., §43.

1941 *Herczegfalvy v. Austria,* op. cit., §86.

1942 *Herczegfalvy v. Austria,* op. cit., §86.

1943 *"...it was carried out against her will and therefore already constituted an interference with her right to respect for her private life." Storck v. Germany,* op. cit., §144.

1944 *Storck v. Germany,* op. cit., §75.

1945 Bartlett et al. (2007), p. 116.

1946 *Juhnke v. Turkey,* op. cit., §71; *Nevmerzhitsky v. Ukraine,* op. cit., §94; *Herczegfalvy v. Austria,* op. cit., §82.

Hence, as a result it could be stated that since the concept of private life includes the right to physical and mental integrity, the manner and conditions under which care is provided fall under Article 8, however the obligation to provide adequate care is considered within the concept of Article 3.[1947] According to the ECtHR case law, it is allowed to use coercion to detain under Article 5/1(e) and to provide care for persons with mental disorder under Article 3, as long as the medical necessity is well-proven. Coerced medicine, however, can only be applied in cases where the person is not able to consent.

Furthermore, according to Articles 3 and 5/1(e), the comprehensive therapeutic strategy aimed at treating or preventing aggravation shall in principle never include coerced medication or ill-treatment. The issue of ill-treatment will be discussed under *3.3.2 Obligation to Protect Individuals from Proscribed Ill-Treatment or Punishment (Article 3)* subsection below.

3.2.1.1.1 Coerced Treatment in Türkiye

In Türkiye, the involuntary treatment exists for mentally disordered persons. In the absence of specific legislation governing the treatment of mentally disordered offenders in the YGAP Hospitals, the general regulations pertaining to the medical treatment in general are applicable. Article 24 of the Patient Rights Regulation of the Ministry of Health (*Hasta Hakları Yönetmeliği*) regulates consent and authorisation, and Article 25 regulates the refusal or suspension of the treatment. According to Article 24, in cases where the patient has no capacity to consent, the legal guardian can authorise the medical intervention, after informing the restricted patient with the process and the treatment decision. In cases where authorisation is not given by the legal representative, if the intervention is medically necessary, medical treatment is depending on a court decision in accordance with the Turkish Civil Code. In emergency situations, where the patient's life is in danger and the patient is unconscious, medical intervention to the patient does not depend on consent. These regulations match with the ECtHR case law.

The *draft* Mental Health Law (*Ruh Sağlığı Yasası*) regulated these issues for mental health treatment; however, the draft has never come into force. The Psychiatric Association of Türkiye (*Türkiye Psikiyatri Derneği*) has been working on the Mental Health Law for more than 20 years. Up until 2014, the organisation in question had prepared three distinct drafts, and had played an instrumental role in the preparation of the draft that was submitted to parliament in 2018.[1948] Nevertheless, the draft was never enacted into law. These developments are essential in a democratic society and have significant implications for the realisation of human rights. Consequently, the Turkish Grand National Assembly (*Türkiye Büyük Millet Meclisi*, "TBMM") is obliged to take the necessary steps to issue a law on mental health as soon as possible. The same can be said for a regulation on the procedures and organisations of the new YGAP hospitals.

1947 *Eremia v. The Republic of Moldova,* op. cit., §73.
1948 *See.* <https://psikiyatri.org.tr/ruh-sagligi-yasasi> accessed 9 September 2024.

The absence of a regulatory framework governing the procedure at YGAP Hospitals, including the manner in which treatment should be conducted, the range of available treatment options, the circumstances under which involuntary treatment may be employed, and the criteria for the use of isolation, presents a significant challenge. It can be interpreted as an infringement, given that patients are unaware of their rights. Furthermore, there is currently no available information, study, or statistical data on the application of coerced medicine or treatment in the recently established YGAP Hospitals. Consequently, the absence of academic or governmental publications on the subject presents another problem. The fact that these issues are not even being debated is deeply concerning and requires immediate attention.

This absence of regulation can be attributed to the fundamental tenet of the Turkish approach, which is to pursue initiatives without undue concern for the subsequent formation of regulations. Individuals also anticipate that this process will unfold over time. Consequently, it explains why this infringement has not attracted significant attention. It is therefore urgently necessary that a law commission be constituted with the aim of regulating these issues, in accordance with these ECHR standards, and filling the gap.

3.2.1.1.2 Coerced Treatment in England and Wales

Section 63 of the MHA 1983 provides the authority to give appropriate treatment to patients detained under a hospital order, with or without their consent,[1949] if this appropriate treatment is given by or under the direction of the approved clinician in charge of the treatment.[1950] According to s.64, the responsible clinician is the *"approved clinician with overall responsibility for the case of the patient in question"*.

The MHA Code of Practice states that restrictive interventions should only be used where there is a real possibility of harm to themselves or others and to terminate or significantly reduce the danger to themselves or others. Interventions to be applied should be proportionate,[1951] the least restrictive option,[1952] and not be used as punishment and not longer than necessary.[1953] Moreover, they should only be implemented in a manner consistent with the ECHR.[1954]

1949 If it is not a form of treatment to which section 57, 58 or 58A applies.

1950 S. 145(4) regulates that *"Any reference in this Act to medical treatment, in relation to mental disorder, shall be construed as a reference to medical treatment the purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations"*.

1951 Code of Practice MHA 1983 (2008), para. 16.36.

1952 *"People taking action without a patient's consent must attempt to keep to a minimum the restrictions they impose on the patient's liberty, having regard to the purpose for which the restrictions are imposed."*, Code of Practice MHA 1983 (2008), para. 1.3.

1953 Code of Practice MHA 1983 (2008), para. 16.36.

1954 *"It is unlawful for them to act in a way which is incompatible with a patient's rights as set out in the European Convention on Human Rights."*, Code of Practice MHA 1983 (2008), para. 23.39.

According to the MHA Code of Practice, there are no separate regulations for the treatment of detained patients[1955] as they are in the same position as patients who are not subject to the MHA; they have exactly the same rights to consent to and refuse treatment.[1956] Healthcare providers must therefore determine whether a patient is capable of consenting to or refusing a particular medical treatment; and if so, whether the patient actually gives consent.[1957]

The Mental Capacity Act 2005 defines that a person lacks capacity with regard to a matter if, at the time of the facts, they are unable to make their own decision on the matter due to an impairment or disorder of the functioning of the mind or brain.[1958] It should be reminded that the patients under the MHA 1983 do not typically lack capacity to give or refuse consent, and that the capacity may change in time and thus must be assessed when the decision is being made.[1959] The MHA Code of Practice defines *consent* as *"the voluntary and continuing permission of a patient to be given a particular treatment, based on a sufficient knowledge of the purpose, nature, likely effects and risks of that treatment, including the likelihood of its success and any alternatives to it"*.[1960] Hence, by definition, even when a person, who is not capable of giving consent, cooperates or proactively seeks the treatment, they do not consent to treatment.[1961]

In each case, including coercive treatment, adequate information should be given to the patient in order to allow them to broadly comprehend the nature, probable effects and all major potential negative outcomes of that treatment, including the probability of success and possible substitutes.[1962] Clinicians are obliged to record consent or refusal of the patient, as well as their assessment of the capacity to consent of the patient.[1963] Every treatment without consent must comply with the HRA 1998 and Articles 3 and 5 of the ECHR.[1964] The MHA Code of Practise, therefore, recommends that clinicians seek senior clinical and legal advice in the event of concerns about a possible human rights violation.[1965] It shall be noted that attorneys or court-appointed deputies under the Mental Capacity Act may consent to treatment for the patients, and except in emergencies also refuse treatment on behalf of the patients.[1966]

1955 Part 4 of the MHA sets out the rules for treating patients who have been detained in hospital. These patients are referred by the Code of Practice as "detained patients". *See.* Code of Practice, MHA 1983 (2008), para. 23.7.

1956 Code of Practice, MHA 1983 (2008), para. 23.7-23.8.

1957 Code of Practice, MHA 1983 (2008), para. 23.27.

1958 Section 2/1 of the Mental Capacity Act.

1959 Code of Practice, MHA 1983 (2008), para. 23.29.

1960 Code of Practice, MHA 1983 (2008), para. 23.31.

1961 Code of Practice, MHA 1983 (2008), para. 23.32.

1962 Code of Practice, MHA 1983 (2008), para. 23.34 and 23.37.

1963 Code of Practice, MHA 1983 (2008), para. 23.37.

1964 Code of Practice, MHA 1983 (2008), para. 23.39 and 23.40.

1965 Code of Practice, MHA 1983 (2008), para. 23.41.

1966 Code of Practice, MHA 1983 (2008), p. 194.

The MHA 1983 provides legal authority for the treatment of mental disorders without the patient's consent. In accordance with Part 4 of the Act, this is applicable to the majority of detained patients. The relevant sections are as follows: s.2, s.3, Section 37, s.37/41, s.38, s.36, s.47, s.48, s.47/49, s.48/49, s.17A patients who have been recalled, and patients who have been granted leave under the provision of s.17.[1967]

S.58 applies specifically to treatment for mental disorder for detained patients. When a patient is detained in accordance with an aforementioned section they may be administered medication for a mental disorder under the authority of their Responsible Clinician for a period of three months, without the need for consent or authorisation from a Second Opinion Appointed Doctor.[1968] After three-month period,[1969] medication under s.58 can be administered without consent, only with the approval of a second opinion doctor appointed by the Commission.[1970] During its 2016 visit, the CPT considered that the safeguards for consent to treatment during the first three months of involuntary admission need to be strengthened.[1971]

Neurosurgery for detained mentally disordered offenders and other treatments under s.57 cannot be given without the consent of the person and must always be approved by a second opinion doctor appointed by the Commission.[1972] S.57 also applies to neurosurgery for mental disorders and to surgical implantation of hormones to reduce male sex drive.

As mentioned earlier, s.63 of the MHA 1983 regulates that the appropriate treatment to detained mentally disordered offenders can be given with or without their consent. However, in urgent cases where the treatment is immediately necessary to save the patient's life, prevent serious deterioration, reduce serious suffering, or prevent violent or dangerous behaviour, s. 57, 58, or 58A does not apply.[1973] In these urgent cases, hospital managers are obliged to monitor the use of these exceptions to ensure that they are not used inappropriately or excessively.[1974]

1967 *See.* NHS Trust, Consent to Treatment: Procedure for Detained Patients, Policy: C09, para. 4.1, < https://www.dpt.nhs.uk/download/Q1m4Pcuuuw> accessed 14 December 2024.

1968 Code of Practice, MHA 1983 (2008), para. 24.10.
The right to refuse treatment is restricted during the initial three-month period following the issuance of a detention order. The three-month rule is considered a prudent measure designed to prevent the involuntary detention of patients without access to treatment. Oyebode, F. (1993). Ethics and Section 58 of the Mental Health Act (1983). *Psychiatric Bulletin, 17,* 481-583.

1969 *"The three-month period is not affected by renewal of detention, leave or changes to or discontinuation of treatment. A fresh three-month period will only start if the section ends and a new one commences." See.* NHS Trust, Consent to Treatment: Procedure for Detained Patients, Policy: C09, para. 5.4, < https://www.dpt.nhs.uk/download/Q1m4Pcuuuw> accessed 14 December 2024.

1970 Code of Practice, MHA 1983 (2008), p. 196.

1971 The Council of Europe. (2017). *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 12 April 2016, CPT/Inf (2017) 9.* Retrieved 2024 August, from https://rm.coe.int/168070a773, p. 10.

1972 Code of Practice, MHA 1983 (2008), p. 196.

1973 Code of Practice, MHA 1983 (2008), para. 24.32-24.33.

1974 Code of Practice, MHA 1983 (2008), para. 24.37.

In the forensic hospitals visited by the CPT in 2021, detailed information on all individual cases of use of restraints was recorded in the respective electronic patient record system.[1975] A central register in which not only the number of cases of coercive measures but also their duration are kept in an accessible manner is recommended by the CPT.[1976] In all facilities visited, rapid tranquillisation was used, which, whether administered orally or by injection, is a chemical restraint that must be reported to the Mental Health Services Data Set.[1977] The CPT advises that efforts are needed to reduce the use of rapid tranquillisation, particularly by intramuscular injection, and that alternative, less intrusive means of restraining patients should be explored.[1978]

In accordance with the MHA 1983, patients are adequately informed of the nature, probable effects and major potential negative outcomes of their treatment, including the probability of success and possible alternatives, in each case, including coercive treatment. Consequently, it can be stated that the coerced treatment in England and Wales is compatible with the ECHR test. Nevertheless, as the CPT has also observed, the safeguards for consent to treatment during the initial three-month period of involuntary admission represent an area that would benefit from further strengthening.

3.2.1.1.3 Coerced Treatment in the Netherlands

In the Netherlands, the concept of forced care (*gedwongen zorg*) is divided into two subtypes: direct and indirect coercion.[1979] Direct coercion is the forced care in the form of, for example, commitment to a hospital or coerced medication. Indirect coercion, on the other hand, encompasses situations where individuals feel compelled to undergo care, even though it is not legally mandated or ordered by the court; instead, it is an intervention that is a natural consequence of the condition of a conditional sentence.[1980] Below the possibilities for coerced treatment will be discussed, first for mentally disordered offenders under a TBS-order, and second, for those under a care authorisation given by the criminal court.

The *Beginselenwet verpleging ter beschikking gestelden* ("BVT", the Principles Act for TBS Patients) provides the regulatory framework for the care for mentally disordered offenders within the TBS-system. Compulsory care or nursing is mandatory within the closed forensic psychiatric centers. Article 16/4 of the BVT regulates that prior to the adoption of the care and treatment plan, consultations shall be held with the guardian (in the event that the patient has been placed under guardianship), the mentor (in the event that a mentorship has been established for the benefit of the nurse), or the parents or guardian

1975 CPT (2022), p. 68.
1976 CPT (2022), p. 68.
1977 CPT (2022), p. 71.
1978 CPT (2022), p. 71.
1979 Winter, H., Legemaate, J., Ploem, C., uit Beijerse, J., Mevis, P., Wolf, van der, M., Akerboom, C., Schol, M., & Woestenburg, N. (2014). *Thematische wetsevaluatie: gedwongen zorg*. Den Haag: ZonMw, p. 16.
1980 Winter et al. (2014), p. 16.

(in the event that the patient is a minor). The treatment of the inpatient may only proceed if the aforementioned individuals consent, or in instances where the patient or the aforementioned individuals do not object to treatment.[1981] In cases where the aforementioned conditions are not met, treatment may nevertheless be provided as a last resort in cases where the mental disorder is deemed to be a significant risk to the patient's wellbeing and cannot be resolved within a reasonable time, or where the head of the institution has taken the decision to proceed with treatment in accordance with the advice of a medical professional, and it is deemed to be the most appropriate course of action to avert the danger that the patient causes within the institution.[1982]

According to the ECHR test on Article 3, forms of coerced treatment may be justified on the grounds of medical necessity, but also on considerations of the safety of others. The ECtHR establishes that while the *medical authorities* have the authority to determine the appropriate therapeutic methods based on the established standards of medical science, *if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3, whose requirements permit of no derogation.*[1983]

The BVT holds particular significance in this context, as the compulsory care or nursing is a mandatory aspect of the closed forensic psychiatric centers, and the BVT establishes the regulatory framework. In instances where the patient's consent cannot be obtained, treatment may still be provided as a last resort in emergency situations or when the head of the institution, with the advice of a medical professional, deems it appropriate. With regard to coerced treatment, the ECtHR establishes a high standard of severity before it deems such treatment unlawful. Moreover, it relies heavily on medical expertise, particularly the concept of medical necessity. Consequently, the BVT regulations align with the ECHR test.

As a sidestep, with regards to mentally disordered offenders, the CPT has reiterated that chemical coercive measures shall *never* be administrated in a prison environment.[1984] While visiting Curaçao, the CPT reported that chemical restraint was used occasionally in the forensic psychiatric support unit (*forensische observatie en begeleidings afdeling*, "FOBA") of a prison, by nurses.[1985] The CPT underlined earlier that injections of fast-acting sedatives constitute a form of chemical coercion that poses a significant risk to patients' health; its use therefore requires close medical supervision and strict adherence to protocols by all staff.[1986] In the event of an emergency intervention by nursing staff in a prison setting, a medical doctor must promptly attend to monitor the patient and address

1981 Article 16a of the BVT.
1982 Article 16b of the BVT.
1983 *Herczegfalvy v. Austria,* op. cit., §82.
1984 CPT (2023a), p. 104.
1985 CPT (2023a), p. 104.
1986 CPT (2017a), p. 47.

any complications.[1987] In the Dutch legislation this issue is addressed in the Penitentiary Principles Act ("Pbw", *Penitentiaire beginselenwet*) by regulating that except in emergency situations, coerced treatment can only be administered in the prison system within the Penitentiary Psychiatric Centres ("PPC"), to which the prisoner should be transferred first. In the PPC similar regulations exist as for TBS-patients with relation to coerced treatment.[1988]

The Compulsory Mental Health Act (*Wet verplichte geestelijke gezondheidszorg*, "Wvggz")[1989] deals with compulsory care for psychiatric patients. Even though it regulates the general care under civil law, it is still important to mention it here, as mentally disordered offenders can be diverted to the civil law system for treatment and care via Article 2.3 of the *Wet forensische zorg* ("Wfz"). The purpose of compulsory care is multiple and may be provided to: a) avert a crisis situation; b) avert a significant risk of harm; c) stabilise the mental health of the person concerned; d) restore the mental health of the person concerned in such a way as to restore their autonomy as far as possible, or; e) stabilise or restore the physical health of the person concerned in the event that their behaviour, as a result of their mental disorder, causes serious harm to them.[1990] The *ultimum remedium* principle is that the compulsory care can only be used as a last resort when there are no more possibilities of voluntary care,[1991] regardless of the nature (acute or non-acute) of the care applied. This is primarily the responsibility of the care provider who must,[1992] with regard to the application of compulsory care, draw up a policy plan aimed at reducing and preventing compulsory care and seeking voluntary alternatives.[1993] Novel in the new Act is that compulsory medication requires the same conditions as compulsory commitment to a psychiatric hospital, introducing in theory the opportunity that compulsory medication is administered outside such a facility. Even though in general this is only feasible in rare cases, however it does seem to offer a solution in forensic cases next to a conditional sentence (prison or TBS-order). In cases where someone is cooperates with

1987 CPT (2017a), p. 47.

1988 Article 46a-e of the Pbw.

1989 *See.* ANNEX 7- Relevant Articles of the Dutch Compulsory Mental Health Care Act.

1990 Article 3:4/1 of the Wvggz.

1991 Article 2:1/2 of the Wvggz.

1992 Pursuant to Article 2:2 of the Wvggz.

1993 Winter et al. (2014), p. 99.
It follows from this principle that when preparing, issuing, implementing, executing, modifying and terminating a crisis measure, authorisation to continue the crisis measure or civil care referral, the proportionality, subsidiarity, effectiveness and safety of compulsory care, including compulsory care in outpatient settings, shall be assessed. (Article 2:1/3 of the Wvggz.) Furthermore, the conditions necessary to promote participation of the person concerned in social life; the wishes and preferences of the person concerned regarding care; the opinions of the family, immediate relatives of the person concerned and the general practitioner; the possible long-term adverse effects of the compulsory care on the person should also be taken into account. (Article 2:1/4-5-6-7-8-9 of the Wvggz.)

conditions, like admission to a hospital, but refuses necessary medication, the care authorisation can be added to the sentence for just that.[1994]

Since the Special Admissions to Psychiatric Hospitals Act (*Wet bijzondere opnemingen in psychiatrische ziekenhuizen*, "Bopz"), there is a discussion regarding the coercive treatment for incapacitated patients.[1995] The Bopz was repealed in 2020 and replaced with the aforementioned Wvggz and the Care and Coercion of Psychogeriatric and Mentally Disordered Patients Act (*Wet zorg en dwang psychogeriatrische en verstandelijk gehandicapte cliënten*, "Wzd"). Following the Wvggz, the primary rationale for the applicability of compulsory care continues.[1996] Article 1:5 of the Wvggz regulates that it should be recorded, in writing, that the extent to which the person responsible for care considers the person concerned incapable of a reasonable appreciation of their interests with regard to care or the exercise of rights and duties pursuant to this Act. As previously stated, the wishes and preferences of the individual in question regarding compulsory care must be respected unless the individual is incapacitated or there is an imminent risk of life-threatening harm to the individual, or a significant risk of serious harm to one or more others. Therefore, it has been argued that Dutch regulations on coerced treatment should give greater meaning to the concept of 'incapability of will' (*wilsonbekwaamheid*).[1997] A person is legally capable of 'willing' until proven otherwise.[1998] The capacity in question may vary over time and is specific to each decision.[1999] Accordingly, it is essential to conduct periodic assessments to ensure the accuracy and reliability of the evaluation. In instances where a legal capacity assessment leads to a determination of incapacity, the patient may be labelled as 'legally incapable'. This can result in erroneous assumptions regarding their incapacity for compulsory care. Conversely, in instances where the legal capacity assessment determines that an individual is capable of making decisions, there is a possibility that the necessary care may not be provided.[2000] It is also important to consider the concept of volitional resistance (*wilsbekwaam verzet*) in this context. If the patient is voluntarily opposing to compulsory care, this must be respected and the care cannot be carried out.[2001] However, the compulsory care can be carried out if there is an acute threat to the patient's life or serious harm to another person. Hence, it is essential to carefully weigh the conflicting values and to exercise great care in assessments of legal capacity.[2002]

1994 Mebius, L., Prinsen, M., Kempes, M., & Van der Wolf, M. (2024). Welke stok achter welke deur? Verminderde toerekeningsvatbaarheid én oplegging van bijzondere voorwaarden gecombineerd met afgifte van een (civielrechtelijke) zorgmachtiging. *Sancties*, *17*, 62-71, p. 67-68.

1995 *See.* Winter et al. (2014), p. 23.

1996 Vellinga, A., Hein, I.M., Blankman, C., Hondius, A.J.K., & Welie, S.P.K. (2021). De rol van wilsbekwaamheid in de Wet verplichte geestelijke gezondheidszorg. *Tijdschrijf voor Psychiatrie*, *63*(10), 717-722, p. 717.

1997 Winter et al. (2014), p. 23; Vellinga et al. (2021), p. 718.

1998 This implies that persons with psychosis are not necessarily in capable of will. *See.* Vellinga et al. (2021), p. 719, Table 2.

1999 Vellinga et al. (2021), p. 719, Table 2.

2000 Vellinga et al. (2021), p. 720.

2001 Vellinga et al. (2021), p. 721.

2002 Vellinga et al. (2021), p. 721.

The concept of volitional resistance (*wilsbekwaam verzet*) under Article 2:1 of the Wvggz was also subjected to examination by the *Hoge Raad*.[2003] In the judgment of 14 October 2022, the *Hoge Raad* ruled, among other things, that the court's reasoning must unambiguously show that the court has assessed whether there is an acute danger to life for the person concerned without the forced medication.[2004] Furthermore, it is underlined that, in line with the international obligations, equal value is attached to the personal opinion and consent of a person with a mental disorder who is capable of giving their consent as is the case with a person who is capable of giving their own consent without a mental disorder.[2005] According to the *Hoge Raad,* the principle of volitional resistance must be upheld throughout the entire procedure including the preparation, the issuance of the measure, its implementation, and its eventual termination of the crisis measure or civil care referral.[2006]

The ECtHR explicitly mentions the individual's inherent right to self-determination and rules that this right may be limited to safeguard the best possible health care for those with diminished mental faculties, due to, for instance, their lack of insight into their condition.[2007] This does not imply immediately that coercive medicine should be allowed in every case of incapacitated patient. However, it seems that the court is less likely to find the application of coercion acceptable in the case of a competent patient than in the case of incapacitated patients.[2008]

As in the regulations of coerced treatment/medication incapacity to consent is not explicitly mentioned, it may be that in practice this issue is overlooked. However, no sources or data were found suggesting that this is actually the case.

3.2.1.2 Language Barrier

As explained in detail in *Chapter 2*, subsection *3.4.3 Detention Conditions – Analysing Article 3 and Article 5/1(e) Together*, the Court rules that the lack of appropriate medical care may amount to treatment contrary to Article 3,[2009] and the "adequacy" of medical assistance includes providing a proper treatment and a suitable medical supervision by qualified staff.[2010] In the *Dhoest* judgement, the Commission accepted that proper psychiatric treatment is difficult if it takes place in a foreign language.[2011] In the *Rooman* judgement, the Court further emphasised that in the context of psychiatric treatment under Article 3, the purely linguistic element could prove to be a determining factor in the availability or administration of appropriate treatment; however, this would only be the case where

2003 Hoge Raad, 14-10-2022, ECLI:NL:HR:2022:1466.
2004 Hoge Raad, 14-10-2022, ECLI:NL:HR:2022:1466, para. 3.1.3.
2005 Hoge Raad, 14-10-2022, ECLI:NL:HR:2022:1466, para. 3.1.3. *See also.* Hoge Raad, 04-02-2022, ECLI:NL:HR:2022:123, para. 3.1.3.
2006 Hoge Raad, 04-02-2022, ECLI:NL:HR:2022:123, para. 3.1.3.
2007 *Plesó v. Hungary*, op. cit., §66.
2008 Winter et al. (2014), p. 24.
2009 *Keenan v. the United Kingdom*, op. cit., §111; *İlhan v. Turkey*, op. cit, §87.
2010 *Bamouhammad v. Belgium*, op. cit., §122.
2011 *Dhoest v. Belgium*, op. cit., §124.

other factors do not allow for effective communication to be established and, in particular, where the individual concerned is willing to cooperate.[2012] In cases where it is impossible for medical staff to communicate with the patient, therefore, therapeutic treatment or individualised care cannot be provided.[2013] In these cases, the Court declines to accept excuses or justifications from a State regarding lack of resources if the lack of medical care exceeds the threshold of severity under Article 3.[2014]

It is regrettable that no data or sources were found on the potential for language barriers to emerge in the context of psychiatric treatment in Türkiye.[2015] However, given the country's high immigration rates,[2016] it seems logical to assume that there are foreign patients who have been detained and placed in YGAP Hospitals or other forensic psychiatric clinics for crimes committed in Türkiye or against Turkish citizens.

In its 2017 report, the Office for Health Improvement and Disparities in the United Kingdom set forth recommendations concerning language interpreting and translation in the context of migrant health.[2017] The report also underscored the critical need for ensuring that interpreters are made available when required. Additionally, the report drew attention to the fact that an individual may demonstrate proficiency in spoken English, yet lack the requisite skills to comprehend or engage in discourse about health-related matters.[2018] According to the Equality Act 2010 of the UK, the NHS has the legal duty to reduce inequalities between patients. Principle 1 of the NHS England Guidance states that "*Patients should be able to access primary care services in a way that ensures their language and communication requirements do not prevent them receiving the same quality of healthcare as*

2012 *Rooman v. Belgium*, op. cit., §151.

2013 *Rooman v. Belgium*, op. cit., §151-157.

2014 For the language barrier *see. Rooman v. Belgium*, op. cit., §158; financial or logistic difficulties *see. Poghosyan v. Georgia*, op. cit., §48; maintenance works *see. Mamedova v. Russia*, op. cit., §63; shortage of places in suitable facilities *see. Claes v. Belgium*, op. cit., §99.

2015 The only data available on this subject is a visit report from 2019. It was stated therein that within the YGAP Hospital, there are nurses who are able to speak Arabic and use sign language for patients with hearing impairment. *See.* Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 3.

2016 In 2022, 494,052 individuals migrated to Türkiye from abroad, of whom 25% originated from Russia and 8.1% from Ukraine. In 2021, the total number of migrants reached 739,364, with 12.1% migrating from Iraq and 10.9% from Iran. Furthermore, According to the data announced by the Ministry of Interior Directorate of Migration Management, the number of Syrians under temporary protection status registered in Türkiye is 3 million 96 thousand 157 people as of 29 August 2024.
https://data.tuik.gov.tr/Bulten/Index?p=Uluslararasi-Goc-Istatistikleri-2022-49457, https://data.tuik.gov.tr/Bulten/Index?p=Uluslararasi-Goc-Istatistikleri-2021-45814,
https://multeciler.org.tr/turkiyedeki-suriyeli-sayisi/ (accessed 02 November 2024).

2017 Office for Health Improvement and Disparities. (2017). *Language interpreting and translation: migrant health guide*. Retrieved 2024 November, from https://www.gov.uk/guidance/language-interpretation-migrant-health-guide#further-learning-and-best-practice

2018 *Ibid.*

others".[2019] In the event of a language barrier, the Guidance stipulates the deployment of a professional interpreter.[2020] Specific guidance pertaining to the challenges and opportunities inherent in the interpretation of a mental health consultation is generally absent.[2021] Of particular note is the absence of any policy that explicitly highlights the benefits of the interpreter as a facilitator of cross-cultural understanding.[2022] In mental health settings, the interpreter plays a pivotal role in facilitating the establishment of a therapeutic relationship, which is a prerequisite for ensuring the delivery of appropriate medical care in accordance with the case law of the ECtHR.

Under the hospital order, the life of the detainee may be limited due to language barriers, customary rules, religious practices, and dietary habits.[2023] When dealing with foreigners and migrants, the language for psychiatric assessment and treatment may become a complicated problem. Hence, it is found logical to conduct the examination in a common language, without an interpreter.[2024] Hiring a translator for a psychiatric treatment may not be the solution to the problem, also, since the language plays a significant role in influencing expression and personal perception; and words also have cognitive meaning or denotations.[2025] Thus, translating these communications in between languages is not an easy task. The number of misdiagnoses may be alarmingly high in the absence of cross-cultural approaches.[2026] The added anxiety to speak in a second language must also be taken into consideration.[2027] As cultural attitudes differ; responses might be understood differently. Thus, when possible, hiring a bilingual, immigrant or expat employee may help better in this sense.

It was reported that there is a disproportionate representation of non-Western immigrants in TBS institutions in the Netherlands.[2028] Language differences have an impact on the various stages of the TBS measure. It was stated that individuals with a migrant background exhibit distinctive coping mechanisms in response to feelings of guilt and shame, demonstrate heightened challenges in establishing openness, and espouse divergent perspectives on gender and authority dynamics; and these factors are especially pertinent in forensic settings. However, in forensic treatment of risk factors, it is found to be challenging to distinguish between cultural influences and other pertinent factors,

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2019 NHS England. (2018). *Guidance for commissioners: Interpreting and Translation Services in Primary Care*. Retrieved 2024 November, from https://www.england.nhs.uk/wp-content/uploads/2018/09/guidance-for-commissioners-interpreting-and-translation-services-in-primary-care.pdf

2020 *Ibid.*

2021 Bamford, J., Abraham, S., Alachkar, M., & Akinola, A. (2024). Falling on deaf ears: interpreters as cultural brokers in mental healthcare. *BJPsych bulletin*, *48*(2), 73–77, p. 74.

2022 Bamford et al. (2024), p. 74.

2023 *See*. Koenraadt & Van Deutekom (2007), p. 118-119.

2024 Westermeyer (1990), p. 745.

2025 Westermeyer (1990), p. 745.

2026 Westermeyer (1990), p. 745.

2027 Westermeyer (1990), p. 745.

2028 Verstegen, N., Zendedel, R., Ingleby, D., & De Vogel, V. (2011). *'De puzzel is het grootst bij allochtonen': Een verkennend onderzoek naar culturele diversiteit in de tbs*. WODC, p. 17.

including psychological disorders, intellectual deficiencies and substance abuse. It is important to recognise that culture is not an independent phenomenon; rather, it provides a framework through which we understand and make sense of our experiences, and therefore has a significant impact on all aspects of the TBS measure.[2029] In this regard, it is positive that one of the TBS-clinics (Veldzicht) was changed to a Centre for Transcultural Psychiatry, which also had a department for TBS-patients, from which knowledge is being spread across the entire field. However, the new government intends to reform it into a regular TBS-clinic again because of capacity shortage.[2030]

The results of an empirical study conducted in general mental health, where also patients are placed with a care authorisation from the criminal court, demonstrated that participants who are able to read and communicate in Dutch still experience limitations in expressing complex emotions and thoughts in a non-native language.[2031] The CPT report for the Netherlands from 1994 already advised language education for foreigners who speak neither Dutch nor English, and the Government's response stated that these remarks will be brought to the attention of these establishments.[2032] The following report also included advice for centres with foreigners to familiarise the staff with different cultures of the detainees, and to have at least some of them equipped with relevant language skills.[2033]

These discussions seem to pertain more to morality of aspiration than to morality of duty.[2034]As general conclusions about shortcomings cannot be reached, compliance with the test in this regard may differ from case to case. To conclude, all three criminal justice systems face challenges in culturally attuned (forensic) psychiatric treatment, with studies showing that migrants may struggle to communicate at the required level.

2029 Verstegen et al. (2011), p. 17-23.

2030 *See*. De Nederlandse ggz (October 2024). Ongemakkelijk debat TBS en gevangeniswezen. Retrieved 2024 December, from https://www.denederlandseggz.nl/nieuws/2024/ongemakkelijk-debat-tbs-en-gevangeniswezen

2031 Ilozumba, O., Koster, T.S., Syurina, E.V., & Ebuenyi, I. (2022). Ethnic minority experiences of mental health services in the Netherlands: an exploratory study. *BMC Research Notes 15*, 1-5.

2032 The Council of Europe. (1994). *The Response of the Netherlands Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the Netherlands from 30 August to 8 September 1992, (CPT/Inf (93)20).* Retrieved 2024 August, from https://rm.coe.int/168069775b, p. 37.

2033 The Council of Europe. (1998). *The Report to the Netherlands Government on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 27 November 1997, (CPT/Inf (98)15).* Retrieved 2024 August, from https://rm.coe.int/16806977bd, p. 33.

2034 A distinction exists between the morality of duty and the morality of aspiration. The morality of duty establishes fundamental principles without which an ordered society is untenable. In contrast, the morality of aspiration is the morality of excellence, of the fullest realisation of human capabilities. A failure to actualise one or more of these capabilities would not be considered wrongdoing; rather, it would be regarded as a shortcoming or failure to actualise potential. *See.* Murray, J.R. (1965). Introduction to the Morality of Law. *Villanova Law Interview, 10,* 623-630, p. 624-625; Van der Burg, W. (2009). The Morality of Aspiration: A Neglected Dimension of Law and Morality. *Erasmus Working Paper Series on Jurisprudence and Socio-Legal Studies,* 169-192, p. 174.

Cultural differences also influence behavioural treatment, adding complexity to the therapeutic process. Relevant advice in line with the ECtHR standards are regular access to qualified interpreters, or cultural- and language-education to both patients and regular staff.

3.2.1.4 Treatment Aimed at Reintegration In Society

In assessing whether in the relevant frameworks in the three countries treatment is aimed at reintegration, one often discussed issue in particular in the Netherlands, and it stays on topic with the former subsection, as it involves foreigners in the TBS-system.

This issue is also closely related to the concepts of long detention and possibility of review under Articles 3 and 5/1(e) and 5/4 of the ECHR. To prevent repetition, it will not be discussed again under that subsection below. That subsection will discuss another relevant feature of the Dutch TBS-system in this regard, the 'long stay' status and facilities, which – again to avoid repetition – will not be discussed here.

In 2021, the Council for the Administration of Criminal Justice and Protection of Juveniles ("RSJ", Raad voor Strafrechtstoepassing en Jeugdbescherming) published an advisory report on "Foreigners in the TBS".[2035] In the report, the RSJ discusses the situation of foreign nationals with compulsory TBS-detention that are not allowed to stay in the Netherlands – often as the right to stay has been revoked due to the offence for which they have received the TBS-order – but, for various reasons, cannot (temporarily) return to their country of origin. Where a regular TBS-treatment is aimed at reintegration in society, for this group treatment options are limited because necessary resocialisation leave is not allowed, since these foreign nationals have no right of residence and are therefore not allowed to re-socialise in the Dutch society.[2036] The report also underlines the above-mentioned three elements that must be in balance with each other:[2037] security of society, forensic treatment and legal protection of the convict; and these elements also apply to detained foreign nationals. However, over the past three decades, the emphasis has shifted to more security and less legal protection, and this has led to negative consequences for the foreign national patients and to obstacles in forensic treatment such as late start of treatment and no re-socialisation leave.[2038] At the time of the report, there were approximately 130 foreign patients in the TBS. In cases where the Immigration and Naturalisation Service (Immigratie- en Naturalisatiedienst, IND) terminates the right of residence, resocialisation leave is no longer allowed as an 'essential part' of the treatment and re-socialisation philosophy. [2039]

2035 Raad voor Strafrechtstoepassing en Jeugdbescherming. (2021). *Vreemdelingen in de tbs, Impasse door botsende rechtssystemen.* Den Haag.

2036 RSJ (2021), p. 4.

2037 *See.* Van der Wolf et al. (2020), p. 17.

2038 Van der Wolf et al. (2020), p. 27.

2039 RSJ (2021), p. 4-5.

Jurisprudence states that re-socialisation should for this group be aimed at reintegration in the country of origin. Therefore, special wards are created for these patients, in which it is being tried to transfer them to these countries. However, also in jurisprudence it is stated that this transfer can only be made when the (legal) context of care does not diminish too much. Therefore, the transfer of the TBS measure is often not possible because of this, even though they do manage to transfer others. The report states as a recommendation that a temporary residence permit for the duration of treatment shall be considered to be granted to facilitate the practice of re-socialisation leave.[2040] This seems the most appropriate and humane way to resolve the possible human rights violation of the mentally disordered foreigner convict. The report's other recommendation is that the Public Prosecutor Office should inform the competent courts of the IND's intention regarding the right of residence in the event that the defendant will be sentenced to a TBS order, so that this can be taken into account in the court's judgment.[2041] However, this may lead to prison sentences instead, which is probably a less appropriate accommodation for offenders with a mental disorder, giving rise to other tensions with ECtHR standards.

In this context, it is also pertinent to cite the *Azzaqui* judgment which concerned the reintegration of offenders back into society. The ECtHR ruled that the Netherlands had violated Article 8 of the ECHR due to the imposition of a ten-year entry ban and the revocation of the residence permit of a long-term settled migrant. The Court held that, while the person's criminal history, which included violent and sexual offenses, provided a compelling rationale for his expulsion, the revocation proceedings had insufficiently considered the personal circumstances of the individual in question.[2042] The objective of his treatment was to facilitate his reintegration into Dutch society; consequently, no measures had been implemented to prepare him for his return to Morocco. Given the unlikelihood of his country of origin accepting him back due to his criminal and psychiatric background, there was a strong possibility that he would end up on the streets.[2043] Consequently, authorities are obligated to coordinate the procedures concerning the applicant's right to respect for his private life and to assess the practical feasibility of his expulsion in a timely and thorough manner. This is necessary to ensure that the interests protected by Article 8 are properly respected.[2044]

It is feasible that similar problems exist in England & Wales and Türkiye, but no such specific discussions have been found. In England & Wales a group for which the issue of treatment aimed at reintegration into society has been debated in the past, was the Dangerous and Severe Personality Disorder Program, within the legal framework of the hospital order, which was phased out between 2007 and 2012. In a way they copied the

2040 RSJ (2021), p. 6-7.
2041 RSJ (2021), p. 7.
2042 *Azzaqui v. the Netherlands*, op. cit., §55-59.
2043 *Azzaqui v. the Netherlands*, op. cit., §21.
2044 *Azzaqui v. the Netherlands*, op. cit., §60.

clinical phase of the Dutch TBS, in which a lot of personality disordered patients are (successfully) treated, but did not copy the system of gradual reintegration into society, leading also to critiques from a human rights' perspective, as most patients were detained indefinitely.[2045] That was of course one of the reasons to terminate the program. However, also without such a program, the risk of indefinite detention under a hospital order exists.

As in Türkiye, there are several relevant issues related to adequate medical assistance, they are collected in the next subsection, which is in that sense broader than just the requirement of having a comprehensive therapeutic strategy in place.

3.2.1.5 Therapeutic Strategy and Adequate Medical Assistance in General

In general, both in England & Wales and the Netherlands, regulations exist that are aimed at ensuring that a comprehensive treatment strategy is in place for all patients. And that is exactly what is lacking in Türkiye.

Even though currently 6 YGAP Hospitals in Türkiye have been established since 2018, there is still no regulation or by-law on how to provide care. However an academic article suggests that forms of care are begin provided, mentioned as functions and roles of the forensic psychiatric social worker were: working with individuals and their families, providing case management, risk analysis, care coordination, comprehensive social history taking and report writing, psychotherapy, psychoeducation and counselling, discharge planning and post-discharge support when legal regulations allow.[2046] The study acknowledges that there are very few studies in this field in Türkiye, therefore mostly foreign literature was cited.[2047] Unfortunately, however, the standards that are followed and how they are to be implemented are not written in any regulation. Hence, while the care is provided, general regulations regarding that care are still absent.

Furthermore, also relevant information to assess the adequacy of the medical assistance and care provided is also hard to find. For example, there is a dearth of data pertaining to the number of patients who are under forensic placement as a result of the provisions set forth in the TCC. The Turkish Statistical Institute (TÜİK) has published the Statistics of Penal Institutions for the year 2020,[2048] presenting data on the number of individuals detained in penal institutions, the number of individuals released from such institutions, the percentage of criminal acts committed by convicts, and the educational attainment of convicts. However, no statistics have been published on the number of convicted mentally disordered offenders in YGAP hospitals. As outlined in the Treatment and Rehabilitation Centres Report of the Human Rights Foundation of Turkey for the year 2022, key concerns pertaining to prisons are the insufficient provision of healthcare services and the difficulty in acquiring independent and expert medical assessment

2045 Van der Wolf, M. (2012). *TBS – veroordeeld tot vooroordeel, Een visie na analyse van historische fundamenten van recente knelpunten, het systeem en buitenlandse alternatieven.* Nijmegen: Wolf, p. 687-688.

2046 Karaağaç & Çalık Var (2021), p. 134-135.

2047 Karaağaç & Çalık Var (2021), p. 138.

2048 *See*. <https://data.tuik.gov.tr/Bulten/Index?p=Ceza-Infaz-Kurumu-Istatistikleri-2020-37202> accessed 07 October 2023.

reports.[2049] However, it is noteworthy that the data regarding convicted individuals treated at YGAP hospitals was not made accessible, as well.

Currently, the only data available are the YGAP Hospital Visit Report of the Türkiye Human Rights and Equality Institution (*Türkiye İnsan Hakları ve Eşitlik Kurumu*), conducted in Adana in 2019.[2050] As has been previously stated, the Adana YGAP Hospital constituted the very first YGAP hospital in Türkiye which commenced operations in 2018. Subsequently, this means that the visit was conducted at an exceedingly preliminary stage, and thus does not reflect the general circumstances in the six YGAP Hospitals in 2024. However, it can be stated that the physical conditions of the YGAP hospital were generally quite good, as they were new, and patients were also satisfied with the physical conditions of the hospital.[2051]

As stated by the ECtHR, the care and treatment services in YGAP institutions should be of the same standard as care and treatment services provided in other mental health institutions, and the general health needs of those held in these institutions should also be met. In the previously cited YGAP Hospital visit report, it was stated that all procedures to be implemented to the patient were determined by the doctor's visit, a separate 'treatment and care plan' was created for each patient, and this plan was coordinated by the relevant disciplines in line with the needs of each patient, and that patients were informed about when and how to take medication before receiving the treatment.[2052] In addition to pharmacological treatment, it was stated that 'good morning meetings' were held every day and supportive group psychotherapies were applied by the psychologist. Patients also confirmed that they had a good morning meeting every day, and had a psychologist meeting once a week, yet did not make any complaints about their treatment.[2053]

According to the report, in the YGAP Hospital, there is a separate department established for electroconvulsive therapy (ECT) and an anaesthesia technician is on duty 24 hours a day in the hospital. The ECT treatment can only be administered with the informed consent of the patient or the patient's guardian (legal representative) in cases where a consent cannot be obtained from the patient, according to the Directive on the Application of Electro Convulsive Therapy. Since the hospital failed to obtain the consent of the only patient (and their guardian) to whom the doctor had decided to administer ECT, no patient was administered ECT until the day of the report.[2054]

Isolation and mechanical or chemical restriction are used as "control methods" on patients to prevent harm to other patients and the staff. Isolation is the act of keeping

2049 *See*. < https://tihv.org.tr/wp-content/uploads/2023/08/tihv-tedavi-raporu-2022.pdf>, p. 28, accessed 07 October 2023.

2050 For the full report *See*. <https://www.tihek.gov.tr/upload/file_editor/2019/11/1573135344.pdf>, accessed 12 October 2023.

2051 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 6.

2052 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 11.

2053 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 11.

2054 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 12.

the patient in a room with a locked door without the patient's consent in order to control the condition. The most important feature of isolation is that the patient is separated from the crowd and kept in a stimulus-free environment called a 'soft room'. The doors of these rooms have shatterproof glass windows for observation. In these departments called psychiatric intensive care and they can be monitored via cameras from the nurse station. When the records were examined, there were 22 times restriction and 2 times isolation within 6 months; the maximum duration of isolation was four hours and patients were checked at intervals of 15 or 30 minutes. [2055]

The absence of regulatory framework renders it challenging to anticipate the experiences of patients and to ascertain the standards that should be upheld to ensure their enjoyment of their human rights. As the YGAP Hospitals are established with joint organisation of the Ministry of Health, Ministry of Justice, and Ministry of Interior, they should come together to issue a regulation as soon as possible. First, it was rather concerning that in between 2005 and 2018, the TCC was mandating to have highly secured forensic health institutions, but there were no institutions, and now secondly, that from 2018 to 2024 there are six institutions operating, however without any regulation in place governing organisation and treatment. Both staff and patients should be informed of their specific responsibilities and rights, within this specific context. It is important to note that general health law regulations are applicable in this context. However, due to the absence of civil high-security mental hospitals, there is currently no civil regulatory framework in place governing the manner in which security at such facilities can be arranged.

3.2.2 Appropriate Institution

As stated in the ECHR test, for lawful detention on the grounds of Article 5/1(e) the place of detention must be a hospital, clinic, or other appropriate institution authorised for the detention of mentally disordered offenders.[2056] For the appropriateness of the institution, the title or the name does not matter for the purposes of Article 5; however, the possibility of treatment does. In order to speak of an appropriate institution, the admission should be done in an appropriate time, without a significant delay; appropriate care should be provided there, and the staffing situation should be similar to a psychiatric hospital run in the same country.

The objective of this subsection is to examine the aforementioned criteria in relation to the relevant frameworks in the three criminal justice systems. Yet, in the criminal justice systems of England and Wales[2057] and the Netherlands, where forensic mental health care institutions have existed for centuries and have been examined on numerous occasions

2055 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 9-11.

2056 *L.B. v. Belgium*, op. cit., §93; *Ashingdane v. the United Kingdom*, op. cit., §44; *Hutchison Reid v. the United Kingdom*, op. cit., §48.

2057 In 2021, the CPT visited five psychiatric facilities in England. There, the treatment offered to patients was found to be of a high quality, and the CPT was pleased to observe good practices and a wide range of therapeutic and occupational activities in all visited institutions. *See.* The Council of Europe. (2022). *Report to the United Kingdom Government on the periodic visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading*

by the CPT and the ECtHR, there is no debate on whether these institutions are in principle indeed appropriate institutions in accordance with the definitions set forth in Article 5/1(e) or Article 3 of the ECHR, even though of course the appropriateness of the placement time and the care provided in practice should still be examined. But, before turning to the specific requirements, it will first be discussed whether the new YGAP hospitals in Türkiye are in principle appropriate institutions. Subsequently, the criteria of the appropriate placement time, care and staffing situation are discussed for all three systems. Finally, as a related side note (as the detention is not based on Article 5/1 (e) the prison conditions in the three different criminal justice systems are discussed from the perspective of the detainee with a mental disorder.

3.2.2.1 YGAP Hospitals in Türkiye: Appropriate Institutions?

As described in *Chapter 3*, Türkiye was declared a candidate country in 1999 for the European Union.[2058] To become eligible for accession to the European Union, amendments to the Turkish criminal codes have been made. The new Turkish Criminal Code ("TCC"), the Turkish Code of Criminal Procedure ("TCCP"), and the Law on Execution of Penalties and Security Measures ("EPSM") were published in the Official Gazette in 2004 and entered into force in 2005. One of the changes was the introduction of the new concept of security measures. Article 57 of the TCC regulates the security measure specific to persons with mental disorders. According to the Article 57/1: *"Mentally disordered persons that are subject to security measures under the court's decision are sheltered and are taken under protection for treatment purposes in the highly secured health institutions*[2059]*."*. Thus, the new concept of the Highly Secured Forensic Psychiatry Hospitals ("YGAP", *Yüksek Güvenlikli Adli Psikiyatri Hastanesi*)[2060] was introduced into the criminal justice system.

However, as mentioned multiple times before, until 2018, there was no highly secured health institution established, even though it was mandatory to have it according to the TCC. The very first highly secured health institution was opened with the name Yüksek Güvenlikli Adli Psikiyatri Hastanesi ("YGAP") inside the Adana City Hospital on 23 January 2018. Later, other YGAPs were established in Kayseri, Elazığ, Eskişehir, Bursa, and Ankara, respectively.[2061] Currently, Adana, Bursa, Eskişehir, and Elazığ YGAP Hospitals have a capacity of 100 beds, Kayseri 72 and Ankara 80 beds.[2062] It is planned to establish YGAP Hospitals in İstanbul and İzmir, to compensate the need of big cities. Within Ankara, Elazığ, and Kayseri YGAP Hospitals, there are separate parts for the forensic psychiatric patients in pre-trial detention

Treatment or Punishment (CPT) from 8 to 21 June 2021, CPT/Inf (2022) 13. Retrieved 2024 August, from https://rm.coe.int/1680a72b71, p. 61-66.

2058 *See*. < https://ec.europa.eu > accessed 28 June 2021.

2059 The naming of the *"highly secured health institutions"* is a one-to-one translation of the terminology used in the TCC.

2060 The concept was briefly explained under the subsection *5.1.2.2 Types of Facilities* in *Chapter 3*.

2061 The opening dates are 01 July 2018 in Kayseri, 18 August 2018 in Elazığ, 21 February 2019 in Eskişehir, 11 November 2019 in Bursa, and 22 March 2021 in Ankara. *See*. ANNEX 9- Opening Dates and Bed Capacities of YGAP Hospitals.

2062 *See*. ANNEX 9- Opening Dates and Bed Capacities of YGAP Hospitals.

and serving a prison sentence. These are called Forensic Psychiatric Hospital for Prisoners and Convicts ("THAP", *Tutuklu ve Hükümlü Adli Psikiyatri*). In order to ensure uniformity in the terminology used, this study uses the term YGAP, which also includes THAP.

During the period in which YGAP Hospitals were not yet in operation, the responsibility for the care of forensic psychiatric patients was assumed by mental healthcare institutions under the aegis of the Ministry of Health. These institutions bore the entire burden, even though there was no high-security facility in place. Despite the establishment of six YGAP Hospitals, the responsibility for providing mental healthcare services to forensic psychiatric patients remains in part with the existing mental healthcare institutions, due to the limited capacity of the YGAP Hospitals. Consequently, the complete transition to the new system has not yet been achieved. Currently, traditional forensic psychiatric wards can be found in regional psychiatric hospitals, including those in Istanbul, Samsun and Manisa. According to the data provided by the Ministry of Health, there are 483 forensic beds in these institutions, which continue to operate in a manner similar to the situation that existed prior to the opening of the YGAP Hospitals.[2063]

The purpose of YGAP hospitals is to provide treatment in appropriate clinical conditions for forensic psychiatric patients involved in crime in order to protect the society and themselves until their dangerousness is eliminated.[2064] In other words, it is to realise the execution of security measures specific to the mentally disordered offenders within the scope of the provisions of the TCC. The YGAP Hospitals are organised to serve as expert providers for courts and service providers for treatment and protection. The duties as the expert are to write and submit forensic expert reports to establish the criminal responsibility of the offenders, inform the court whether a stationary examination is required, and conduct the stationary examination to establish criminal responsibility.

It should be mentioned that unlike in the other two examined countries, currently there are no separate institutions for high, medium, or low security. YGAP Hospitals are high security institutions, by default, according to the regulations and practice. When the system is on track and the operation runs properly, the next step should be to have separate institutions for different degrees of security.

An important part of the notion of *appropriate institution* as a requirement from the ECtHR is providing an appropriate and individualised form of therapy or course of treatment.[2065] In this respect, in practice YHAP Hospitals may serve as *appropriate institutions*. However, the absence of any regulation regarding the care to be provided demonstrates that it is unclear what standards are being applied. And for the patients, not knowing the rules and regulations means that uncertainty related to treatment planning, expectations and subsequent release date, which raises doubts about compliance with Article 3.

2063 Karaağaç & Çalık Var (2021), p. 131.

2064 Türkiye Psikiyatri Derneği (2010). *Türkiye Psikiyatri Derneğinin Yüksek Güvenlikli Servisler Hakkında Raporu*. <https://psikiyatri.org.tr/55/turkiye-psikiyatri-derneginin-yuksek-guvenlikli-servisler-hakkinda-raporu-adl> accessed 9 September 2024.

2065 *Rooman v. Belgium*, op. cit., §210.

To date, no case before the ECtHR has addressed the conditions of detention of mentally disordered offenders in Türkiye. The only case against Türkiye in which the Court has found a violation related to the lawfulness of the deprivation of liberty within the meaning of Article 5/1 is the *Ümit Bilgiç* case.[2066] However, this was due to a civil placement for observation based on Article 432 of the Turkish Civil Code, rather than to forensic placement under the Turkish Criminal Code.

Currently, the only data available about the practices in the YGAP Hospitals are the Visit Report of the Türkiye Human Rights and Equality Institution (*Türkiye İnsan Hakları ve Eşitlik Kurumu*), conducted in Adana in 2019.[2067] As mentioned before, since this report was only related to the first YGAP Hospital in Adana, it could be argued that the findings from the visit cannot be generalize to date and to the other hospitals. The visit report reflects on the initial findings and observations regarding the hospital, including one-to-one and collective interviews with the patients, visiting all floors, rooms and the hospital garden, and analysing six randomly selected patient files.[2068] According to the report, the YGAP Hospital is built on an area of approximately 12,000 m^2 and it is surrounded with 6-meter-high garden walls and secured with electronic door and alarm systems and 269 security cameras to monitor 24 hours from the outer walls to the inner corridor and social areas. The hospital consists of 3 floors with a total of 100 beds: 3 adult wards with 20 beds, 3 adult wards with 10 beds and 1 adolescent and paediatric ward with 10 beds. All patients are accommodated in single rooms of 20 m^2 with bathroom and toilet, and each room has a bed, a table and a chair, a cupboard with a shelf system and a lidless cupboard. The equipment in the toilet and bathroom is organised in such a way as to prevent patients from harming themselves, furthermore, all of the windows and glass in doors are unbreakable glass. The wards have a dining hall, a TV room and an indoor gym accessible during the day.[2069]

In the YGAP Hospital, at that date, there were 12 specialist psychiatrists, 26 nurses, 1 psychologist, 1 social worker, 4 support staff, an occupational therapist and a sports instructor working in the hospital. It is important to underline that both the internal and external security of the YGAP hospital is provided by a private security company, thus there were no law enforcement officers in the hospital. It was stated that inside the YGAP Hospital, there were nurses who speak Arabic and who are able to use sign language for patients with hearing impairment.[2070] In the YGAP Hospital, there were patients brought under Article 57/1 of the TCC, and also suspects/defendants who are under observation to determine their imputability and are therefore not yet sentenced. In the facility, there were no separate wards for the stationary mental examination patients, they were placed

2066 *Ümit Bilgiç v. Turkey*, §95.

2067 For the full report *See.* <https://www.tihek.gov.tr/upload/file_editor/2019/11/1573135344.pdf>, accessed 12 October 2023.

2068 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 3.

2069 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 4.

2070 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 3.

together with other patients. At the time of the visit, there were 70 adult male patients being treated in the hospital, and there were no female, disabled, foreign national, adolescent and paediatric patients.[2071] Overall, it has been observed by the committee that the physical conditions of the YGAP hospital were generally quite good, and patients were also satisfied with the physical conditions of the hospital and that they were comfortable in the single rooms.[2072]

In terms of additional facilities, according to the report, the YGAP Hospital, furthermore, has a cinema hall with a capacity of 100 persons, a library, and an outdoor garden with hobby gardens, basketball and football fields belonging to the hospital. There is no barbed wire on the walls surrounding the garden, instead, trenches were dug at the base of the walls to prevent unauthorised departures from the institution.[2073] Inside the Hospital, it was stated that patients can move freely in their own wards during the day; at night, the doors of the rooms are locked. The terraces in each ward are open for use from 7 am to 10 pm. Patients can go to the terrace during the specified hours without restriction. There is an indoor sports hall in each ward. In these halls, there are fitness equipment such as treadmills, exercise bikes, foosball and ping-pong tables. Patients have access to these rooms throughout the day, under the supervision of a security guard to prevent harm to themselves or the environment.[2074] Yet, it has been observed by the Committee that even though patients are allowed to go to the areas called terraces all day long and benefit from the open air, they could not go out to the outdoor garden of the institution and were not sufficiently benefiting from the present outdoor sports facilities. Thus, it was recommended to take necessary measures to ensure that patients regularly benefit from the outdoor garden and outdoor sports fields.[2075]

The lack of (recent) information through studies, reports, and visits conducted on the (other) YGAP Hospitals makes it hard to reach conclusions about practical compliance with the ECHR test. Hopefully more information will become available in the future.

3.2.2.2 Appropriate Admission Time – No Significant Delay

As elucidated in *Chapter 2*, the ECtHR introduced a novel conceptualisation of Article 5/1(e) through its interpretation in the *Rooman v. Belgium* case, which integrated it with Article 3.[2076] Consequently,, the focus has been expanded by the Court by identifying several key criteria for determining the legality of detention under Article 5/1(e), including the absence of significant delays in admission.[2077] This subsection will analyse the admission time in the three chosen criminal justice systems, based on information from existing studies, reports, and other publications and from relevant case law from the ECtHR.

2071 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 5-6.
2072 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 6.
2073 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 14-15.
2074 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 14.
2075 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 16.
2076 *Rooman v. Belgium*, op. cit., §130.
2077 *Ibid.*, §198-205.

As previously discussed, information regarding the recently established YGAP hospitals in Türkiye is scarce. In a recent study, the following table was provided to demonstrate the units and beds in forensic psychiatric services:[2078]

Forensic psychiatry services in specialist units in Turkye (as of August 2023)

	Total forensic psychiatry inpatient beds	Male	Female	Adolescent	CT	SME[a]
High secure units						
Adana	100	90	–	10	⊕	⊕
Ankara	70	50	20	–	⊕	⊕
Bursa	100	85	10	5	⊕	⊕
Elazığ	100	80	10	10	⊕	⊕
Eskişehir	100	90	10	–	⊕	⊕
Kayseri	72	56	16	–	⊕	⊕
Regional mental health hospitals						
Adana	No specialist forensic unit[b]				⊖	⊕
Bolu	No specialist forensic unit[b]				⊕	⊕
Elazig	No specialist forensic unit[b]				⊖	⊖
Istanbul Bakirkoy[c]	271	241	30	–	⊕	⊕
Istanbul Erenkoy	No specialist forensic unit[b]				⊖	⊕
Manisa[c]	84	50	34	–	⊕	⊕
Samsun	52	52	–	–	⊕	⊕
Tokat	No specialist forensic unit[b]				⊕	⊕
Trabzon	No specialist forensic unit[b]				⊕	⊕
Atakoy						
Units as specialist psychiatric hospitals						
Bursa Dortcelik	No specialist forensic unit[b]				⊖	⊕
Konya Beyhekim	26	26	–	–	⊕	⊕

2078 Balcıoğlu et al. (2023), p. 5.

	Total forensic psychiatry inpatient beds	Male	Female	Adolescent	CT	SME[a]
Convict units						
Ankara[d]	20	20	–	–	⊕	⊕
Adana[e]	30	24	6	–	⊕	⊕
Elazığ[d]	50	40	4	6	⊕	⊕
Istanbul Bakirkoy[e]	50	42	8	–	⊕	⊕
Istanbul Erenkoy[e]	3	3	–	–	⊖	⊖
Kayseri[d]	28	22	6	6[f]	⊕	⊕
Manisa[e]	17	15	2	–	⊕	⊕
Samsun[e]	5	5	–	–	⊕	⊕
Council of forensic medicine (stationary units)						
Istanbul	57	54	3	–	⊖	⊕

Abbreviations: CT, Compulsory treatment according to the Turkish Penal Code art 57; HSU, High-security unit; RMHH, Regional mental health hospital; SME, Stationary mental examination according to the Turkish Penal Procedure Code art. 74 (for criminal responsibility assessment).
[a] Stationary mental examinations are also performed in general psychiatry inpatient units in general/specialist hospitals across the country. Criminal responsibility assessments are occasionally performed in ambulatory units of these institutions without a stationary period due to the heavy amount of requests by the courts.
[b] In hospitals without specialist forensic units, CTs or SMEs may be performed in general psychiatry inpatient units.
[c] Compulsary treatment according to the Turkish Penal Code art. 57 is also performed in general psychiatry inpatient units due to the limited space in the forensic psychiatry unit and the high amount of patient turnover.
[d] Affiliated with the high secure unit.
[e] Affiliated with the regional mental health hospital.
[f] Depending on the presence.

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It is evident that the number of beds is insufficient, particularly for female and juvenile offenders. In addition to the aforementioned statistical data pertaining to forensic units, no further information is available regarding the duration of patient waiting times or the location where patients await placement in Türkiye. However, the limited availability of beds suggests that the waiting period may be lengthy. Consequently, it is impossible to ascertain whether any infringements or potential infringements of human rights have occurred.

In England and Wales, as discussed earlier in the *3.1.3.3 Treatability or Efficiency Criteria* subsection, a hospital order can only be made if the hospital specified is willing to admit

2079 It should be noted that the "*high secure units*" located in Adana, Ankara, Bursa, Elazığ, Eskişehir, and Kayseri are the YGAP Hospitals.

the offender.[2080] When it comes to the transfers from prisons, the Prison Reform Trust states that the courts can transfer a patient only if a bed is *available* and, unfortunately, they have no authority to enforce this.[2081] In England and Wales, therefore, the court cannot sentence a person to hospital treatment unless the intended hospital and treating physicians agree to provide a bed for a patient.[2082] Even if it makes sense to seek the opinion of psychiatrists on the level of security; leaving the admission decision entirely to the hospital whether or not to admit a patient raises a serious issue.

In 2005, the European Commission Health & Consumer Protection Directorate-General reported bed shortages, particularly in general psychiatry and medium security institutions.[2083] More recently, the Prisons and Probation Ombudsman states that the lengthy waiting times are problematic, as the MHA does not specify any time limit for the transfers.[2084] Lord Bradley recommended in his 2009 review that the Department of Health should develop a 14-day transfer scheme for prisoners with acute and severe mental disorder.[2085] The *Good Practice Procedure Guide* on the transfer of detainees under the Mental Health Act was published in 2011 by the Department of Health and included a suggested time limit of 14 days.[2086] However, there is evidence that in many cases this can take much longer. An empirical study from 2016 demonstrated that transferring prisoners under s.47 and s.48 of the MHA continue to exceed the 14-day transfer target.[2087] Only 14% of the prisoners were transferred within the recommended 14-day, and 26% took more than 3 months.[2088] The CPT also reported in 2017 that due to lack of available beds in specialised psychiatric facilities, the waiting period for transfer from prison was up to several months.[2089] It should be further noted that the delays are not well recorded.[2090]

2080 *Parker (unreported, 21 March 1975; Jones, unreported, 19 November 1976* (cited by Archbold. *Criminal Pleading Evidence and Practice*, §5A-1403.)

2081 Kimmett Edgar and Dora Rickford (2009): *Too Little Too Late: an independent review of unmet mental health need in prison*, Prison Reform Trust, prisonreformtrust.org.uk/Portals/0/Documents/Too%20Little%20Too%20Late%20-%20a%20review%20of%20unmet%20mental%20health%20need%20in%20prison%20.pdf, p. 8.

2082 *See*. European Commission (2005), p. 122.

2083 European Commission (2005), p.132.

2084 Prisons & Probation Ombudsman (2016), p. 31.

2085 The Bradley Report (2009), p. 106.

2086 Department of Health. (2011). *Good Practice Procedure Guide: The transfer and remission of adult prisoners under s47 and s48 of the Mental Health Act*. Retrieved 2024 August, from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/215648/dh_125768.pdf, p. 12.

2087 *See.* Sharpe, R., Völlm, B., Akhtar, A., Puri, R., & Bickle, A. (2016). Transfers from prison to hospital under Sections 47 and 48 of the Mental Health Act between 2011 and 2014. *The Journal of Forensic Psychiatry & Psychology, 27*(4), 459-475, p. 459.

2088 Sharpe et al. (2016), p. 465-466.

2089 CPT (2017c), p. 44.

2090 Prisons & Probation Ombudsman (2016), p. 32.

It has been documented that the existing system for transferring prisoners to secure hospitals is characterised by significant delays and the presence of perverse incentives.[2091] The National Audit Office report indicates that prisoners who meet the eligibility criteria should be admitted to a secure hospital within 14 days.[2092] However, only 34% of prisoners were transferred within this timeframe in 2016-2017; of those transferred, 7% waited for more than 140 days, with one waiting for more than a year.[2093]

In 2021, the document "Government Response to Consultation" introduced a 28-day time limit with the objective of accelerating the process of transfer from prison to mental health institutions. The aforementioned time limit is to be divided into two sequential, statutory time limits of 14 days each: first from the point of initial referral to the first psychiatric assessment, and then from the first psychiatric assessment until the transfer takes place.[2094] Nevertheless, the Mental Health Lawyers Association maintains that 28 days is an excessive period for conducting an assessment. It is imperative that the individual in question is regarded as a patient, rather than merely a detainee.[2095] As reported by the Prison Reform Trust, the transfer from prison under the Mental Health Act is problematic, still in 2021. Despite ongoing efforts, there are still reports of lengthy delays for individuals experiencing acute illness. In light of this, it has been proposed that the Act should include a timeframe within which the statutory time limit for secure transfers is implemented.[2096]

For the Dutch TBS-order, this issue has been discussed before in subsection *3.1.3.1 Combination Sentences or Hybrid Orders*. The *Hoge Raad* ruled in 1998 that a stay as a *TBS transient detainee*[2097] in a pre-trial prison setting becomes unlawful in principle after six months.[2098] As a result, the State is liable to pay damages to a *TBS transient detainee* after

2091 Independent Review of the Mental Health Act. (2018). *Independent Review of the Mental Health Act 1983: supporting documents*. Retrieved November 2024, from https://assets.publishing.service.gov.uk/media/5c6596e140f0b676df6e4746/Independent_Review_of_the_Mental_Health_Act_1983_-_supporting_documents.pdf, p. 357.

2092 National Audit Office. (2017). *Mental health in prisons*. Retrieved November 2024, from https://www.nao.org.uk/wp-content/uploads/2017/06/Mental-health-in-prisons.pdf, p. 9.

2093 National Audit Office (2017), p. 9.

2094 Secretary of State for Health and Social Care and the Lord Chancellor and Secretary of State for Justice. (2021). *Reforming the Mental Health Act: The Government's response to the consultation*. Retrieved November 2024, from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002885/reforming-mental-health-act-consultation-response-print-ready.pdf, P. 70.

2095 Secretary of State for Health (2021), p. 71.

2096 Prison Reform Trust. (2021). *Prison Reform Trust response to Reforming the Mental Health Act – April 2021*. Retrieved November 2024, from https://prisonreformtrust.org.uk/wp-content/uploads/old_files/Documents/Consultation%20responses/Reforming%20the%20Mental%20Health%20Act%20PRT%20response.pdf, p. 1.

2097 In Dutch criminal law, the term "*passanten*" refers to detainees or individuals held temporarily in forensic psychiatric facilities without a formal treatment plan or mandatory psychiatric order.

2098 Hoge Raad, 05-06-1998, ECLI:NL:PHR:1998:ZC2663.

the expiry of a six-month period. Standard amounts have since been developed on the amount via case law.[2099] The ECtHR assessed the *Brand, Nelissen, and Morsink* applications and ruled the periods in these cases (6, 13, and 15 months respectively) to be in violation of Article 5/1.[2100] In the *Brand* judgement, the Court stated that a significant delay in the admission of an individual to a custodial clinic, and thus the commencement of their treatment, will inevitably impact the likelihood of success within the statutory two-year timeframe for the initial validity of a TBS order.[2101] As mentioned in subsection *3.1.3.1 Combination Sentences or Hybrid Orders*, a similar argument is used in the discussion on combining a (long) prison sentence with a subsequent TBS-order. Furthermore, the probability of requiring an extension to the validity of the TBS order will, in turn, be heightened.[2102]

The CPT has also published reports regarding long waiting periods due to a lack of places.[2103] As already the CPT report of the second visit in 1997 stated that the waiting period was average of 9 months,[2104] due to a significant increase in TBS impositions and increased mean treatment duration of more than six years then, it requested information from the Dutch authorities on the measures and steps to be taken to ensure that those awaiting admission to a TBS institution receive *"at least minimally adequate treatment in the meantime"*.[2105] In their response to the CPT report the Dutch Government informed the CPT that structural solutions are being sought through the regulation of demand for TBS institutions.[2106] The new provision for conditional TBS was presented as a solution to reduce the number of patients entering TBS institutions.[2107] However, the TBS-population

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2099 Hoge Raad, 21-12-2007, ECLI:NL:HR:2007:BB5074.

2100 *See. Morsink v. the Netherlands,* op. cit., §68; *Brand v. the Netherlands*, op. cit., §58-65; *Nelissen v. the Netherlands,* op. cit., §60.

2101 *Brand v. the Netherlands,* op. cit., §68.
In *Morsink* judgment, the Court also ruled that the delay in the admission to a custodial clinic affects the prospects of the success of the treatment. *See. Morsink v. the Netherlands,* op. cit., §68.

2102 *Brand v. the Netherlands,* op. cit., §68.

2103 The Council of Europe. (1993). *The Report to the Dutch Government on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 August to 8 September 1992, (CPT/Inf (93)15).* Retrieved 2024 August, from https://rm.coe.int/1680697759

2104 *"Concern has been expressed in the Netherlands about the position of inmates waiting in prison for admission to a TBS institution. During this waiting period, currently averaging 9 months, the persons concerned do not receive the treatment they require, a situation which, it has been pointed out, is likely to provoke feelings of anxiety, self doubt and anger in the persons concerned. Further, as they are considered dangerous, those inmates run a serious risk of being placed in restrictive regimes in the prison establishments where they are temporarily being held."*, CPT (1998), p. 42.

2105 CPT (1998), p. 42.

2106 The Council of Europe. (1999). *The Interim report of the Dutch Government in response to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the Netherlands from 17 to 27 November 1997, (CPT/Inf (99)5).* Retrieved 2024 August, from https://rm.coe.int/16806977bf, p. 36.

2107 CPT (1999a), p. 36.
In 2012, the FPC Van Mesdag was visited for the second time. The report stated that there were

only decreased after the mean duration peaked at 11 years around 2008 and the order as a result became less popular amongst lawyers, defendants (refusing evaluation) and courts. However, since 2019 the population is rising again, meaning that the issue of delays in admission time has returned.[2108]

With regards to the care authorisation by the criminal court, less information is available, but as these patients are not placed in TBS-clinics a waiting period is not to be expected, while the legislation requires the authorisation to be used within 14 days.[2109]

In conclusion, the issue of delayed admission is a common challenge faced by all three criminal justice systems (even though for Türkiye, no specific data were found). In accordance with the case law of the ECtHR, the admission of an individual to an appropriate institution must be conducted in a timely manner. Consequently, any significant delay is inexcusable. The lack of available space in an appropriate institution cannot be used as a justification for the detention of mentally disordered offenders in ordinary prisons.[2110] Nevertheless, individuals may be temporarily accommodated in an institution that is not specifically designed for the accommodation of mentally disordered offenders, pending their transfer to the appropriate facility. This would comply with the ECHR test, provided that the waiting period is not excessively long while the individual is detained in this temporary institution.[2111] Nevertheless, it appears that all three criminal justice systems should expeditiously identify solutions to address the prevailing excessively lengthy waiting periods, and should pay damages to these patients in the meantime.

3.2.2.3 Staffing Situation and Appropriate Care

In order to speak of an appropriate institution, one other requirement should be fulfilled, and that is that the staffing situation should be similar to a psychiatric hospital run in the same country.[2112] It is quite challenging to reach the statistics of the staffing situation in civil psychiatric hospitals and forensic ones to compare. Nevertheless, relevant information on this issue from sources like ECtHR case law, CPT reports, other visit

159 beds in 1997 and 240 in 2012, and a new building with 55 additional beds. *See.* The Council of Europe. (2012). *Report to the Government of the Netherlands on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 21 October 2011 (CPT/Inf (2012)21).* Retrieved 2024 August, from https://rm.coe.int/1680697829, p. 36.

2108 Van der Wolf et al. (2020), p. 51, graphic 4A.

2109 Article 8:1/1 of the Wvggz.

2110 *Sy v. Italy,* App no 11791/20, (ECtHR, 24 January 2022), §135.

2111 *"The Court cannot find that, in the circumstances of the present case, a reasonable balance was struck. The Court is of the opinion that even though the delay of* ***two months and twenty five days*** *in the admission of the applicant to a psychiatric hospital may not at first glance seem particularly excessive, it cannot be regarded as acceptable", Pankiewicz v. Poland,* op. cit., §44-45. *See also Morsink v. the Netherlands,* op. cit., §61-69; *Brand v. the Netherlands,* op. cit., §58-66.

2112 *Rooman v. Belgium,* op. cit., § 210.

reports, existing empirical studies, and other relevant publications, may give some indication.

In Türkiye, the establishment of high-security forensic hospitals (YGAP Hospitals) was a relatively recent phenomenon, occurring only in 2018. This is discussed in greater detail in Chapter 3. Consequently, mentally disordered offenders were previously being placed in civil (but governmental) psychiatric hospitals, rather than forensic ones. In 2013, while examining an alleged unlawful detention, the ECtHR stated for the conditions of Adana Psychiatric Hospital that the deprivation of liberty took place in an establishment qualified to detain persons with mental disorders.[2113] Hence, at the time when YGAP Hospitals were not yet established, the ECtHR found that the psychiatric hospital in question was the qualified institution to incarcerate mentally disordered offenders.[2114]

Already in 1992, the CPT visited the Judicial Psychiatric Service of Bakırköy Mental and Psychological Health Hospital.[2115] The wards were examined and found reasonably good.[2116] At that time, Bakırköy Judicial Psychiatry Service had a total of 316 beds divided between: a secure arrest unit with 60 beds, female judicial service with 36 beds, male judicial service with 45 beds, and two protected rehabilitation service with 175 beds; and on the day of the visit there were 208 patients in residence, of whom 24 were women.[2117] A total of 88 staff were involved: 13 doctors, 30 nurses, 20 medical orderlies and 25 support staff.[2118] Bakırköy was visited again in 1997. The CPT recommended that more efforts should be made to provide a varied therapeutic environment for patients, for instance personal possessions, lockers, bedside tables; and to develop a wider range of physical, psychological, social, and occupational activities for patients, especially for those detainees staying for an extended period.[2119]

The only available data on the YGAP Hospital is the visit report of the Türkiye Human Rights and Equality Institution (*Türkiye İnsan Hakları ve Eşitlik Kurumu*), conducted in Adana, in April 2019.[2120] As was mentioned previously, the visit was conducted in a really early stage, and it does not reflect the situation in 2024 for the currently existing 6 different YGAP Hospitals. In the YGAP Hospital, at that date, there were 12 specialist

2113 *Ümit Bilgiç v. Turkey*, op. cit., §108.

2114 *Ümit Bilgiç v. Turkey*, op. cit., §107.

2115 The Council of Europe. (2007). *Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 November to 3 December 1992, (CPT/Inf (2007)5)*. Retrieved 2024 August, from https://rm.coe.int/16806981a4

2116 CPT (2007b), p. 34.

2117 CPT (2007b), p. 33.

2118 CPT (2007b), p. 33.

2119 The Council of Europe. (1999). *Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 17 October 1997, (CPT/Inf (99)2)*. Retrieved 2024 August, from https://rm.coe.int/16806981dc, p. 65.

2120 For the full report *See.* <https://www.tihek.gov.tr/upload/file_editor/2019/11/1573135344.pdf>, accessed 12 October 2023, p. 33-42.

psychiatrists, 26 nurses, 1 psychologist, 1 social worker, 4 support staff, an occupational therapist and a sports instructor working in the hospital.[2121] It was noted by the Committee that there was no specially designed room for handicapped persons in the institution. For this reason, it was advised to make the necessary arrangements in order to prevent unjust treatment in case a disabled person is admitted to the hospital.[2122]

Despite the currently existing YGAP Hospitals in Türkiye, there is no regulation or by-law on how to provide care. As my Freedom of Information requests were constantly rejected, I ultimately managed to obtain the table below that demonstrates the staff of the YGAP Hospitals:[2123]

List of staff employed in YGAP Hospitals in Turkey in July 2023

	Adana YGAP	Bursa YGAP	Elazığ YGAP	Eskişehir YGAP	Kayseri YGAP	Ankara YGAP
Psychiatrist doctor	3	3	3	2	1	3
Child and adolescent psychiatrist	1	0	1	0	0	0
Nurse	43	38	38	36	41	53
Psychologist	2	5	3	1	2	3
Social services specialist	2	2	2	2	3	1
Job trainer / Instructor	5	12	2	1	1	2
Pharmacist	1	1	1	1	0	0
Dentist	2	0	0	0	0	0
Anaesthesia technician	1	1	1	1	1	1
Patient support staff	4	3	20	4	2	0
Secretary	2	5	5	2	3	2
Other office staff	1	2	3	1	0	0
Security guard	28	27	28	21	13	26
Total number of employees	95	99	107	72	67	92
Treatment staff to patient ratio	0.57	0.60	0.49	0.42	0.64	0.88

According to the aforementioned YGAP Hospital visit report, it was considered appropriate to increase the number of psychologists and social workers in the YGAP Hospitals.[2124] Yet, no comparison can be made with the current staffing situation in an

2121 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 3.

2122 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 17.

2123 This table was presented by Dr. Yasin Hasan Balcıoğlu at the *Adli Psikiyartide Temel Uygulamalar ve Güvenlikli Servisler* (General Practices and Security Services in Forensic Psychiatry) online talk on 16/04/2024. The table was translated to English by me.

2124 Türkiye İnsan Hakları ve Eşitlik Kurumu (2019), p. 17.

equivalent civil psychiatric hospital. However, the numbers from 1992 mentioned above do not lead to concerns about too different standards in patient-staff ratio.

As provided in *Chapter 3*, subsection *5.2.1.3 Types of Facilities*, in England and Wales there is no strict separation between forensic and non-forensic hospitals. Information from a report by the European Commission from about twenty years ago suggests that psychiatric hospitals treat both forensic and non-forensic patients, and forensic patients can be treated in the same wards with regular patients.[2125] Therefore, a simple comparison cannot be made. All forensic mental health institutions are part of the National Health Service, and there are no forensic hospitals in the prison system.[2126] In England and Wales, forensic secure services are provided at high, medium and low levels of security.[2127] Logically, at a high security level relatively more forensic patients are present, and the patient-staff ratio would be higher.

An equivalent example of Turkish YGAP Hospitals is Broadmoor Hospital in England, which is one of three high-security specialist mental health hospitals. Fortunately, there are visit reports published on the website of the Government. One of the reports reveals that until the 1990s, Broadmoor Hospital was strongly institutional, the hospital's main mission was custodial, staff were 'attendants' not nurses, and residents were inmates rather than patients.[2128] In time, the number of nurses has risen, nurse-patient ratio has been improved, and security has been further strengthened.[2129] Policies and procedures have always been in place to regulate the treatment, patient observation and monitoring, incident reporting, maintaining confidentiality, and responding to incidents; and it was stated that these written procedures were shaped by the custom and practice.[2130]

In 2021, the CPT visited five psychiatric facilities in England. Staff numbers of the visited hospitals were found adequate.[2131] On Priory Hospital Enfield, for instance, there were 55 beds, and 4 FTE psychiatrists, 6 mental health nurses, 12 staff nurses, and 41 health care assistants.[2132]

Regarding the staffing situation in England and Wales, the latest Care Quality Commission inspection report from 2022 states that there were high vacancy levels for registered nurses which impact the quality of care and treatment.[2133] It was also stated

2125 European Commission (2005), p. 122.

2126 European Commission (2005), p. 122.

2127 Secure hospital care, Information for carers: < https://institutemh.org.uk/images/research/7778_Secure_Hospital_Care_Brochure_A5_V5_Online.pdf> accessed 26 November 2023, p. 5.

2128 West London Mental Health NHS Trust. (2014, June 2). *Jimmy Savile Investigation: Broadmoor Hospital, Report to the West London Mental Health NHS Trust and the Department of Health.* Retrieved 16 October 2023, from https://assets.publishing.service.gov.uk/media/5a7e24e0e5274a2e8ab461e9/Broadmoor_report.pdf, p. 19.

2129 West London (2014), p. 20-22.

2130 West London (2014), p. 22.

2131 CPT (2022), p. 67.

2132 CPT (2022), p. 67.

2133 West London Mental Health NHS Trust. (2022). *High secure hospitals: Inspection report.* Retrieved 16 October 2023, from https://api.cqc.org.uk/public/v1/reports/93bda6aa-8f50-48b7-8997-b4375a27fdbb?20221128140550.

that some staff on Kempton Ward had not completed the necessary knowledge and understanding framework to work with patients with personality disorders, which may result in them not being fully equipped for their role.[2134] Following the reported bed shortages, particularly in general psychiatry and medium security institutions, two decades ago shortages of forensic psychiatrists were also reported.[2135] The swift growth of new forensic psychiatric institutions was found to be impeded by the inability to provide sufficient numbers of fully trained forensic psychiatrists to run the institutions in question.[2136]

In the Netherlands, as previously explained in *Chapter 3*, subsection *5.3.2.3 Types of Facilities*, forensic care can be administered in three different systems : a) the penitentiary system that is governed by the Pbw, b) the TBS system that is governed by the BVT and c) the (forensic) mental health system which is governed by civil (mental) health laws.[2137] All three systems have their own special facilities for persons with mental disorder. The penitentiary system has Penitentiary Psychiatric Centres ("PPC"), the TBS-system consists of Forensic Psychiatric Centres (*Forensisch Psychiatrisch Centrum* "FPC"), and the forensic mental health system has Forensic Psychiatric Clinics (*Forensisch psychiatrische kliniek* "FPK"), and Forensic Psychiatric Departments in psychiatric hospitals ("FPA").[2138]

TBS Nederland[2139] published the statistics for the year of 2023. As evidenced by the published data, the number of new TBS patients entering the system in 2023 was 159. This represents a decrease of 40 in comparison to the previous year, due to the limitation of inflow by the available capacity. A total of 106 patients were discharged in 2023, with the average number of TBS patients being 1,614.The treatment duration set on average in 2023 was 8.7 years.[2140] These patients are divided over mainly the 7 FPC's and FPK's. At FPC Oostvaarderskliniek, there are 122 TBS patients, cared for by four hundred staff members in a range of roles, including socio-therapists, psychologists and nurses.[2141] The largest FPC is the FPC Van Mesdag, which in 2019, was responsible for 228 patients.[2142] However,

2134 West London (2022).

2135 European Commission (2005), p.132.

2136 European Commission (2005), p.133.

2137 Van der Wolf & Mevis (2022), p. 372.

2138 Van der Wolf & Mevis (2022), p. 372.

2139 *TBS Nederland* is a collaboration of 11 forensic psychiatric centres and clinics in the Netherlands. Every year, it publishes an overview of the figures and details surrounding tbs patients in the Netherlands. *See.* TBS Nederland. (2023). *Cijfers & Bijzonderheden 2023.* Retrieved 6 November 2024, from https://tbsnederland.nl/?r3d=cijfers-bijzonderheden-2023, p. 4.

2140 TBS Nederland (2023), p. 10.

2141 FPC Oostvaarderskliniek: https://www.werkenbijdji.nl/locatie/forensisch-psychiatrische/forensisch-psychiatrisch-centrum-oostvaarderskliniek accessed 06 November 2024.

2142 Jaarverslag Commissie van Toezicht bij Het Forensisch Psychiatrisch Centrum FPC Dr. S. van Mesdag 2019: https://www.dji.nl/binaries/dji/documenten/jaarverslagen/2020/04/01/jaarverslag-2019-dr.-s.-van-mesdagkliniek/jaarverslag-2019-mesdag.pdf&ved=2ahUKEwj8vrXt1MeJAxVvhv0HHdRxFc0QFnoECBQQAQ&usg=AOvVaw15sFRu5OvwavTs8ZsSuNx1 accessed 06 November 2024.

current numbers for staff members weren't found. Nor could a comparison been made with regular mental health institutions. However, in 1998, the CPT already reported the Van Mesdag forensic clinic had a high staff/patient ratio at the time.[2143] It was reported that there were 9 psychiatrists and 9 psychologists, 40 other staff members involved in the different types of therapeutic and education activities, and 233 sociotherapeutic workers.[2144] In 2012, when the TBS was less popular due to negative press, and the global economic crises led to budgetary constraints within the system, it was hard to find enough staff. Since there were more than 80 patients per psychiatrist, the CPT strongly recommended to *"pursue vigorously their efforts to fill the vacant posts of psychiatrists"*, and to *"train more forensic psychiatrists in the Netherlands"*.[2145] More recently, the mentioned capacity shortage is mainly considered to be a personnel shortage, where some clinics are so understaffed that they had to close wings, as the safety could not be guaranteed. The care authorisation by the criminal court is generally carried out in the third pillar of (forensic) mental health, where shortages may not be as urgent.[2146]

In conclusion, despite current shortages of personnel, in general England and Wales and the Netherlands seem to have sufficient staff-to-patient ratios. Even with the challenges concerning data collection in Türkiye, the ratios do not seem alarmingly different from the civil mental health care, while of course the ratios of for example in the Dutch TBS-clinics, are of course not reached. Further research and empirical studies are imperative to shed light on this matter.

3.2.2.4 Prison Environment for Mentally Disordered Offenders

To reiterate, in this chapter the 'sentences' or legal frameworks that are specifically intended for mentally disordered offenders, and are therefore subject to the requirements of Article 5/1(e) are being tested against the case law standards derived from that article. In general, people in penitentiary or prison settings are deprived of their liberty on other grounds, such as sub-paragraph (a) for convicted prisoners and sub-paragraph (c) for pre-trial detention. Therefore, in these cases the requirements of Article 5/1(e) do not apply. Of course, detainees in prison settings with a mental disorder enjoy rights tailored to their conditions, for example based on principles like equivalence of care – related to those in the community – also derived from Articles 3 and 5/1(e) of the ECHR. But that is not what is tested in this Chapter. However, it has already been mentioned in subsection *3.1.3.1 Combination Sentences or Hybrid Orders* that the ECtHR takes a very formalistic approach in allowing those already having received a sentence based on sub-paragraph (e) to first undergo a sentence based on sub-paragraph (a) in a prison setting.

But that is not the only reason to discuss the prison setting in this Chapter. As the title or the name of an institution does not matter for the purposes of Article 5/1(e), the

2143 CPT (1998), p. 44.
2144 CPT (1998), p. 44.
2145 CPT (2012), p. 40.
2146 Van der Wolf et al (2020).

question is whether sentences based on Article 5/1(e) are, and could also be, executed in a prison setting. In principle, the place of detention must be a hospital or a clinic, however other appropriate institution authorised for the detention of mentally disordered offenders can also comply with the ECtHR case law.[2147]

Empirical studies show that a prison environment, however, is not the best place to detain persons with health problems, including mental health.[2148] Merely staying in prison itself may damage the mental health of persons.[2149] Without assuming causality, it can for example be pointed out that according to an empirical study using data of 861 prison suicides in 12 countries, suicide rates among male inmates were at least three times higher than estimates of suicide rates among the male general population; and suicide rates among female prisoners were also higher than general suicide rates.[2150] Under this title the prison environments in the three justice systems will nevertheless be discussed within the concept of Article 5/1(e).

3.2.2.4.1 Practices in Türkiye

As mentioned already in *Section 1 of Chapter 1*, until 2019 there were no high security forensic psychiatric institutions in Türkiye, despite the fact that they have been mandatory since the Turkish Criminal Code of 2005. This issue was the starting point of the research proposal of this PhD dissertation. Under both the repealed and current provisions, persons who, at the time of the offence, suffer from a mental disorder which results in a lack of understanding or control of criminal acts shall not be punished.[2151] However, such persons are still subject to security measures. In the absence of secure mental health facilities, offenders were often detained in prisons, even though this violated the TCC. This illegality was tried to be justified on the grounds of the interest of public safety and security. The very first YGAP Hospital was opened in 2018, and currently there are six of such institutions. Regrettably, the Covid pandemic led to a further delay, and the gap between law and practice in this respect was not easily bridged, as these new facilities were initially allocated as sites for corona testing and vaccination. As a result, it took 19 years for the system to take shape as envisaged.

Since there were no separate forensic institutions, for years, one would expect the existence of adequate and suitable psychiatric wings or centres within the penitentiary system to safeguard human rights. But unfortunately, there were and are no psychiatric centres in the penitentiary system in Türkiye. This created a significant issue related to

2147 *L.B. v. Belgium*, op. cit., §93; *Ashingdane v. the United Kingdom*, op. cit., §44; *Hutchison Reid v. the United Kingdom*, op. cit., §48.

2148 Peay (2011), p. 123.

2149 *"We found that being in prison may in itself damage mental health: for example because of separation from family, bullying and a lack of someone to trust. Self-harm and worries about children are particularly serious problems for women prisoners." See.* Durcan (2008), p. 7.

2150 Fazel, S., Grann, M., Kling, B., & Hawton, K. (2011). Prison suicide in 12 countries: an ecological study of 861 suicides during 2003–2007. *Social Psychiatry and Psychiatric Epidemiology, 46*, 191-195, p. 193-194.

2151 *See.* ANNEX 2 – Relevant Articles of the Turkish Criminal Code.

safety and care. In the Turkish criminal justice system, there is no legal framework allowing for diversion to civil law, as in England and Wales, and in the Netherlands.[2152] Hence, persons with mental disorders were stuck in institutions which were not appropriate to provide any adequate medical assistance.

In accordance with Article 18 of the EPSM, the sentences of those who have *mental disorders other than mental illness caused by incarceration and other reasons*, and who are not deemed necessary to be kept in psychiatric hospitals and sent back to penal institutions, are to be executed in special sections of the designated penal institutions.[2153] It is, however, somewhat an unusual proposition to cite *mental disorders other than mental illness caused by incarceration and other reasons*. Neither the legislation nor its preamble provides an explanation of the meaning thereof or indicates who is responsible for determining the distinction. Even with the assumption that this distinction can be made, there is no possibility of implementing this article, given the absence of dedicated psychiatric sections or facilities within penal institutions.

As there are no adequate and suitable psychiatric wings in the penitentiary system in Türkiye, one might expect that there would be adequate measures for the transfer of mentally disordered persons. According to Article 16 of the EPSM, the execution of the sentence of a convict with a mental illness shall be postponed and the convict shall be placed under protection and treatment in a health institution as referred to in Article 57 of the TCC until they recover. In practice, however, this article is rarely applied.

There are, unfortunately, not many documents on mental health care within the prison settings. In its first visit in 1990, the CPT reported that there was no specialised psychiatric care available in any prison that the CPT visited.[2154] The CPT found out that the mentally disordered offenders in prisons do not receive proper care, instead, they are dealt with through isolation, if they become too troublesome.[2155] Hence, it was recommended ensuring appropriate psychiatric care either in a medical facility within prison or in a secure ward of a civil hospital.[2156] In its next visit in 1994, the CPT reported *with satisfaction* that, in line with its previous recommendations, no prisoners in need of urgent psychiatric care were held in solitary confinement, but the required sections remained absent.[2157]

2152 However, mentally disordered offenders were placed in civil psychiatry hospitals, such as Bakırköy Mental and Psychological Health Hospital in İstanbul. As explained above, its forensic psychiatry department welcomed patients in need, even though this civil hospital did not have high security.

2153 The specialists and other medical personnel required by the penal institutions designated for the execution of the sentences of the persons concerned shall be provided by the Ministry of Health. *See*. Article 18 of the EPSM.

2154 The Council of Europe. (2007). *Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 21 September 1990, (CPT/Inf (2007)1)*. Retrieved 2024 August, from https://rm.coe.int/1680697fcd, p. 53.

2155 CPT (2007a), p. 53.

2156 CPT (2007a), p. 53; CPT (2007b), p. 22.

2157 The Council of Europe. (2007). *Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or*

The Türkiye Human Rights and Equality Institution (*Türkiye İnsan Hakları ve Eşitlik Kurumu*) published one of its reports from a recent visit in 2024.[2158] During the unannounced visit, it was found that the staff of the institution receives professional training, but no specific training on human rights and the prohibition of torture and ill-treatment.[2159] It was reported that there is one psychologist working in the Psycho-social Service Unit, that this psychologist conducts an interview with the prisoners within the first 3 days of their admission to the institution, that each ward is generally visited once a week and that prisoners with special conditions such as suicide risk are closely monitored. It was further stated that there was a need for a psychiatrist to be assigned to the institution; an assignment had been requested but had not yet been actualised.[2160]

Even during imprisonment, the failure to provide adequate care may constitute a violation of Article 3 of the ECHR. The absence of dedicated psychiatric wings within penal institutions and limited measures to transfer individuals to proper facilities left mentally disordered detainees in conditions that lack adequate treatment and, at times, safety, potentially violating Article 3. Furthermore, limited implementation of legislative provisions, unclear definitions within the law, and inadequate staff training highlight the pressing need for structural reforms to uphold human rights and secure necessary care in line with the ECHR. Especially during the time that mentally disordered offenders who had received a security measure, were kept in prison, as no high secure hospitals operated, an infringement of Article 5/1(e) could have been established, as a Turkish prison setting would and will not qualify as an appropriate institution under that Article.

3.2.2.4.2 Practices in England and Wales

As explained under subsection *3.1.3.3 Treatability or Efficiency Criteria*, there are mentally disordered offenders in the prison system of England and Wales, for example as due to the treatability criteria they do not receive a hospital order.

Under the MHA 1983, in order to provide the best route to care for prisoners, prison hospital wings should be suitably staffed and equipped.[2161] This was done to overcome the endless and unacceptable waiting for hospital beds on the NHS and would permit compulsory treatment in prison where necessary.[2162] Healthcare in prisons, provided in the UK by the NHS, is guided by the mentioned equivalence principle that seeks to provide prisoners with healthcare equivalent to that which would be provided if they were living

Punishment (CPT) from 16 to 28 October 1994, (CPT/Inf (2007)7). Retrieved 2024 August, from https://rm.coe.int/16806981a8, p. 39.

2158 An unannounced visit was made to Metris R Type Closed Prison on 20/6/2023. *See*. Türkiye İnsan Hakları ve Eşitlik Kurumu. (2024). *Metris R Tipi Kapalı Ceza İnfaz Kurumu Ziyareti Raporu (Rapor No: 2024/14)*. Retrieved 2024 October, from https://www.tihek.gov.tr/public/images/kararlar/bc3kus.pdf

2159 Türkiye İnsan Hakları ve Eşitlik Kurumu (2024), p. 3-4.

2160 Türkiye İnsan Hakları ve Eşitlik Kurumu (2024), p. 8.

2161 Wilson, S. (2004). The principle of equivalence and the future of mental health care in prisons. *British Journal of Psychiatry*, *184*(1), 5–7, p. 6.

2162 Wilson (2004), p. 6.

in the community.[2163] According to inspectors, however, mentally disordered offenders in prisons are receiving less than equivalent (social) care and support.[2164] Inspectors found significant delays between referrals and assessment of social care needs in some prisons, in some cases up to five months.[2165]

Mental health problems in prison can be worsened in cases of comorbid drug or alcohol addiction, then referred to as *dual diagnosis*.[2166] This condition can be observed in prison populations worldwide. A study revealed that prisoners with drug and/or alcohol addiction had an average of 3.4 mental health problems per person.[2167] In 2009, a "Guide for the Management of Dual Diagnosis for Prisons" was published by the Department of Health, which provided some good practice guidelines for managing dual diagnosis in prison settings.[2168] However, whether a prison environment can be a suitable environment for such detainees is questionable. In 2008, research was published which examined the conditions in five West Midlands prisons where prisoners with mental disorders were detained.[2169] Some of the current problems in mental health care in prisons include lack of understanding between different services in prison, attention to replacement, planning for the release, access to psychological therapy and advice about medication.[2170] In this respect in a CPT from 2017, it was reported that in the prisons visited, there were several prisoners with severe mental disorders residing on normal accommodation wings.[2171] The CPT delegation stated that this was not a suitable environment for a person with severe mental health needs.[2172] Several independent research and monitoring bodies have also revealed a fundamental need to improve mental health services in prisons.[2173] The Prisons and Probation Ombudsman ("PPO") has underlined that "*Unfortunately, some mental health conditions cause sufferers to present difficult and challenging behaviour, which staff may deal with as a behavioural rather than a mental health problem. When this leads to a punitive rather than a therapeutic response, this may only worsen the prisoner's underlying mental ill-health*".[2174]

2163 Sharpe et al. (2016), p. 460.

2164 HM Inspectorate of Prisons & Care Quality Commission. (2018). *Social care in prisons in England and Wales: A thematic report*, London: HMIP. Retrieved 2024 August, from https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2018/10/Social-care-thematic-2018-web.pdf, p. 28.

2165 HM Inspectorate of Prisons (2018), p. 28.

2166 Prisons & Probation Ombudsman (2016), p. 33.

2167 The Rehabilitation for Addicted Prisoners Trust. (2015). Forward Research and Policy Series No.2: Substance misuse and mental health in prison. Retrieved 2024 August, from https://s34767.pcdn.co/wp-content/uploads/substance-misuse-and-mental-health-in-prison-number-2.pdf, p. 4.

2168 *See*. Department of Health. (2009). *A Guide for the Management of Dual Diagnosis for Prisons*. Retrieved August 2024, from https://www.drugsandalcohol.ie/11865/1/DualDiagnosisPrisons.pdf.

2169 Durcan (2008), p. 7.

2170 Durcan (2008), p. 7.

2171 CPT (2017c), p. 44.

2172 CPT (2017c), p. 44.

2173 The Bradley Report (2009); Prisons & Probation Ombudsman. (2016). *Learning from PPO investigations: Prisoner Mental Health*. London, p. 9.

2174 Prisons & Probation Ombudsman (2016), p. 3.

Even a former British Prime Minister underlined that there was a failure in the mental health and treatment approach and a failure in the public policy, by stating that "*In terms of approach, frankly, we are locking up some severely mentally ill people in prison who should not be there*".[2175]

As explained earlier, the transfers are delayed in the UK. The PPO reports that there were 139 prisoners with mental disorders committed suicide between 2012 and 2014.[2176] The PPO refrained from stating whether an earlier transfer would have prevented any of the deaths, but between the lines it was definitely suggested. Similar to the Netherlands, rights of detainees waiting (too long) for the execution of a hospital order may be infringed, even when placed on hospital wings.

3.2.2.4.3 Practices in the Netherlands

The penitentiary system of the Netherlands has Penitentiary Psychiatric Centres ("PPC") for mentally disordered offenders, that are unfit to be detained on regular prison wards. With a capacity of around 7% of the entire penitentiary capacity in the country, it can be derived that there aren't enough PPC beds, as empirical research shows that the percentage of persons with mental health problems in prisons is tenfold.[2177]

The CPT visited PPCs in 2017. The material conditions of the PPCs visited were found to be of a very high standard, in an excellent state of maintenance and cleanliness.[2178] However, it was reported that the patients in Zwolle spend up to 17 hours locked up in their individual rooms each day, without any contact with anyone, including staff. Patients under *individual regime* spend up to 22 hours a day locked up. This situation is found not to be a therapeutic regime. It was further reported that these circumstances may lead to stress and anxiety for some patients. Moreover, as the CPT report notes, the PPC regime at the time failed severely in terms of psychiatric hospital standards. Also, as the CPT reported that the number of psychiatrists were insufficient for a PPC with 132-patient capacity. In order to provide a *truly therapeutic regime*, the CPT advised limiting the confinement time to a maximum of 12 hours a day to engage patients in purposeful activities and interactions with others.[2179] Nevertheless, the Dutch government stated that the situation fitted within the requirements Custodial Institutions Act, given the general therapeutic nature of the PPCs.[2180] It was further reported that in the PPCs, the same

2175 Cameron, D. (2016, February 8). *British Prime Minister's speech on prison reform.* Retrieved August 2024, from https://www.gov.uk/government/speeches/prison-reform-prime-ministersspeech.

2176 Prisons & Probation Ombudsman (2016), p. 32.

2177 *See.* Van der Wolf & Mevis (2022), p. 372.

2178 The Council of Europe. (2017). *Report to the Government of the Netherlands on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 13 May 2016, CPT/Inf (2017) 1.* Retrieved 2024 August, from https://rm.coe.int/16806ebb7c, p. 38.

2179 CPT (2017a), p. 39-40.

2180 The Council of Europe. (2017). *Response of the Government of the Netherlands to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*

disciplinary sanctions are applied as in normal prisons.[2181] The CPT recommended to abolish these disciplinary sanctions for patients in PPCs.[2182] In their response, the Dutch government endorsed this recommendation, and stated that the behaviour of the patients in the PCCs is usually related to their mental status, and therefore the disciplinary sanction should be therapeutic rather than punitive.[2183] Nevertheless, there was no mention of any initiative taken or to be taken to ensure this.

In 2022, the CPT visited the institutions in Curaçao, as well. Detainees with a TBS order[2184] in Curaçao stay in the forensic psychiatric support unit (*forensische observatie en begeleidings afdeling*, "FOBA").[2185] The FOBA has extra safety and security and offers psychiatric support; however it is still inside the prison. It was reported that there was a lack of therapeutic activities related to the clearly inadequately specialised staff. [2186] In the visit of 2014, the CPT already found that this FOBA unit was not a proper psychiatric institution since it failed to provide a suitable therapeutic environment and failed to have sufficient specialist staff.[2187] After the visit of 2022, the CPT recommended an urgent transfer of the prisoners to an appropriate therapeutic environment.[2188]

While these facilities fall under the prison regime, by detaining mentally disordered offenders with a TBS-order, they are obliged to comply with Article 5/1(e) of the ECHR. In subsection *3.2.2.2 Appropriate Admission Time – No Significant Delay* a similar infringement was already described for those waiting in a Dutch prison setting, while the TBS-order had already taken effect. Potentially placement in prison with hospital settings can compensate for this situation, but not if they are substandard in relation to the requirements of Article 5/1(e).

(CPT) on its visit to the Netherlands from 2 to 13 May 2016, CPT/Inf (2017) 29. Retrieved 2024 August, from https://rm.coe.int/pdf/168074bf06, p. 35.

2181 CPT (2017a), p. 48.

2182 CPT (2017a), p. 48.

2183 CPT (2017b), p. 39.

2184 In the Caribbean part of the Kingdom there is no TBS clinic. *See*. https://caribischnetwerk.ntr.nl/2014/03/10/tbs-maatregel-louter-wet-op-papier/, accessed 19 August 2024.

2185 The Council of Europe. (2023b). *Response of the Government of the Netherlands to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the Kingdom of the Netherlands from 10 to 25 May 2022, CPT/Inf (2023) 13*. Retrieved 2024 August, from https://rm.coe.int/1680abb4b8, p. 78.

2186 The Council of Europe. (2023a). *Report to the Government of the Netherlands on the periodic visit to the Kingdom of the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 25 May 2022, CPT/Inf (2023) 12*. Retrieved 2024 August, from https://rm.coe.int/1680abb4b5, p. 102.

2187 The Council of Europe. (2015). *Report to the Government of the Netherlands on the visit to the Caribbean part of the Kingdom of the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 12 to 22 May 2014, CPT/Inf (2015) 27*. Retrieved 2024 August, from https://rm.coe.int/1680697831, p. 84.

2188 CPT (2023a), p. 103.

3.3 Positive Obligations and Safeguards According to Articles 2, 3, 5, 6, and 14

As concluded in Chapter 2, the High Contracting Parties shall comply with certain relevant positive obligations related to mentally disordered offenders following articles 2, 3, 5, 6, and 14. These obligations will not be repeated in full, but in short it comes down to: the obligation to protect the life of individuals in a vulnerable position and the lives of vulnerable individuals (Article 2); the obligation to protect individuals from proscribed ill-treatment or punishment (Article 3); the obligation to offer perspective in cases of long detention and specifically life imprisonment (Articles 3, 5/1(e), and 5/4); the obligations related to the right to legal aid (Article 6/3(c)); to grant effective participation and to provide adequate safeguards in the legal process (Article 5/1(e) and Article 5/4)); to the right to speedily challenge the lawfulness of the detention (Article 5/1(e) and Article 5/4); and the obligation to ensure the rights without discrimination of a mental disorder (Article 14).

As mentioned in *Section 2*, the chosen criminal justice systems are High Contracting Parties to the ECHR and have therefore integrated the rights and freedoms provided for in the ECHR into their national systems and regulations. This should similarly be the case for obligations.

When the state acknowledges that the person is vulnerable, the threshold of the positive obligations increases. The State, then, should proactively take precautions to protect these vulnerable persons. Given the fact that acknowledging the vulnerable status is thus a significant factor for increasing protection, the positive obligation to protect the life of individuals in a vulnerable position and the life of vulnerable individuals will be discussed first below. Second, the obligation to protect individuals from the proscribed ill-treatment or punishment will be discussed. To follow the order of the ECHR test, the issue of life imprisonment will be elaborated on thirdly, then respectively followed by the right to legal aid and effective participation, providing adequate safeguards, the right to a speedily challenge of the lawfulness of detention, and the enjoyment of rights without discrimination. Under this subsection, the compliance with the obligations in general will be given in brief, while (potential) infringements related to mentally disordered offenders will be explained in more detail.

3.3.1 Obligation to Protect the Life of Individuals in a Vulnerable Position and the Life of Vulnerable Individuals (Article 2)

Naturally, the right to life is the most important right, because without it, it is impossible to enjoy the other rights belong to the human being. Therefore, the right to life of both the individuals shall be shielded by the High Contracting Parties. According to the ECtHR, the Contracting Party have three obligations under Article 2; the obligation to protect the right to life by law, the obligation to protect the life of individuals in a vulnerable position (e.g., detainees, military conscripts), and vulnerable individuals (e.g., mentally disordered), and

the obligation to investigate deaths effectively.[2189] Consequently, the State is obliged to take all reasonable measures to prevent (such) individuals from *"real and immediate risk of suicide"*.[2190] The responsibility of the Contracting Parties to protect the life of persons in vulnerable positions includes of course the obligation to provide adequate medical care to those detained in the frameworks to which the ECtHR test is applied in this Chapter, as will be discussed below in relation to Article 3 in conjunction with Article 5/1(e). In absence of specific case law related to the target group of this research, cases from the related fields of criminal justice (including prisons) and general mental health will be discussed to shed a light on how the States fulfil these obligations or have failed to in individual cases.

Article 2 of the Constitution of the Republic of Türkiye regulates that; "The Republic of Türkiye is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, *respecting human rights*, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.". Chapter 2 of the Constitution provides with the rights and duties of the individual, and the first article of this chapter (Article 17) regulates the right to life. The Constitutional Court rules that within the scope of the positive obligations to ensure this right, the State has a duty to protect the right to life of all individuals within its jurisdiction against risks that may arise from the actions of public officials, other individuals or even the individual themselves.[2191] The positive obligation to protect undoubtedly applies to detainees as well, and this obligation includes taking care of the medical treatment of persons deprived of their liberty, as well as preventing possible threats to their lives.[2192] Within the scope of this duty, the State shall i) establish a deterrent and protective legal and administrative framework against threats and risks to the right to life, and ii) must take measures through their officials within reasonable limits and in such a way as to prevent that danger from occurring, where the public authorities know or ought to know that there is a real and imminent danger to a person's life.[2193]

Article 2 of the Human Rights Act ("HRA") 1998, which applies to England, Scotland, and Wales, regulates the right to life. According to the regulation: "*Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*". This regulation matches with Article 2 of the ECHR word by word, as the HRA 1998 was enacted to *give further effect to rights and freedoms guaranteed under the European Convention on Human Rights*.[2194] Furthermore, Section 3 of the HRA 1998 regulates that primary legislation and subordinate legislation must be read and implemented in a manner compatible with the ECHR rights, to the extent possible. Separately, Protocol 13 Article 1 of the Human Rights Act abolishes the death penalty and makes it illegal in the entire UK.

2189 *Paul and Audrey Edwards v. the United Kingdom*, App no 46477/99, (ECtHR, 14 March 2002), §56.

2190 *Keenan v. the United Kingdom*, op. cit., §93-102; *Renolde v. France*, App no 5608/05, (ECtHR, 16 October 2008), §85.

2191 *Elanur Gemici ve Diğerleri Başvurusu*, Anayasa Mahkemesi, E. 2018/23070, T. 06/10/2022, §54.

2192 *Elanur Gemici ve Diğerleri, op. cit.*, §54.

2193 *Muazzez Babak ve Naif Babak Başvurusu*, Anayasa Mahkemesi, E. 2017/35564, T. 27/07/2021, §92.

2194 The Human Rights Act 1998, Introductory Text.

In the Dutch Constitution (*Grondwet*), there is no direct regulation on the protection of the right to live. In this sense, the Dutch Constitution is more exceptional.[2195] The right to physical integrity of the persons (Article 11) and the ban on the death penalty (Article 114) are, however, regulated under the Dutch Constitution. There may be an added value to regulate this significant right in the constitution, alongside the existing international law protection of this right. Yet, as being a Contracting Party, Article 2 of the ECHR is applicable in the Netherlands, regardless.

Article 2 of the Convention requires the Contracting Parties not only to abstain from the *intentional and unlawful taking of life*, but also to *take appropriate steps to safeguard the lives of those within its jurisdiction.*[2196] The protection of the right to life is *particularly stringent*[2197] when a person is under the custody of the State, as States must take positive steps to protect the life of detainees.[2198] In such cases the Court always examines whether the authorities knew or ought to have known of the *existence of a real and immediate risk to the life*, and whether they failed to take measures within the scope of their powers which might have been expected to prevent such risk.[2199]

Since the YGAP Hospitals are quite new in Türkiye, there is no ECtHR case that reflects on the life within these facilities.[2200] However, a reflection of the situation of a convicted

2195 For the discussion regarding whether it should be in the Constitution, *see.* Peters, J., Nieuwenhuis, A., Zoethout, C., Boogaard, G., & Bosdriesz, H. (2009). *Het recht op leven in de Nederlandse Grondwet: Een verkennend onderzoek.* Alphen aan den Rijn: Kluwer.

2196 *Osman v. the United Kingdom,* op. cit., §115.

2197 *Paul and Audrey Edwards v. the United Kingdom,* op. cit., §47.

2198 *Paul and Audrey Edwards v. the United Kingdom,* op. cit., §56.

2199 *Paul and Audrey Edwards v. the United Kingdom,* op. cit., §55.

2200 As previously stated in *Section 1*, the Constitutional Court (*Anayasa Mahkemesi*) has been granted the authority to establish new commissions for the purpose of examining the admissibility of *individual applications* in 2010. It was of paramount importance to consider the fact that Türkiye had the highest number of violation judgments rendered by the ECtHR while implementing a regulatory framework for individual applications to solve these claims at the national level. This amendment allows individuals to submit applications to the Constitutional Court, alleging that their rights have been infringed upon by a public authority, as of 2012. Given the necessity to exhaust domestic remedies prior to seeking recourse from the ECtHR, individuals are currently unable to do so without first submitting an individual application to the Constitutional Court. In light of the above, the judgments of the Constitutional Court arising from individual applications are of particular relevance to the scope of this thesis. Over the period between 23/09/2012 and 31/12/2022, the Constitutional Court received a total of 470,938 individual applications. Of these, 61,588 were found to constitute a violation, with 208 of those violations pertaining to the right to life. Although there is no available information regarding the prevalence of these violations among detainees or within YGAP hospitals, it is nevertheless a noteworthy statistic, given that these cases did not proceed to the ECtHR level.
See. Anayasa Mahkemesi Başkanlığı. (2022). *Bireysel Başvuru İstatistikleri (23/9/2012 – 31/12/2022)*, Retrieved 2024 October, from https://anayasa.gov.tr/media/8499/bb_2022_tr.pdf; Türkiye İnsan Hakları ve Eşitlik Kurumu. (2022). *İnsan Haklarının Korunması ve Geliştirilmesi Raporu.* Retrieved 2024 October, from https://www.tihek.gov.tr/public/editor/uploads/0FmN4YFv.pdf, p.6.

with mental disorder is possible, through the case of *Çoşelav v. Turkey*. A 16-year-old serving a prison sentence in the juvenile wing killed himself after too many failed suicidal attempts; and the ECtHR found the State responsible for not taking the necessary steps to prevent this predicted outcome and declared that there had been a violation of Article 2 of the Convention.[2201] A similar case was also taken to the Constitutional Court. A prisoner, who had an antisocial personality disorder and had attempted suicide before, committed suicide in his cell. In parallel with the ECtHR's approach, the Constitutional Court rules that where the penitentiary authorities know or ought to know that there is a real risk that a person under their control may kill themselves, authorities must take such measures as are reasonably necessary to eliminate that risk within the scope of their powers.[2202] In this particular case, it ruled that the procedural dimension of the right to life was violated. In its examination, however, the Constitutional Court noted that the obligation should not be interpreted in such a way as to create an excessive burden on public authorities, taking into account in particular the unpredictability of human behaviour and the preference for the action to be taken or the activity to be carried out by assessing priorities and resources.[2203]

The *Reynolds v. the United Kingdom* judgment was regarding a suicide of a person who was detained as a voluntary psychiatric patient, after having a history of schizophrenia. The Court considered in this case that there was an obligation to implement reasonable measures to protect the person from a real and immediate risk of suicide, and that this obligation was not met.[2204] Hence, the ECtHR ruled that there had been a violation of Article 2 of the Convention, in conjunction with Article 13, the right to an effective remedy.

As stated, vulnerable persons under custody shall be protected from not only themselves but also from others. The ECtHR rules that the protection of the right to life extends in appropriate circumstances to a *positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual*.[2205] In the case of *Paul and Audrey Edwards v. the United Kingdom*,[2206] the State failed to protect a detainee from another detainee with serious mental disorders by placing them in the same cell. The consultant psychiatrist decided that an offender did not need to be admitted to hospital and that he was fit to be detained;[2207] and yet, this person killed his cellmate. Hence, the Court ruled that there was a breach of Article 2 of the Convention, in this regard.

For the Netherlands, no cases of the ECtHR were found related to this issue.[2208] To conclude it can be stated that the three chosen criminal justice systems, legislation-wise,

2201 *Çoşelav v. Turkey*, op. cit., §52-70.
2202 *Muazzez Babak ve Naif Babak*, op. cit., §93.
2203 *Muazzez Babak ve Naif Babak*, op. cit., §93.
2204 *Reynolds v. the United Kingdom*, App no 2694/08, (ECtHR, 13 March 2012), §61.
2205 *Paul and Audrey Edwards v. the United Kingdom*, op. cit., §54.
2206 *Paul and Audrey Edwards v. the United Kingdom*, op. cit.
2207 *Paul and Audrey Edwards v. the United Kingdom*, op. cit., §17.
2208 A review of the caselaw search on the HUDOC database did not yield any results pertaining to a case against the Netherlands on this issue.

comply with the ECHR's obligation to protect the life of individuals in a vulnerable position and the life of vulnerable individuals. To protect vulnerable persons in practice, authorities have to take precautions towards the mentally disordered offenders to protect them from themselves and others. In particular, it is also the responsibility of the courts or the administrative government bodies to take all reasonable steps to ensure that an offender is not placed in prison under a real and immediate risk of suicide, in order to fulfil the obligations set out in Article 2.[2209] Derived from this is the obligation, in instances where there is a genuine possibility that a custodial sentence may infringe upon the rights of the offender, that courts should seek to identify possible alternatives to custodial punishment, or authorities should consider transfer from prison. It is, similarly, recommended that policies on (return) transfers from hospital to prison or recalls from release on licence must be amended to require an evaluation of whether the individual's rights as set forth in Article 2 will be adequately safeguarded.[2210] Hence, in the event that a return to prison would pose a *real and immediate risk* of violating Article 2, alternative remedial measures must be implemented.

Obviously, even though no such cases were found, all these obligations also apply to offenders detained under a framework because of their mental disorder.

3.3.2 Obligation to Protect Individuals from Proscribed Ill-treatment or Punishment (Article 3)

Under Article 1 in conjunction with Article 3 of the Convention, the Contracting Parties are obliged to take measures aimed at preventing persons under their jurisdiction from being subjected to ill treatment, including by private individuals.[2211] The scope of this positive obligation includes the effective protection of particularly children and other vulnerable persons.[2212] According to the ECtHR; the Contracting Party must also guarantee that persons are detained in conditions compatible with respect for their human dignity, that the manner and method of the execution of the measure do not expose the detainees to 'distress' or 'hardship' of an intensity beyond the foreseeable amount of suffering inherent in detention and that, having regard to the practical of imprisonment, their health and well-being are adequately safeguarded by, among other things, providing them with the necessary medical assistance.

The fact that a person is legally ordered by the court to be institutionalised for treatment and protection does not mean that all kinds of interventions to be carried out in this institution will also be automatically in accordance with the law.

In terms of regulation, Article 17/3 of the Constitution of the Republic of Türkiye regulates that; "*No one shall be subjected to torture or ill-treatment; no one shall be subjected to punishment or treatment incompatible with human dignity.*". Article 17/2 states that "*Except in cases of*

2209 O'Loughlin (2024), p. 191.
2210 O'Loughlin (2024), p. 207.
2211 *X and Others v. Bulgaria*, App no 22457/16, (ECtHR, 02 February 2021), §177.
2212 *X and Others v. Bulgaria*, §177.

medical necessity and in cases prescribed by law, the bodily integrity of the person shall be inviolable; the person shall not be subjected to scientific and medical experiments without their consent.".

As described for England and Wales in the previous subsection, the HRA 1998 was enacted to *give further effect* to the ECHR,[2213] and Article 3 of the HRA 1998 is exactly the same as Article 3 of the ECHR.

Additionally, it was stated that the Dutch Constitution (*Grondwet*) does not regulate this right as such, but it does regulate the right to physical integrity of the persons (Article 11) and the ban on the death penalty (Article 114).

Given the obligation following from Article 2, there is a necessity for courts to seek alternatives to custodial sentences in instances where there is a genuine possibility that such a sentence may infringe upon the rights of the offender. Furthermore, recommendations have been made that policies on transfers from hospital to prison or recalls from release on licence must be amended to require an evaluation of whether the individual's rights as set forth in Article 3 will be adequately safeguarded.[2214] Consequently, alternative remedial measures must be implemented in cases where a return to prison would pose a genuine risk of violating Article 3.

In practice, in each criminal justice system there have been incidents related to this obligation, that were the subject of news reports, submitted to national courts or to the ECtHR, or reported by the CPT. These cases will be discussed below, in separate subsections for each criminal justice system. Since the explanations regarding Article 3 in conjunction with Article 5/1(e) were given under the subsection *3.2 Detention Rules According to Articles 3 and 5/1(e)*, under this title, more general issues under Article 3 will be discussed which may also pertain to mentally disordered offenders, even if related to the bordering systems of prison and general mental health (for example as they may be placed there).

3.3.2.1 Practices in Türkiye

3.3.2.1.1 In General

As mentioned above, Article 17 of the Constitution of the Republic of Türkiye[2215] guarantees the right of persons to protect and improve their material and spiritual existence. The first paragraph aims to protect human dignity, whereas the third paragraph regulates that no one shall be subjected to torture or cruelty, and to punishment or treatment that is incompatible with human dignity. This is the State's negative obligation arising from the obligation to respect the physical and mental integrity of the individual.[2216] Furthermore, the positive obligation of the State includes both the protection of individuals from such treatment (preventive obligation) and the identification and punishment of those responsible through an effective investigation (investigative obligation).[2217]

2213 The Human Rights Act 1998, Introductory Text.

2214 O'Loughlin (2024), p. 207.

2215 *See.* ANNEX 1 – Relevant Articles of the Constitution of the Republic of Türkiye.

2216 *Yasin Güngör Başvurusu,* Anayasa Mahkemesi, E. 2018/26782, T. 20/12/2022, §30.

2217 *Muazzez Babak ve Naif Babak,* op. cit., §111.

The Constitutional Court rules that not every allegation of ill-treatment can be expected to benefit from the protection afforded by Article 17/3 of the Constitution, in this context, allegations of ill-treatment must be supported by appropriate evidence.[2218] In order to establish the validity of the alleged events, there must be reasonable evidence beyond a reasonable doubt based on an abstract allegation.[2219] In line with the ECtHR judgments, the Constitutional Court also rules that in order for a treatment to fall within the scope, it must have reached a minimum level of gravity. This minimum threshold is relative and must be assessed by taking into account the specific circumstances of each case.[2220]

The CPT reports indicate that there are concerns regarding the conditions of detention, which extend from psychiatric hospitals to prisons. Regrettably, the CPT's reports from its 2024, 2022 and 2021 visits to Türkiye have yet to be published.[2221] Consequently, the older reports will be referenced here.

In 1997 the CPT visited Türkiye and reported that there were no allegations heard by the CPT delegation and no other evidence of deliberate mistreatment of patients by staff at the two psychiatric hospitals visited.[2222] In 2001, it was stated that the Turkish authorities had been making considerable efforts to reform the prison system and, in particular, to improve detention conditions.[2223] However, the CPT reiterates its general recommendation that Turkish authorities review detention conditions in all law enforcement institutions to ensure that all custody cells have adequate lighting, including access to natural daylight, that detainees receive daily outdoor exercise, and that they take these needs into account when designing new detention facilities, including police and gendarmerie stations.[2224] It was also recommended that all persons detained by law by enforcement agencies, for any reason, should be fully informed of their fundamental rights, as *from the very outset of their deprivation of liberty*.[2225]

It can be concluded that the regulations in place in Türkiye are designed to prevent ill-treatment. Nevertheless, there is a need for more effective implementation, which would require greater awareness among execution officers of the importance of this issue. Furthermore, additional research is required on the new YGAP hospitals and their conditions, in order to ascertain whether they comply with this part of the test.

2218 *Yasin Güngör,* op. cit., §31.

2219 *Yasin Güngör,* op. cit., §31.

2220 *Serdar Avci Başvurusu,* Anayasa Mahkemesi, E. 2015/19474, T. 09/01/2020, §56; *Yasin Güngör, op. cit.,* §32.

2221 *See.* https://www.coe.int/en/web/cpt/turkiye, accessed 21 August 2024.

2222 CPT (1999b), p. 83.

2223 The Council of Europe. (2001). *Report to the Turkish Government on the visits to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 16 December 2000 and 10 to 15 January 2001 and from 18 to 21 April and 21 to 24 May 2001 and Response of the Turkish Government, (CPT/Inf (2001)31).* Retrieved 2024 August, from https://rm.coe.int/16806981f5, p. 27.

2224 CPT (2020a), p. 17-18; CPT (2020c), p. 4.

2225 *Emphasis added,* CPT (2020a), p. 17.

3.3.2.1.2 Pre-trial Detention for Mentally Disordered Offenders in Türkiye

In the Turkish criminal justice system, "protective measures" are legal remedies that are applied temporarily and require interference with certain fundamental rights and freedoms before the final verdict in order to ensure that criminal proceedings are conducted orderly, in cases where delay is detrimental. Protective measures should be regulated by law, given their limiting nature and the paramount importance of fundamental rights and freedoms. One such regulated protective measure is *arrest*[2226], characterised as the restriction of the personal freedom of the suspect or defendant by a judge's order and placement in a detention centre. The primary objective of an arrest is to prevent the defendant from evading justice, tampering evidence or attempting to influence witnesses, victims and other individuals is another objective of an arrest. Consequently, it will be possible to reach a material truth at the end of the criminal procedure. In accordance with the principle of exceptionality, the trial without arrest represents the norm, whereas the trial after or during (pre-)trial detention constitutes the exception. In accordance with this feature, an arrest warrant can only be issued at the discretion of the judge in cases where the conditions and reasons for arrest exist in the law. It is not possible for the judge to issue an arrest warrant in the absence of these conditions and reasons.

In the Turkish criminal justice system, however, the pre-trial detention exists only for detention in (remand) prison. The period spent in the pre-trial detention is deducted from the prison time after conviction. However, in cases where the court pre-assesses, based on the available evidence, that at the point of sentencing the defendant will be found not criminally responsible, the period of pre-trial detention cannot be reduced. Article 100 of the DCCP regulates that an arrest warrant may not be issued if it is deemed disproportionate to the gravity of the offence or the potential punishment or security measure that may be imposed.

In accordance with Article 57 of the Turkish Criminal Code,[2227] the security measures in question are sanctions that may be imposed subsequent to the issuance of a final verdict, not being applicable during the pre-trial or trial phases. Existing regulations lacking appropriate protective measures for mentally disordered offenders in the pre-trial and trial phases. Therefore it is difficult for a mentally disordered offender in pre-trial detention to be placed in a suitable environment, apart from the time that they are being evaluated in the YGAP.

2226 Article 100 of the TCCP regulates that: (1) An arrest warrant may be issued for a suspect or defendant if there is substantial evidence indicating a strong suspicion of a committed criminal offence and a compelling reason for arrest. An arrest warrant may not be issued if it is deemed disproportionate to the gravity of the offence or the potential punishment or security measure that may be imposed. (2) A reason for arrest may be deemed to exist in the following cases: a) If there are concrete facts that raise the suspicion that the suspect or accused is fleeing, hiding or will flee, or b) If the behaviour of the suspect or accused creates strong suspicion of destroying, concealing or altering evidence, attempting to put pressure on witnesses, victims or others.

2227 Article 57 is regulated under Part III: Sanctions of the TCC. It is notable that the TCCP does not contain any specific regulations pertaining to the pre-trial detention of mentally disordered offenders.

During my visit to the YGAP Hospital in Ankara, I was informed that this situation results in significant practical challenges. In instances where a suspect or accused arrives to one of the recently established high security forensic hospitals for stationary mental health assessment for the criminal procedure, and it is determined that the person presents a danger to themselves or others; there is no alternative means of ensuring their continued detention within the forensic mental facility beyond the legal period of stationary stay.[2228] Consequently, in order to safeguard the safety of the public and the individual in question, these facilities are applying to the civil courts for a civil care order. Even though this is not an uncommon practice in the other two justice systems, there it is despite the fact that there are suitable environments for these offenders in the prison system, in Türkiye the remedy is needed because of the lack of suitable environments in (remand) prison.

3.3.2.2 Practices in England and Wales

A number of judgments of the ECtHR concern the treatment of mentally disordered offenders in the United Kingdom, in which violations of Article 3 were concluded. [2229] To commence with the fundamental *Keenan v. the United Kingdom* judgment, which exemplifies how inadequate medical monitoring and treatment of individuals with mental disorders who are at risk of self-harm and suicide (as mentioned in subsection *3.3.1 Obligation to Protect the Life of Individuals in a Vulnerable Position and the Life of Vulnerable Individuals (Article 2))* may even contravene Article 3.[2230] As previously stated in *Chapter 2*, Article 3 constitutes an absolute right, thereby precluding any form of derogation. Therefore it has been recommended in literature that courts consider alternatives to custody, such as non-custodial sentences or disposals under the MHA 1983, when there is a realistic possibility that imprisonment would result in severe mental distress or self-harm.[2231] Individuals under state custody must be safeguarded from *a real and immediate* risk of suicide, which constitutes a duty under Article 2;[2232] accordingly, the ECtHR assesses whether the relevant authorities were aware, or should have been aware, that the individual in question posed a genuine and imminent risk of suicide. In the event that such awareness existed, the Court then determines whether the authorities took all feasible measures to avert that risk.[2233] Nevertheless, it is contended in literature that vesting responsibility for mentally disordered offenders solely with the Justice Secretary is insufficient to safeguard

2228 According to Article 74 of the TCCP:
(3) The period of the stationary mental examination shall not exceed three weeks. If this period is not sufficient, upon the motion of the public medical centre, a ruling may be made and the additional terms not exceeding three weeks each may be given; the sum of the terms shall not exceed three months.

2229 *M.S. v. the United Kingdom,* App no 24527/08, (ECtHR, 03 May 2012), §46; *Aswat v. the United Kingdom,* App no 17299/12, (ECtHR, 16 April 2013), §58; *Keenan v. the United Kingdom,* op. cit., §116.

2230 *Keenan v. the United Kingdom,* op. cit., §89-102; *Z and Others v. the United Kingdom,* App no 29392/95, (ECtHR, 10 May 2001), §75.

2231 O'Loughlin (2021), p. 102.

2232 *Keenan v. the United Kingdom,* op. cit., §89-102.

2233 *Keenan v. the United Kingdom,* op. cit., §93.

them from harm or to absolve courts of their obligations under Articles 2 and 3 of the ECHR. This is because it is necessary for courts to proactively identify offenders with mental health disorders and divert them into treatment when feasible.[2234]

Another case regarding the treatment of mentally disordered offenders is the *M.S. v. the United Kingdom*.[2235] The case considers whether the authorities complied with their obligation to safeguard a mentally disordered vulnerable applicant from treatment contrary to Article 3 of the Convention.[2236] The applicant was detained under s.136 of the MHA 1983.[2237] During the 72-hour detention at the police station, his condition rapidly deteriorated. Despite the clear recommendation from medical professionals that the applicant required appropriate psychiatric treatment, this was not provided.[2238] Consequently, the applicant's situation was found not to be in accordance with the standards of medical practice in England. As the applicant was under the complete authority and control of the state; the Court ruled that the state was obliged to safeguard the applicant's dignity given its responsibility for the treatment the applicant received. It was stated that the situation arose essentially as a result of difficulties in coordination and communication amongst the relevant authorities when suddenly confronted with an urgent mental health case. Despite the absence of any deliberate intention of the state to humiliate or degrade the applicant, the Court nevertheless ruled that the treatment to which the applicant was subjected constituted an infringement of human dignity and crossed the threshold of degrading treatment within the meaning of Article 3.[2239]

Another relevant case before the ECtHR is the *Aswat v. the United Kingdom*.[2240] The case concerned an applicant facing an extradition proceeding.[2241] The applicant alleged that if extradited and convicted, he would face a significant risk of mistreatment, either as a consequence of the conditions of his potential incarceration or the length of his prospective sentence. The Court establishes that the States have the right to regulate the entry, residence, and expulsion of aliens.[2242] However, while exercising this right, Contracting States must comply with the requirements set forth in Article 3 of the Convention, which safeguards a fundamental value of democratic societies. The ECtHR has consistently emphasised, in numerous cases concerning extradition, expulsion, or deportation to third countries, that regardless of the conduct of the person in question, the guarantees set out in Article 3 must be respected.[2243]

2234 O'Loughlin (2021), p. 112.

2235 *M.S. v. the United Kingdom,* op. cit., §46.

2236 *M.S. v. the United Kingdom,* op. cit., §39.

2237 S.136 of the MHA 1983 regulates the removal of the mentally disordered person, who is in immediate need of care or control, to a place of safety without a warrant.

2238 *M.S. v. the United Kingdom,* op. cit., §44.

2239 *M.S. v. the United Kingdom,* op. cit., §45-46.

2240 *Aswat v. the United Kingdom,* op. cit., §58.

2241 The applicant was arrested under s. 73 of the Extradition Act 2003. The applicant was transferred to Broadmoor Hospital in accordance with the United Kingdom's mental health legislation, on the grounds that he met the criteria for detention.

2242 *Aswat v. the United Kingdom,* op. cit., §49.

2243 *Aswat v. the United Kingdom,* op. cit., §49.

As previously discussed in *Chapter 2*, the detention of a person with a mental disorder may give rise to concerns under Article 3 of the Convention; moreover, the lack of appropriate medical care may be deemed a violation of Article 3. Consequently, in cases of individuals with mental disorder, it is necessary to assess whether the specific conditions of detention are in conflict with the standards set forth in Article 3. This assessment must consider their inherent vulnerability and their potential inability to communicate effectively or at all about the impact of any given treatment.[2244] It is imperative to exercise heightened scrutiny when evaluating compliance with the Convention in cases where the individual in question is experiencing a mental disorder, as this often manifests as feelings of inferiority and powerlessness. In order to ascertain the compatibility of an applicant's health with their detention, three particular elements must be considered: (a) the medical condition of the detainee, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of the applicant.[2245]

In the case of *Aswat*, the applicant was diagnosed with paranoid schizophrenia, with auditory hallucinations, hence, the First-Tier Tribunal determined that the applicant's detention and treatment in a medical hospital was crucial for safeguarding his health and safety.[2246] In light of the aforementioned considerations, the ECtHR has determined that the key issue in determining whether the extradition of the applicant would contravene Article 3 is the nature of the conditions of detention and the availability of medical services.[2247] Ultimately, the Court concluded that there is a substantial likelihood that the extradition of the applicant to a different country and to an alternative, and potentially more hostile, environment precipitate a notable decline in his mental and physical well-being, and that this deterioration could potentially reach the threshold set out in Article 3 of the ECHR.[2248] Hence, the ECtHR ruled that *"there would be a violation of Article 3 of the Convention in the event of the applicant's extradition solely on account of the current severity of his mental condition"*.[2249]

In England and Wales, it has been established that the prison system can readily present an elevated risk of harm to prisoners with mental disorders.[2250] Despite the availability of a range of options for sentencing courts to divert vulnerable convicts from harmful prisons, the number of offenders found not guilty by reason of insanity remains relatively

2244 *Aswat v. the United Kingdom*, op. cit., §50.
2245 *Dybeku v. Albania*, op. cit., §42; *Melnik v. Ukraine*, App no 72286/01, (ECtHR, 28 March 2006), §94; *Aswat v. the United Kingdom*, op. cit., §50.
2246 *Aswat v. the United Kingdom*, op. cit., §51.
2247 *Aswat v. the United Kingdom*, op. cit., §52.
2248 *Aswat v. the United Kingdom*, op. cit., §57; *see also. Bensaid v. the United Kingdom*, op. cit., §37.
2249 *Aswat v. the United Kingdom*, op. cit.
2250 O'Loughlin (2021), p. 98.

low on an annual basis.[2251] In 2015, the Court of Appeal in the case of *Vowles*[2252] advised judges that a *hybrid order* is the *"usual course"* and should be considered *first* when sentencing a mentally disordered offender convicted of an imprisonable offence.[2253] In analogy with the case law on sentencing offenders with physical disabilities, it has been argued that sentencing courts have an obligation under Article 2 and 3 of the ECHR to protect vulnerable mentally disordered offenders from harm in prisons.[2254]

The Ministry of Justice's enduring policy also states that mentally disordered offenders *"should receive specialist mental health treatment rather than being punished, wherever that can safely be achieved"*.[2255] The policy provides an incentive for courts to consider alternative sentencing options, such as treatment, in cases where there is no risk to public safety. Furthermore, the courts are expected to assume a proactive role in diversionary measures. Therefore, courts are strongly encouraged to utilise the non-punitive disposals available for convicted offenders under the MHA 1983, and this is *not merely aspirational*.[2256] This is done in order to fulfil the obligations set out in Articles 2 and 3 of the ECHR. Nevertheless, the obligation of sentencing courts to protect the rights of convicted mentally disordered offenders has been widely criticised as being grossly disregarded.[2257] In the case of *Qazi (2010)*[2258], the Court of Appeal ruled that sentencing judges are entitled to consider the arrangements put in place by the Justice and Health Secretaries' arrangements for prisoners with mental or physical health needs.[2259] Furthermore, the court held that in extreme cases imprisonment might itself constitute a breach of Article 3.[2260] Furthermore, the court acknowledged that in certain extreme cases, *"a court cannot, in considering its own obligations under Article 3, simply rely on legal provisions as to the duties of the Secretary of State for Justice; it is the actuality of the performance of those duties…that is an essential consideration"*.[2261] Consequently, this obligation is borne by the public authorities entrusted with the execution of sentences and by the courts responsible for determining the appropriate form of sentencing.

However, also within the hospital situation, Article 3 can come into play. For example in 2011, the situation in a psychiatric hospital was identified as an *extreme example of abuse*,

2251 There are no published annual statistics of not guilty by reason of insanity (NGRI) findings. The latest figures are from 2012, when 30 people were found NGRI. RD Mackay, "The Insanity Defence in Operation" [2014] 65 NILQ 153.

2252 *Vowles* [2015] EWCA Crim 45, [2015] 1 W.L.R. 5131, [2015] 2 WLUK 161.

2253 *Vowles* [2015], §51.

2254 O'Loughlin (2021), p. 99.

2255 Ministry of Justice. (2008, March). *Mental Health Act 2007: Guidance for the courts on remand and sentencing powers for mentally disordered offenders*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/614497/guidance-for-the-courts-mha.pdf, accessed 22 January 2024.

2256 O'Loughlin (2021), p. 100.

2257 O'Loughlin (2021), p. 100.

2258 *R v Qazi [2010] EWCA Crim 2579; [2011] 2 Cr. App. R. (S.) 8;* cited by O'Loughlin (2021), p. 100.

2259 *Qazi* [2010] EWCA Crim 2579; [2011] 2 Cr. App. R. (S.) 8, at [35]; cited by O'Loughlin (2021), p. 100.

2260 *Qazi* [2010] EWCA Crim 2579; [2011] 2 Cr. App. R. (S.) 8, at [35]; cited by O'Loughlin (2021), p. 100.

2261 *Qazi [2010] EWCA Crim 2579; [2011] 2 Cr. App. R. (S.) 8, at [27];* cited by O'Loughlin (2021), p. 100.

due to poor-quality care, inadequate care planning, and an overreliance on restraining individuals.[2262] Furthermore, the CPT's visit to a hospital in 2021 revealed that there had been an alleged incident of verbal abuse of a racist nature, and the CPT considered that this behaviour constituted a form of ill-treatment.[2263]

3.3.2.3 Practices in the Netherlands

A number of judgments of the ECtHR can be found concerning the situation of execution of sentences in the Netherlands, in which violations of Article 3 were found.[2264] The most prominent case is the *Murray v. the Netherlands* judgment. He suffered from a mental illness and was convicted to a life sentence in the Netherlands Antilles in 1980. The Court established in this case – next to the right to a review, as will be discussed in the next subsection – that the evaluation of the compatibility of specific conditions of detention with the standards set forth in Article 3 must consider the vulnerability of these individuals and, in certain instances, their inability to articulate or express their experiences in a coherent manner regarding the impact of any particular treatment.[2265] The ECtHR recognised that there are certain mental health problems for which there is no known treatment or the treatment is extremely challenging to administer.[2266] At that time, there was no legal provision for the placement of mentally disordered offenders in the Netherlands Antilles; therefore, the applicant was placed in a prison setting, despite having been diagnosed as *a retarded, infantile and narcissistic young man whose character structure had a serious disturbance of a psychopathiform nature*.[2267] The obligation to provide individuals with personality disorders with meaningful rehabilitation opportunities to become eligible for potential release was emphasized.[2268] To underscore the significance of the case, the words of Judge Paulo Pinto de Albuquerque resonate. In his partly concurring opinion, he states that regardless of the severity of the crime committed, no prisoner deserves to be treated in the manner of "*forgotten human waste*".[2269]

2262 *See.* Department of Health (2012). *Department of Health Review: Winterbourne View Hospital, Interim Report,* p. 7, <https://assets.publishing.service.gov.uk/media/5a7b5f1ce5274a319e77ed8d/Department-of-Health-Review-Winterbourne-View-Hospital-Interim-Report1.pdf> accessed on 23 July 2024.

2263 CPT (2022), p. 62.

2264 *Murray v. the Netherlands,* op. cit., §127; *Van der Ven v. the Netherlands,* op. cit., §45; *A. v. the Netherlands,* App no 4900/06, (ECtHR, 20 July 2010), §151; *Lorse and Others v. the Netherlands*, App no 52750/99, (ECtHR, 04 February 2003), §74; *Sylla v. the Netherlands*, App no 14683/03, (ECtHR, 06 July 2006), §62.

2265 *Murray v. the Netherlands,* op. cit., §106.

2266 *Murray v. the Netherlands*, op. cit., §108.

2267 *Murray v. the Netherlands*, op. cit., §117.

2268 *See.* Concurring Opinion of Judge Silvis in *Murray v. the Netherlands*, op. cit., p. 51.

2269 *See.* Partly Concurring Opinion of Judge Pinto de Albuquerque, *Murray v. the Netherlands*, op. cit., p. 69, §21.

In the judgements of *Sylla*[2270] and *Lorse and Others*[2271], the Court assessed the conditions of the Extra Security Institution (*Extra Beveiligde Inrichting,* "EBI")[2272] within the Dutch prison system (not intended for security risks based on mental disorder, but on organized crime or terrorism), and ruled that they constitute a violation of Article 3. The CPT has also published findings regarding the EBI,[2273] both in 1997[2274] and 2002.[2275] It is the view of the CPT that a prisoner should not be held in a special security unit for a period longer than is necessary in light of the risk they present. This necessitates the implementation of periodic reviews of placement decisions. It is essential that such reviews are based on the continuous assessment of the individual prisoner by staff who have received specialised training in carrying out such assessments.[2276] The ECtHR ultimately ruled that the conjunction of routine strip-searching with the other rigorous security protocols within the EBI constituted a violation of Article 3 of the Convention, amounting to inhuman or degrading treatment.[2277] The judgement is a reminder that whereas such grave restrictions can be legitimized based on an individual assessment, it cannot be part of a general regime.

As mentioned in the previous subsection, which examined the practices in England and Wales,[2278] the ECtHR established in a judgment against the Netherlands that while the Member States exercise their right to regulate the entry, residence, and expulsion of aliens, they must comply with the requirements set forth in Article 3.[2279] In light of the aforementioned considerations, the Court determined that there are compelling reasons to believe that the applicant would be subjected to treatment that is prohibited by Article 3 of the Convention if he were to be expelled.[2280] Consequently, in such cases, the Member States should assess initially whether the extradition of the applicant would contravene Article 3 is the nature of the conditions of detention and the availability of medical services.[2281]

2270 *Sylla v. the Netherlands,* op. cit., §47-50.

2271 *Lorse and Others v. the Netherlands,* op. cit., §32-46.

2272 The EBI is intended for both remand prisoners and convicted prisoners. *See.* <https://www.dji.nl/justitiabelen/volwassenen/regimes-en-doelgroepen/ebi> (accessed 10 November 2024).

2273 Findings and the Government's response are cited by the ECtHR in *Van der Ven* judgement. *See. Van der Ven v. the Netherlands,* op. cit., §32-35.

2274 CPT (1998), p. 25-29.

2275 The Council of Europe. (2002). *Report to the Authorities of the Kingdom of the Netherlands on the visits carried out to the Kingdom in Europe and to the Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in February 2002, (CPT/Inf (2002) 30).* Retrieved 2024 November, from https://rm.coe.int/16806977e7, p. 27.

2276 CPT (2002), p. 27, para. 41.

2277 *Lorse and Others v. the Netherlands,* op. cit., §74.

2278 *See. Aswat v. the United Kingdom,* op. cit., §49.

2279 *A. v. the Netherlands,* op. cit., §142.

2280 *A. v. the Netherlands,* op. cit., §150-151.

2281 *A. v. the Netherlands,* op. cit., §144-151; *Aswat v. the United Kingdom,* op. cit., §52.

Even though the CPT makes its recommendations specific to particular circumstances; it is still possible to generalise some of them made for the Netherlands over the years with regard to possible ill-treatment within forensic psychiatric hospitals. The CPT recommends that the cells without natural light[2282], call services, fire alarms, or video surveillance cameras shall be taken out of service;[2283] every detainee, including those under isolation, get at least one hour of outdoor exercise daily;[2284] in cases where instruments of physical restraint is used, or disciplinary sanctions are applied; it should be recorded in a central register, with the times which it started and ended, the circumstances of the case, and the legal justification for it.[2285]

In conclusion, to effectively safeguard the most fundamental human rights of the detainees with mental disorders, Member States must conduct regular inspections with specific intervals to assess the situation and quality of care in these institutions.

3.3.3 Long Detention – Possibility of Review (Articles 3, 5/1(e), and 5/4)

In accordance with Article 3 of the ECHR, it is incumbent upon the States to guarantee that the conditions of detention are in accordance with the principles of human dignity and that the manner and method of execution of the measure do not subject the individual to "*distress*" or "*hardship*" beyond the predictable amount of suffering that is acceptable and normal in detention.[2286] The ECHR does not prohibit the imposition of a life imprisonment sentence on an adult offender, nor is it incompatible with Article 3.[2287] However, the Court has determined that the imposition of an "*irreducible life sentence*" on an adult *might* raise an issue under Article 3.[2288,2289] In *Murray v. the Netherlands*, it was established that this issue may emerge in instances where there is no prospect of release, no possibility of review, or no periodic review mechanism for such sentences.[2290] In the event of a life sentence being handed down, the national legislation must establish a mechanism for the periodic review of such sentences with a view to their commutation, remission, termination or the conditional release of the individual concerned, in accordance with the provision set out in Article 3. Furthermore, the Court has ruled that a convicted person cannot be detained unless there are legitimate penological reasons for detention, including rehabilitation.[2291]

2282 CPT (1998), p. 46; CPT (2012), p. 47.
2283 CPT (1998), p. 46.
2284 CPT (1998), p. 46.
2285 CPT (1998), p. 47.
2286 *Kafkaris v. Cyprus*, op. cit., §96; *Kudła v. Poland*, op. cit., §92-94.
2287 *Kafkaris v. Cyprus*, op. cit., §97; *Murray v. the Netherlands*, op. cit., §99; *Khamtokhu and Aksenchik v. Russia*, op. cit., §72; *Sanchez-Sanchez v. the United Kingdom*, op. cit., §79.
2288 *Kafkaris v. Cyprus*, op. cit., §97; *Murray v. the Netherlands*, op. cit., §99; *Khamtokhu and Aksenchik v. Russia*, op. cit., §72; *Sanchez-Sanchez v. the United Kingdom*, op. cit., §79.
2289 *Kafkaris v. Cyprus*, op. cit., §97; *Murray v. the Netherlands*, op. cit., §99; *Khamtokhu and Aksenchik v. Russia*, op. cit., §72; *Sanchez-Sanchez v. the United Kingdom*, op. cit., §79.
2290 *Murray v. the Netherlands*, op. cit., §92, 99; *Vinter and Others v. the United Kingdom*, op. cit., §119-122.
2291 *Murray v. the Netherlands*, op. cit., §100.

Accordingly, a review is required to enable domestic authorities to assess whether changes in rehabilitation have occurred during the term of this life sentence to such a degree that continued detention is no longer justified.[2292] The ECtHR rules that human dignity is the essence of the ECHR, therefore depriving an individual of their freedom without seeking rehabilitation and providing them with the opportunity to regain that freedom would be incompatible with this essence.[2293]

For deprivation of liberty under Article 5/1(e), in accordance with the case law of the ECtHR pertaining to the right to judicial review of the lawfulness of detention based on Article 5/4, the person of unsound mind who is detained for an indefinite or long period of time has, in principle, the right to initiate legal proceedings before a court *at reasonable intervals* to challenge the lawfulness of their detention, in cases where there is no automatic periodic review of a judicial character.[2294] Hence, failure or refusal to order a new psychiatric assessment amounts to a violation of Article 5/4, as this article provides detained persons with the right to actively seek a judicial review of their detention.[2295] In this regard, the *medical assessment* must be sufficiently recent to allow the authorities to assess the current situation of the person concerned at the time the application for discharge is examined.[2296] Consequently, persons of unsound mind who are compulsorily restrained in a psychiatric institution for an indefinite time or long period are also entitled to take proceedings at reasonable intervals before a court to put in issue the lawfulness of their detention, in accordance with Article 5/1(e) and Article 5/4.

Below, the significant issues in three criminal justice systems related to this issue will be discussed under separate subsections.

3.3.3.1 The Absence of Regulations on Review, and the Situation of Offenders with Diminished Responsibility in Türkiye

As previously outlined in *Chapter 3*,[2297] the Turkish criminal justice system, Article 32 of the TCC regulates criminal responsibility – imputability. The initial paragraph introduces a distinct criterion in comparison to the subsequent paragraph:

> *(1) A person lacking the ability to perceive the legal meaning and consequences of the offence or having considerably lost the capacity to control their actions due to having a mental disorder cannot be subject to any punishment. However, security measures are imposed on such individuals.*
>
> *(2) Even if not to such an extent as stated in the first paragraph, a person lacking ability to control or direct their actions in respect of the offence committed by them is sentenced to twenty-five years imprisonment instead of aggravated life imprisonment and to twenty years imprisonment instead of life imprisonment. In other cases, up to one sixth of the punishment*

2292 *Murray v. the Netherlands*, op. cit., §100-101.
2293 *Murray v. the Netherlands*, op. cit., §101.
2294 *Stanev v. Bulgaria*, op. cit., §171.
2295 *Ruiz Riviera v. Switzerland*, op. cit., §66.
2296 *Ruiz Riviera v. Switzerland*, op. cit., §60.
2297 *See. 3.1.2 Mental Disorder as an Exemption.*

to be imposed may be abated. The entire or part of the penalty imposed may be applied as a security measure specific to mentally disordered persons, provided that the sentence period remains the same.

Article 57 of the TCC establishes the security measures that are applicable to individuals with mental disorders.[2298] Its second paragraph reads that *"A mentally disordered person on whom security measures have been imposed, may be discharged from the health institution where they are receiving treatment under the court's or judge's decision, if the report prepared by the health commission of the institution states that their release carries no risk to the community, or if there is a risk that it is considerably diminished"*. Nevertheless, this discharge criterion can only be applicable to the mentally disordered offenders who are found to have no criminal responsibility. Those with diminished responsibility, according to Article 32/2, should remain in these institutions until the period set by the competent court has been completed. Consequently, offenders with diminished responsibility are unable to request a review of their detention. This regulation may raise an issue under Article 5/4 of the ECHR.

A further issue pertaining to diminished responsibility. Article 32/2 reads that *"The entire or part of the penalty imposed may be applied as a security measure specific to mentally disordered persons, provided that the sentence period remains the same"*. However, a gap exists in the criminal justice system, in that there is no regulation concerning the execution of a partly imposed security measure and partly imprisonment, nor which of these should take precedence. During my visit to the YGAP Hospital in Ankara, I was informed that there are cases in which the offender has been found to have no criminal responsibility with respect to one alleged crime but has been deemed fully responsible with respect to others. In such cases also, there is no regulation or guideline in place to determine which placement should come first: the imprisonment or the security measure.

In accordance with Article 57 of the TCC, individuals with no criminal responsibility are eligible for discharge by the execution judge when their level of dangerousness is assessed to have significantly diminished by the institution. Nevertheless, there is no provision for an automatic periodic review to assess the dangerousness. Furthermore, due to the absence of a time limit until the next review, the foreseeability is restricted. This raises, thus, a significant issue regarding Articles 3, 5/1(e) and 5/4. Moreover, as stated under the *3.2.2.1 YGAP Hospitals in Türkiye* subsection, there is no regulation, by-law or guideline on how to assess the development and dangerousness level of detainees with mental disorders who have received security measures from the criminal court as a sanction for the crime(s) committed. In order to avoid any potential violations by the ECtHR, it is essential that Türkiye makes the necessary amendments to provide the (automatic) possibility of (actively seeking) judicial review at reasonable intervals with a view to its commutation, remission, termination or the conditional release of the detainee, with the assistance of a recent mental health report.[2299]

2298 *See.* ANNEX 2- Relevant Articles of the Turkish Criminal Code.

2299 Criteria can be found in *Kafkaris v. Cyprus*, op. cit., §98; *Ruiz Riviera v. Switzerland*, op. cit., §66; *Stanev v. Bulgaria*, op. cit., §171.

3.3.3.3 Long-Term Detention under a Hospital Order in England and Wales

In England and Wales, long-term detention can be reached through a long, life or extended sentence, or within a hospital order possibly with a restriction order or with a hospital and limitation direction (hybrid order). In the latter two, discharge procedures differ due to the perspective of public safety: release cannot just be the decision of the clinic.[2300] However, periodic review from the perspective of legal protection is present in the regulations and in practice. With the framework of the hospital order there are certain regimes that involve long-term restrictions. The first one is the *long-term segregation* and the second is the long-term detention for learning disabilities and autism.

According to the MHA Code of Practice, the *long-term segregation* is a situation to reduce a sustained risk of harm to others, which is constant.[2301] A multidisciplinary assessment and a representative of the responsible authority determine that a patient should not freely mix with other patients on the ward or unit for long periods. The setting should not be more restrictive than necessary, and this means that it should be as homely and personal as the risks allow.[2302] Furthermore, patients should not be isolated from contact with staff or denied the opportunity to therapeutic interventions.[2303] The treatment plan of the patient should clearly state the reasons why long-term segregation is required so that these reasons can be reviewed during the evaluation.[2304]

During the CPT visit of 2016, the long-term segregation issue was examined in Ashworth and Broadmoor high secure hospitals.[2305] The CPT criticised the regime, since the patient could be kept in the same condition for years with minimal human contact, which is often not face-to-face or meaningful, but instead via the hatch in the door to the room of the patient.[2306] The CPT observed that patients are hospitalised for treatment and that long-term segregation cannot be considered conducive to their treatment, as in some cases it seems that long-term segregation is nothing more than a containment measure where patients receive medication but practically no human interaction.[2307] Moreover, when the patients' reports were examined, it was found that there were no certain criteria for release from long-term segregation; and the patients certainly did not know what the requirements were, other than to be "non violent".[2308] It was, therefore, concluded that in certain cases the effect of the long-term segregation could amount to inhuman or degrading treatment.[2309] In 2021, long-term segregation was implemented in the high

2300 In accordance with s.45A (hybrid order), following the completion of treatment in a hospital setting, the offender may be transferred back to prison to serve the remaining period of their sentence.
2301 MHA 1983 Code of Practice (2015), para. 26.150.
2302 MHA 1983 Code of Practice (2015), para. 26.151.
2303 MHA 1983 Code of Practice (2015), para. 26.152.
2304 MHA 1983 Code of Practice (2015), para. 26.157.
2305 CPT (2017c), p. 83-86.
2306 CPT (2017c), p. 83.
2307 CPT (2017c), p. 82.
2308 CPT (2017c), p. 84.
2309 CPT (2017c), p. 81; CPT (2022), p. 74.

secure hospitals, in the CPT's visit of 2021, it was reported that long-term segregation was also in medium and low secure mental health units.[2310] It is recommended by the CPT that all mental health departments in the UK make efforts to reduce the use of long-term segregation by using less restrictive measures as much as possible and that the duration of long-term segregation is also shortened.[2311]

The current Mental Health Act (1983) does not define learning disabilities as a mental disorder, as set out in Part I, Section 1. Nevertheless, individuals may still be detained in accordance with Part III of the MHA, as a forensic detention. for assessment purposes and under Section 3 if they present with a co-occurring psychiatric disorder that is not a learning disability or autism.[2312] It is notable that as of October 2022, 39% of individuals with learning disabilities and autistic persons in inpatient settings have been detained under Part III of the MHA.[2313] In November 2021, 2,085 individuals with a learning disability and/or autism were detained under the MHA, of whom 200 were under the age of 18.[2314] The average length of detention under the MHA was 5.4 years.

Individuals with learning disabilities and those on the autism spectrum who are admitted to inpatient facilities are especially vulnerable to criminalisation. It was reported that an inappropriate inpatient environment can result in an autistic individual exhibiting distressed behaviours in response to a sensory overload; hence, restrictive practices in long-term segregation may also contribute to the emergence of more aggressive and destructive behaviour.[2315]

The placement of individuals with learning disabilities and/or autism in secure settings has been a long-standing issue, with concerns raised that such placements are not always appropriate as they lead to long-term institutional care.[2316] A committee working a new draft legislation stated that appropriate community alternatives be established, and subsequently, the prolonged detention of individuals with learning disabilities or autism in unsuitable facilities must be terminated.[2317]

2310 CPT (2022), p. 74.

2311 CPT (2022), p. 75.

2312 Joint Committee on the Draft Mental Health Bill. (2023). *Draft Mental Health Bill 2022: Report of Session 2022-23*. Retrieved November 2024, from https://committees.parliament.uk/publications/33599/documents/182904/default/, p. 50.

2313 JCDMHB (2023), p. 50.

2314 *See*. Learning Disability Services Statistics: https://digital.nhs.uk/data-and-information/publications/statistical/learning-disability-services-statistics/at-november-2021-mhsds-september-2021-final/ (accessed 10 November 2024).

2315 JCDMHB (2023), p. 56.

2316 Joint Committee on Human Rights. (2019). *The detention of young people with learning disabilities and/or autism: Second Report of Session 2019*. Retrieved November 2024, from https://publications.parliament.uk/pa/jt201919/jtselect/jtrights/121/121.pdf, p. 8.

2317 JCDMHB (2023), p. 58.

3.3.3.3 Dutch Long Stay Facilities and Possibility of Review

Under this subsection, the Dutch concept of long stay (recently the term *Langdurige Forensisch Psychiatrische Zorg,* LFPZ, is used) status and facilities within the TBS-system shall be discussed, within the scope of Articles 3 and 5/1(e) and 5/4. Subsequently, the issue of possibility of review in TBS centres will be presented.

As explained in *Chapter 3*, a TBS-patient that remains a danger to society despite intensive treatment, can receive a long stay status from the Minister and be transferred to the *long stay* unit[2318] of a forensic clinic. The TBS measure is explicitly intended to reintegrate the convicted mentally disordered offender into society without posing danger.[2319] However, a part of the population of patients subject to compulsory hospitalisation is no longer treated with an aim of reintegration into society because it has been determined that further treatment would be pointless.[2320] In other words, this group is said to be untreatable (*onbehandelbaar*).

The *long stay*, concept dates back to April 1999, when a first unit on the premises of FPC Veldzicht was introduced.[2321] The *long stay* ward was established in a highly secured forensic facility for permanently dangerous offenders who showed no improvement despite many years of treatment.[2322] Now, only the FPC Pompestichting has two LFPZ-facilities, one in Zeeland and a crisis unit in Vught. As criteria for placement, the TBS-patient has to have undergone all relevant treatment options – preferably in at least two institutions – without this having led to a substantial reduction in the risk of re-offending, and no possibilities are seen to place the offender elsewhere in the mental health system in a way that would adequately safeguard the security of society.[2323] This may mean that the length of treatment before placement in long stay is variable.[2324] Supervised leave is only possible for a selected group of short term low risk.[2325]

2318 In order to briefly mention the circumstances of the *long stay* units; the CPT reported that the material conditions and living conditions were *very good. "Patients are accommodated in individual rooms, measuring 12m2. All rooms have good access to natural light, are well ventilated and equipped (including screened sanitary facilities) and have a small balcony. As regards the daily regime, the patients are allowed to move freely within the compound during the day.", see.* CPT (2012), p. 45.
However, the CPT was *very concerned* that the psychiatrists were present only for a limited time, as one part-time psychiatrist visits the "long stay" wards of the Pompe Institute in Zeeland every week. *"Patients are accommodated in individual rooms, measuring 12m2. All rooms have good access to natural light, are well ventilated and equipped (including screened sanitary facilities) and have a small balcony. As regards the daily regime, the patients are allowed to move freely within the compound during the day.", see.* CPT (2012), p. 45.

2319 Deenen (2007), p. 26.

2320 Deenen (2007), p. 26.

2321 CPT (2012), p. 44.

2322 CPT (2012), p. 44.

2323 Deenen (2007), p. 30.

2324 Deenen (2007), p. 30.

2325 DJI, Straffen en maatregelen: <https://www.dji.nl/justitiabelen/forensische-zorg/straffen-en-maatregelen> accessed 05 May 2024.

The objective of the long stay units is threefold: to protect society from the risk of criminal offences by these patients; to provide care to the patients to optimise their quality of life and minimise the risk of recidivism; to provide care at a lower cost than a regular treatment unit.[2326] The National Placement Advisory Committee (*Landelijke Adviescommissie Plaatsing*, 142"LAP"), which is a multidisciplinary committee, works as a safeguarding mechanism.[2327] Independent psychologists and psychiatrist assess the request for a long stay decision on the basis of the dossier and recent multidisciplinary reports.[2328] Upon application by the clinic, the LAP assesses the case and advises the Minister, and on behalf of the Minister, the Individual TBS Affairs Department (*Divisie Individuele Zaken*)[2329] makes a decision.[2330] The mentally disordered offender could appeal against the long stay order to the Council for the Administration of Criminal Justice and Protection of Juveniles ("RSJ", *Raad voor Strafrechtstoepassing en Jeugdbescherming*).[2331]

As could be understood from the concept, the aim is not resocialisation or social rehabilitation,[2332] but optimising the quality of their life and stabilise their condition.[2333] In other words, the ultimate goal is not placement back into society, but accepting that they will stay in a secure environment for the rest of their life.[2334] It was stated that for most long stay patients, the measure will end upon death.[2335] Which raises questions from a human rights perspective.

The RSJ considers that *long stay* detainees fail to work towards safe resocialisation.[2336] The CPT observed that the majority of patients were negative about the idea of 'therapy', after experiencing repeated relapses and failures during their lengthy stay in

2326 CPT (2012), p. 44.

2327 The LAP has the task of advising the Minister on the settlement of applications for placement or termination of placement of persons subject to a long-term detention order in a long stay facility. The LAP also advises the Minister every three years on the continuation of the placement. *See.* Article 3 of the Instellingsbesluit Landelijke adviescommissie plaatsing longstay forensische zorg.

2328 The LAP consists of at least six forensic psychiatrists and psychologists, and at least two lawyers, one of whom shall be the chairman of the LAP. A subcommittee shall consist at least of a forensic psychiatrist, a forensic psychologist and, as chairman, a lawyer.
See. Articles 4/1 and 6/2 of the Instellingsbesluit Landelijke adviescommissie plaatsing longstay forensische zorg.

2329 *Divisie Individuele Zaken* decides on the freedoms granted to convicted offenders in the interest of their treatment or reintegration. *See.* < https://www.rijksoverheid.nl/contact/contactgids/divisie-individuele-zaken-diz> Accessed 07 September 2024.

2330 Deenen (2007), p. 32.

2331 Deenen (2007), p. 32.

2332 DJI, Straffen en maatregelen: <https://www.dji.nl/justitiabelen/forensische-zorg/straffen-en-maatregelen> accessed 05 May 2024.

2333 CPT (2012), p. 44.

2334 Deenen (2007), p. 29.

2335 The TBS measure can be extended for maximum of two years by the court, however extensions can be repeated indefinitely. Therefore, the court remains an important reviewing body, in this sense, for long stay TBS patients. *See.* Deenen (2007), p. 35.

2336 RSJ (2020), p. 7.

TBS-centres.[2337] Usually, TBS patients who qualify for long stay have no or little awareness of their illness; hence they see no need or desire for treatment.[2338] Sometimes, therefore, there is resistance to treatment or refusal to cooperate, and sometimes they explicitly and repeatedly state that they do not want treatment.[2339] The CPT observed that an independent expert committee evaluates patients every two years, and a multidisciplinary body conducts internal evaluations at least once a year,[2340] which is indeed the current policy. For some time now the long stay population includes about 10% of the entire TBS-population (for example in 2011, there were 180 *long stay* patients out of 1800 TBS patients[2341]), and stigma makes it hard for this group to be transferred to follow-up institutions.[2342] Such follow-up facilities were found to be not always adequately equipped for these patients with -possibly multiple- disorders when it comes to necessary risk management.[2343] The CPT alsot noted that the concept of *long stay* contradicts the BVT, since the therapeutic goal of resocialisation is *explicitly abandoned*.[2344] The CPT underlined that the bottlenecks exacerbated by the staff shortages and the increase of the "TBS stigma" are the consequence of an *upstram systematic failure*.[2345]

As both the periodic review of the TBS-order and of the placement on a long stay ward has a frequency of two years, while the placement can also be challenged in between, there seems to be compliance with the ECtHR requirements. However, it is possible to claim that keeping mentally disordered offenders in forensic secured institutions due to their dangerousness, and not providing any treatment aimed at resocialisation or social rehabilitation does not comply with Article 5/1(e). In response, one could argue that there is a frequent review of the status, posing the opportunity to go back to a treatment facility, while the periodic review by the court sometimes leads to (conditional) discharge from the TBS-order of long stay patients. It was reported, again in 2011, that there were 206 long stay forensic patients, and among them, one person received conditional termination, three patients were discharged, and one patient went back to the treatment under hospital order.[2346] Some have argued that the influence of the long stay placement on the chance of release, requires a court instead of a ministerial decision for placement on a long stay ward in light of the ECtHR standards.[2347]

2337 CPT (2012), p. 44, footnote 49.
2338 Deenen (2007), p. 29.
2339 Deenen (2007), p. 29.
2340 CPT (2012), p. 46.
2341 CPT (2012), p. 44.
2342 CPT (2012), p. 44, footnote 51.
2343 RSJ (2020), p. 7.
2344 Emphasis added. *See.* CPT (2012), p. 47.
2345 Emphasis added. *See.* CPT (2012), p. 47.
2346 CPT (2013), para. 77.
2347 *See.* for example Tak, P. (2011). Rechtspraak van het Europese Hof over de Sicherungsverwahrung: lessen voor de longstay. In P.H.P.H.M.C. van Kempen, & Buruma, Y. (eds.), *Levend strafrecht. Strafrechtelijke vernieuwingen in een maatschappelijke context. Liber amicorum Ybo Buruma* (pp. 559-573), Deventer: Kluwer, p. 560.

When it comes to the general possibility of review for the continued lawfulness of the TBS-order under Article 5/4 of the ECHR, there are several ECtHR judgments concerning situations in which the Netherlands had not complied with its own procedural regulations, such as the failure of the public prosecution to submit extension demands in due time,[2348] the failure to hear the appeal against an extension on time,[2349] and the failure to keep an official record of the extension hearing.[2350] These failures should be thoroughly scrutinised.

In the *Winterwerp* judgment, although a civil hospital order case, the ECtHR the Court ruled that a two-week delay in extending a detention order could not be considered unreasonable or excessive.[2351] However, in the *Erkalo* case, the request of the public prosecutor to extend the TBS-order was not received by the Court until two months after the expiry of the statutory period.[2352] Hence the Court, as a result, ruled that after waiting for 82 days, the placement of the applicant was not based on any court order,[2353] and the detention between the date on which the original placement decision expired and the date on which the Groningen Court delivered its judgment was not compatible with the purpose of Article 5.[2354]

In the *Rutten* case, the prolongation request was filled within the statutory time limit, however the court made the case wait for 2 months and 17 days.[2355] The ECtHR ruled that the detention between the expiry of the TBS order and the Regional Court's decision on it cannot be regarded arbitrary, however there was a violation of Article 5/4, since Article 5/4 guarantees the right to take proceedings to challenge the lawfulness of their detention and to receive a speedy judicial decision.[2356] By extending the concept of *speedy judicial decision*, the Court ruled that the appeal cases against a decision on the lawfulness of the detention shall be also speedily, due to the aim and purpose of Article 5/4.[2357]

In the *Schenkel* judgment, the ECtHR ruled that failure to draw up an official report of the hearing disrespects the procedure regulated by the law, and breaches Article 5/1.[2358]

2348 *"There is no express provision requiring the release of the person concerned if the time-limits laid down by Articles 509o § 1 and 509t §§ 1 and 2 are not complied with, nor does the CCP impose any sanctions on exceeding these time-limits.", Erkalo v. the Netherlands,* op. cit., §28.
See also. Prak v. the Netherlands, App no 3869/08, (ECtHR, 24 September 2013). In this case the TBS order of the applicant had expired. The public prosecutor had failed to seek an extension within the prescribed time-limit; however, the applicant was not released. This case concluded with friendly settlement reached by the Dutch government and the applicant.

2349 *Rutten v. the Netherlands,* App no 32605/96, (ECtHR, 24 July 2001), §55; *Schenkel v. the Netherlands*, App no 62015/00, (ECtHR, 27 October 2005), §36-38.

2350 *Nakach v. the Netherlands,* App no 5379/02, (ECtHR, 30 June 2005), §34-44; *Schenkel v. the Netherlands,* op. cit., §32-33.

2351 *Winterwerp v. the Netherlands,* op. cit., §49.

2352 *Erkalo v. the Netherlands,* op. cit., §57.

2353 *Erkalo v. the Netherlands,* op. cit., §57.

2354 *Erkalo v. the Netherlands,* op. cit., §60.

2355 *Rutten v. the Netherlands,* §48.

2356 *Rutten v. the Netherlands,* §52-55.

2357 *Rutten v. the Netherlands,* §53 and 55.

2358 *Nakach v. the Netherlands,* op. cit., §34-44; *Schenkel v. the Netherlands,* op. cit., §32-33.

The same was reiterated in the *Nakach* judgement, in which the Court held that even though the ECHR does not contain a provision requiring the keeping an official record of hearings, the absence of it can only raise questions under the Convention.[2359] Since the examination of the lawfulness of the detention involves assessing compliance with the procedure prescribed by law, the Court finds that this obligation exist in Dutch domestic law.[2360] In the Dutch criminal justice system, if there is no official record of hearings, judgments do not exist, cannot be final, and cannot be subjected to any appeal. As this detention does not follow the procedure prescribed by the national law, the ECtHR finds that Article 5/1 has been violated.[2361]

There was another violation judgment against the Netherlands, on the issue of extension of TBS order, after the maximum term of four years.[2362] In this specific instance, the Regional Court declared the public prosecutor's application on extension inadmissible in 2009, due to the fact that the TBS order cannot be extended lawfully beyond four years, if the crime committed was not against or endangering the physical integrity of a person. The public prosecutor appealed, and the Arnhem Court of Appeal extended the TBS order for one year by changing the judgment of the Regional Court which found the person guilty in 2003, by stating that the Regional Court formulated the judgement with the words "serious interference with ... mental integrity" and "personal suffering and psychological harm", however there is an *omission,* since threatening persons with a gun should be understood as a violence directed not only against the mental integrity, but also the physical integrity.[2363] However, the judgment of the Regional Court was final and unappealable at that time. Thus, the ECtHR rules that the continuation of detention after 2009 was against domestic law, and thus was a violation of Article 5/1 of the ECHR.

In light of this judgment, it can be understood that the court which initially orders the TBS is obliged to determine the scope of the TBS-order and whether it is subjected to a maximum limit according to the current applicable law. Failure to do so would render any extension not *in accordance with a procedure prescribed by law*, and therefore non-compliant with Article 5/1. However, the Supreme Court has ruled that when it is obvious that there was a physically violent element to the offence, this failure is not fatal, and prolongation of the TBS-order is possible.[2364]

All these violations result not from the fact the regulations are not in place, but from the fact that in practice regulations are not followed. So just the fact that regulations are in place, is no safeguard against violations.

2359 *Nakach v. the Netherlands,* op. cit., §36.
2360 *Nakach v. the Netherlands,* op. cit., §37-39.
2361 *Nakach v. the Netherlands,* op. cit., §43-44.
2362 *Van der Velden v. the Netherlands,* App no 21203/10, (ECtHR, 31 July 2012), §13.
2363 *Van der Velden v. the Netherlands,* op. cit., §16.
2364 Hoge Raad, 12-02-2013, ECLI:NL:HR:2013:BY8434.

3.3.4 Right to Legal Aid, Effective Participation, and Fitness to Stand Trial (Articles 5/1(e), 5/4, 6/1, and 6/3(a), (b), (c))

As set forth in the ECHR test, in accordance with the regulations established by the ECtHR, throughout the entirety of the criminal proceedings, the mentally disordered offender is entitled to sufficient legal assistance, as outlined in Article 6/3(c). In the context of *lawfulness* guarantees regulated under Article 5/1(e), it is not always necessary for the relevant judicial proceedings to be attended by the same guarantees as those required under Article 6/1.[2365] Nevertheless, it is of the utmost importance that the mentally disordered offender *should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation.*[2366] It is therefore incumbent upon the relevant authorities to ensure that any mentally disordered offender detained in a psychiatric institution is provided with actual legal assistance in relation to any procedures pertaining to the prolongation, suspension or termination of their detention.[2367] This implies that the right to legal aid does not cease upon the finalisation of the verdict; rather, it persists throughout the execution of the verdict. According to the Court, the nature of the disorder or the condition of the person and the significance of the matter at hand necessitate this outcome.[2368] In a similar manner, mentally disordered offenders are not expected to assume the responsibility of obtaining their legal representation.[2369] In accordance with the case law of the ECtHR, the appointment of a lawyer for the purpose of providing legal assistance to a mentally disordered offender during criminal proceedings is insufficient in itself to satisfy the requirement of "*necessary legal assistance*".[2370] In order to safeguard the rights *that are not theoretical or illusory but practical and effective*,[2371] the ECtHR asserts that the domestic courts are the *ultimate guardians of fairness*.[2372] Consequently, it can be concluded that special procedural safeguards may be needed to protect the interests of persons who are not fully capable of advocating for themselves because of their mental disabilities,[2373] according to the principles derived from the case law on Article 5/1(a),(e), Article 5/4,[2374] and Article 6/3(c)[2375].

Furthermore, in accordance with Articles 5/1(e), 5/4 in conjunction with 6/1, 6/3(a), the High Contracting Parties are obliged to implement additional measures to guarantee that

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2365 *M.S. v. Croatia (No. 2)*, op. cit., §152.

2366 *M.S. v. Croatia (No. 2)*, op. cit., §152; *Stanev v. Bulgaria*, op. cit., §171.

2367 *M.S. v. Croatia (No. 2)*, op. cit., §153.

2368 *Megyeri v. Germany*, op. cit., §23; *M.S. v. Croatia (No. 2)*, op. cit., §153.

2369 *Winterwerp v. the Netherlands*, op. cit., §66; *M.S. v. Croatia (No. 2)*, op. cit., §153.

2370 *M.S. v. Croatia (No. 2)*, op. cit., §154; , op. cit., §35.

2371 *V.K. v. Russia*, op. cit., §35.

2372 *V.K. v. Russia*, op. cit., §39.

2373 In the case of *V.K. v. Russia*, the lawyer appointed by the court concluded that the client should undergo citing the potential benefits to the client as a reason for doing so, without first ascertaining the client's wishes on the matter. The ECtHR accepted that the lawyer's conduct was incompatible with the requirements of effective representation. *See. V.K. v. Russia*, op. cit., §39.

2374 Summarized in *M.H. v. the United Kingdom*, op. cit., §77.

2375 *V.K. v. Russia*, op. cit., §35-38; *M.S. v. Croatia (No. 2)*, op. cit., §152-153.

mentally disordered offenders are furnished with comprehensive information regarding the nature and cause of the charges against them. The authorities are obliged to take supplementary measures to guarantee that individuals with mental disorders are adequately informed of the nature and cause of the accusation against them.[2376]

In first assessing compliance of the three systems to this element of fairness, the Turkish legislation guarantees the right of access to a lawyer for the suspect and the accused at every stage of the investigation and prosecution. According to Article 149 of the TCCP, detainees are free to choose one or more lawyers and be represented by them. As stated in Chapter 3, in Türkiye the legal assistance is assigned for vulnerable persons automatically and free of charge. According to Article 150/2 of the TCCP[2377], when a suspect or a defendant who does not have an appointed lawyer and is incapable of defending themselves, an attorney shall be assigned without their request. This is called *mandatory advocacy (zorunlu müdafilik)*, and therefore the Bar Association must assign a lawyer free of charge. In this way, the defence rights are expected to be protected by the presence of a lawyer. Hence, the presence of a lawyer is always ensured to protect the person's rights during the pre-trial and the trial phase. In practice, the CPT reported some issues regarding the right to lawyer. It recommended that the Turkish authorities adopt the necessary measures to ensure that everyone has the right to a lawyer from the beginning of deprivation of liberty. [2378,2379] It was further stated that the Bar Associations should ensure that the appointed lawyer is present in police station in a diligent and timely manner.[2380]

In England and Wales, individuals with mental disorders who are involved in criminal proceedings or cases concerning mental health assessments, hospital orders, or detention under the MHA 1983 are entitled to legal representation. England and Wales has been at the forefront of ensuring the right to legal representation before police interrogation since the entry into force of the Police and Criminal Evidence Act 1984 ("PACE") in early 1986, preceding the *Salduz* judgment of the ECtHR in 2008. This exemplifies best practice

2376 *"They could have ordered the applicant to attend the appointment with the psychiatrist and to appear at the hearing and, in the event of his failing to comply, arranged for him to be represented by his supervisor or a lawyer. That would have enabled the applicant to understand the proceedings and to be informed in detail of the nature and cause of the accusation against him within the meaning of Article 6 § 3 (a) of the Convention; it would also have enabled the Criminal Court to reach its decision entirely fairly.". See. Vaudelle v. France*, op. cit., §65.

2377 *See.* ANNEX 3 – Relevant Articles of the Turkish Code of Criminal Procedure.

2378 *"Although in law such suspects have a right of access to a lawyer as from the outset of their deprivation of liberty, in practice access to a lawyer is usually only allowed at a relatively late stage of the period of police custody."*, CPT (1999b), p. 80.

2379 The Council of Europe. (2020). *Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 6 to 17 May 2019, CPT/Inf (2020) 24.* Retrieved 2024 August, from https://rm.coe.int/16809f20a1, p. 15.

2380 CPT (2020a), p. 15.

in this field.[2381] As previously outlined in Chapter 3, the PACE 1984 Codes of Practice delineate the procedures that police are obliged to adhere to. In accordance with the PACE 1984, any individual detained by police, including those with mental health issues, is entitled to access legal advice. The PACE Code of Practice C stipulates that mentally disordered detainees or otherwise mentally vulnerable should be provided with supplementary support, including the presence of an "appropriate adult" and explicit explanations of their right to legal representation.

When a mentally disordered offender is detained under a hospital order (under s.37, 41, or 47 of the MHA), they retain the right to legal representation, especially in tribunals and appeals regarding detention. The MHA provides that patients have access to free legal advice funded by legal aid for Mental Health Tribunal hearings, where the legality of their detention can be reviewed. The responsibility for informing patients of their right to free legal counsel and representation falls upon hospital administrators and local government officials.[2382] Independent Mental Health Advocates also support detained patients by explaining their rights and ensuring access to legal representation.[2383] While IMHAs do not replace legal counsel, they help patients understand the legal processes and facilitate communication with lawyers. The legal professionals who represent mentally disordered offenders are expected to adhere to the guidelines set forth by the Law Society[2384] on working with vulnerable clients. It is the responsibility of these lawyers to ensure that communication methods are adapted to the needs of mentally disordered clients and that these clients are made aware of their rights and any legal processes in which they are involved.

In the Netherlands, mentally disordered offenders are 'vulnerable suspects' (*kwetsbare verdachten*). According to Article 28b of the DCCP, when a vulnerable suspect has been arrested, the assistant public prosecutor who, at the arraignment, orders that the suspect be detained for investigation shall immediately notify the Board of the Legal Aid Council of their arrest, so that the Board may appoint a legal counsel. Such notification may be waived if the suspect has chosen a legal counsel, and such counsel can be available in a timely manner. The *Hoge Raad* has ruled that in case of doubt a court should always assess whether the waiving of counsel was done knowingly and willingly.[2385]

For defendants with a mental disorder who are considered incapable of defending themselves, there are safeguards to promote a fair trial set out in the DCCP. According to Article 509a of the DCCP, in cases where it is suspected that the defendant has a mental

2381 Ogorodova, A., & Spronken, T. (2014). Legal Advice in Police Custody: From Europe to a Local Police Station. *Erasmus Law Review, 4*, 191-205, p. 192.

2382 Mental Health Act 1983: Code of Practice, para. 12.6.

2383 *See.* https://www.voiceability.org/about-advocacy/types-of-advocacy/independent-mental-health-advocacy-imha (accessed 07 November 2024).

2384 *See.* https://www.lawsociety.org.uk/topics/client-care/meeting-the-needs-of-vulnerable-clients (accessed 07 November 2024).

2385 Gerechtshof Arnhem, 28-05-2011, ECLI:NL:GHARN:2011:BQ4981.
See. Van der Wolf & Mevis (2022), p. 267.

disorder and, as a consequence of this mental disorder, is incapable of properly representing their own interests, the court shall declare this in a decision.[2386] As soon as possible after this decision, the court shall instruct the Legal Aid Board to appoint a lawyer for the defendant.[2387] With this decision, the powers granted to the defendant by the DCCP shall always be vested in the lawyer.[2388] This infers that in cases where the defendant wishes to appeal against the court decision, the lawyer can oppose and prevent that intention.[2389] In this sense, Article 509d may violate Article 14 of the ECHR, since the lawyer should never fully step into the accused's position.[2390]

Related to the explanations above, the High Contracting Parties must protect the right to be informed and to *effective participation* by taking extra measures to ensure the persons with mental disorders to be informed in detail of the nature and cause of the accusation against them, under Article 6/1 in conjunction with 6/3(a), (c), (d), (e). The right to *effective participation* entails: (i) right to be present, (ii) right to hear and follow proceedings, (iii) right to legal aid, (iv) right to attend the court sessions, and (v) right to explain their own version of events and challenge the arguments.[2391] These rights are applicable also to the prolonging hearings of the security measures. As discussed under *Chapter 2,* the concept of *fitness to stand trial* should be also discussed under the concept of *effective participation*.

As previously explained in *Chapter 3* under the *4.2.1 Fitness to Plead and Stand Trial* subsection, the unfit to plead test in England and Wales is obtained from the case of *R v Pritchard*.[2392] The test encompasses the abilities to comprehend the charges, to instruct legal counsel, to follow the procedural course of the trial, and to present evidence in one's own defence. In the absence of one or more of these abilities, a conventional trial should not proceed.[2393] In order to guarantee compliance with the fair trial guarantees laid down in

2386 No forensic assessment is needed for this decision, however, according to Article 509b Sv, before pronouncing its decision, the court may order a further examination. Articles 196 and 198 Sv regulates that when it is necessary to carry out an examination of the mental capacity of a suspect, and this cannot be adequately carried out in any other way, the judge shall order the that the suspect be transferred to a psychiatric institution for clinical observation, not exceeding the period of seven weeks.

2387 Article 509c Sv.

2388 Article 509d/3 Sv.

2389 Van der Wolf & Mevis (2022), p. 365.

2390 Van der Wolf & Mevis (2022), p. 370.

2391 Van den Anker et al. (2011), p. 130.

2392 Where the prosecution does initiate proceedings, one must be *'of sufficient intellect to comprehend the course of the proceedings in the trial so as to make a proper defence, to challenge a juror to whom he might wish to object and comprehend the details of the evidence'. R v M(John)* case set out the six-point test asking whether the defendant is capable of: *i. Understanding the charges, ii. Deciding whether to plead guilty or not, iii. Instructing solicitors and counsel, iv. Exercising his right to challenge a juror, v. Following the course of proceedings, vi. Giving evidence in his own defence.* Without one or more of these abilities, a conventional trial should not proceed.
See. R v Pritchard (1836) 7 C&P 303; R v M(John) [2003] EWCA Crim 3452; R v Padola [1960] 1 QB 325.

2393 *Ibid.*

Article 6 of the ECHR, the test should require an assessment of the defendant's ability to participate effectively in the proceedings on the offences charged, taking into account reasonable adjustments that can be made to support capacity. The *Criminal Procedure (Insanity) Act 1964*, Section 4 establishes the criteria for determining unfitness to plead.[2394] It is not possible for the judge to find the defendant unfit, without the agreement of at least two medical practitioners.[2395] However, a finding that the defendant is fit does not constitute a determination and therefore does not necessitate evidence from two practitioners.[2396]

The Pritchard test has been criticized for failing to take into account the *decision-making capacity and autonomy of the individual*, which are of central importance in modern practice.[2397] Evidently, the criteria for determining "unfitness" were established in 1836 and do not reflect contemporary medical perspectives on capacity. This may result in miscarriages of justice.[2398] At the time of its formulation, access to legal representation was not widely available, and defendants were not permitted to give evidence in their own defence. Furthermore, the composition of the jury was markedly different from that of modern juries. Consequently, the Pritchard test, in its original form, does not accurately reflect the contemporary trial process, particularly in regard to the defendant's capacity to present evidence and to instruct counsel.[2399] Moreover, it is argued that clinicians do not consistently apply the legal criteria in their assessments,[2400] therefore their clinical assessment of fitness to plea becomes unreliable.

In its reports on *Unfitness to Plead*, published in response to these significant concerns, the Law Commission proposed legal and procedural reforms. It recommended that a defined psychiatric test should be developed and that the Pritchard test should be replaced by a new legal standard.[2401] It argued in that regard that it is not entirely evident how the Pritchard criteria correspond with the distinct examination of "effective participation" as outlined in Article 6 of the ECHR.[2402] In light of the requirements set forth in the *SC v United Kingdom* judgment, it can be argued that the *Pritchard criteria* warrant reconsideration.[2403] According to the *Mental Health and Fair Trial Report* by, the test

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2394 It shall be determined as soon as it arises; and the question of fitness to be tried shall be determined by the court, without a jury. The court may postpone the exercise of its power to decide whether the defendant is fit to be tried, until immediately before the opening of the defence case. *See*. *CrimPR, r.25.10, (2).*

2395 *Lederman [2015] EWCA Crim 1308; [2016]R.T.R. 16.*

2396 *Ghulam [2009] EWCA Crim 2285; [2010] 1 Cr. App. R. 12.*

2397 Brown, et al. (2018), p. 2.

2398 The Law Commission (2016), p. 60.

2399 The Law Commission (2016), p. 60.

2400 Rogers, T.P., Blackwood, N., Farnham, F., Pickup, G., Watts, M. (2009). Reformulating fitness to plead: A qualitative study. *Journal of Forensic Psychiatry and Psychology 20 (6),* 815–834, p. 820.

2401 *See*. The Law Commission. (2016). *Unfitness to Plead Volume 1: Report*. London: Williams Lea Group. Retrieved 08 November 2024, from https://lawcom.gov.uk/project/unfitness-to-plead/ *See also.* Rogers et al. (2009), p. 830.

2402 The Law Commission (2016), p. 63.

2403 *"However, "effective participation" in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any*

should explicitly incorporate decision-making capacity and include an assessment of the defendant's ability to, amongst other capacities: *"a. understand the trial process and the consequences of being convicted; b. give instructions to a legal representative; c. make a decision about whether to plead guilty or give evidence; d. give evidence."*[2404] One should comprehend the charges against one in order to be able to enjoy the right to a fair trial. However, it is equally crucial to understand the potential consequences of being convicted, as this is also a fundamental aspect of this right.

The ECtHR has established that the individual in question should be able to comprehend the fundamental aspects of the proceedings, and this may necessitate the assistance of an interpreter, legal counsel, social worker, or other suitable acquaintance.[2405] This suggests that in instances where the individual is able to follow the proceedings through legal assistance or other forms of assistance, there is no justification for postponing the proceedings.

It should be underlined that very few persons are found to be unfit to plead,[2406] thus professionals are doubtful about the usefulness of the current assessment process.[2407] The bar for being deemed unfit to plead is situated at an excessively high level. Consequently, there is a disconcerting possibility that a defendant exhibiting a profound mental disorder that could potentially hinder their capacity to engage meaningfully in the proceedings, as exemplified by the defendant in the *Berry*[2408] case, may be adjudged fit to plead.[2409] It has therefore been argued that mentally disordered offenders are, therefore, unfairly subjected to criminal trials.[2410]

Evidently the problem is that postponing the proceedings due to unfitness, raises another issue related to Article 6 and receiving a speedy judgement. In the unfitness issue two different requirements of Article 6 collide. It has also been argued that in an adversarial system fitness is more important than in an inquisitorial one.[2411] However, also in the inquisitorial systems of Türkiye and the Netherlands, regulations exist on postponing the proceedings until such a time as the individual is able to comprehend the trial, the accusation and the potential penalties that they may face as a result of the conviction. In cases where it is not possible to ascertain whether the accused will ever

penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence". See. S.C. v United Kingdom, op. cit., §29.

2404 Justice, p. 76.

2405 *S.C. v United Kingdom,* op. cit., §29.

2406 Padfield (2016), p. 81.

2407 Brown, et al. (2018), p. 1.

2408 (1978) 66 Cr App R 156, [1977] Criminal Law Review 750.

2409 The Law Commission (2016), p. 61.

2410 Brown, et al. (2018), p. 1.

2411 Van der Wolf, M., Van Marle, H., Mevis, P., & Roesch, R. (2010). Understanding and evaluating contrasting unfitness to stand trial practices: A comparison between Canada and the Netherlands. *The International Journal of Forensic Mental Health, 9*(3), 245–258.

reach the level of understanding required, it may be beneficial to continue the criminal proceedings in order to reach the substantive truth, by taking additional safeguards to protect the rights of the mentally disordered offender with the assistance of legal aid. As previously stated, the Court rules that the *effective participation* of a defendant in legal proceedings can be safeguarded via the securing of the comprehension of the fundamental aspects of the proceedings, with the assistance of an interpreter, legal counsel, social worker, or other suitable acquaintance.[2412] In the Netherlands, the regulations are not yet aligned with this case law, but that is being amended in the draft proposal for a new Code of Criminal Procedure. However, in practice, national courts are already using 'effective participation' as a criterion.[2413]

After all, in light of the case law of the ECtHR, it is a legal obligation for the authorities to implement additional procedural safeguards to ensure that individuals with mental disorders are adequately informed of the nature and cause of the accusation against them.[2414] Furthermore, it may be necessary to implement unique procedural safeguards to protect the interests of individuals who are unable to fully advocate for themselves due to mental disabilities, [2415] as outlined in the case law pertaining to Article 5/1(e), Article 5/4,[2416] and Article 6/3(c) [2417].

3.3.5 Additional Safeguards; *Speedily* Challenging the Lawfulness of the Detention (Articles 5/1(e) and 5/4)

As demonstrated in Chapter 3, every criminal justice system has their own ways to sentence mentally disordered offenders. Even though the procedure differs from system to system, the detention in hospital or other detention centre shall not violate the rights regulated under Article 5 of the ECHR.

According to Article 5/1(e) and Article 5/4, the procedure followed have a judicial character and provide the person concerned with adequate safeguards for the type of deprivation of liberty at issue; in order to determine whether a procedure provides adequate safeguards, the particular nature of the circumstances in which such proceeding takes place should be taken into account. Safeguards such as legal aid and periodic review, have already been discussed. As an additional safeguard, the possibility to speedily challenge the initial detention will be discussed in more detail here.

In accordance with the case law on Article 5 of the ECHR, an initial detention period may be granted by an administrative authority as an emergency measure provided that it is of short duration and that the individual in question is able to initiate judicial proceedings "speedily" to challenge the lawfulness of any such detention including, where appropriate,

2412 *S.C. v United Kingdom*, op. cit., §29.
2413 Rechtbank Noord-Nederland, 04-03-2021, ECLI:NL:RBNNE:2021:671.
2414 *Vaudelle v. France*, op. cit., §65.
2415 *V.K. v. Russia*, op. cit., §39.
2416 Summarized in *M.H. v. the United Kingdom*, op. cit., §77.
2417 *V.K. v. Russia*, op. cit., §35-38; *M.S. v. Croatia (No. 2)*, op. cit., §152-153.

the justification for it as an emergency measure. Given the fundamental importance of individual freedom, states should ensure that the procedure is conducted with the utmost expediency.[2418] It is important to note that the term "speedily" cannot be defined in absolute terms; rather, it must be determined on a case-by-case basis, taking into account the specific circumstances of each situation.[2419] The circumstances include the complexity of the procedure, the conduct of the domestic authorities and of the applicant, what was at stake, and any particularities of the national proceedings.[2420] The requirement is both relevant for civil (law) commitment and criminal law – respectively based on 5/1(e) and (c) -, as both legal disciplines allow for (emergency) detention without a court order. As it can be expected that mentally disordered offenders are first considered suspects, below only the regulations in criminal law are being tested.

According to Article 19/9 of the Constitution of the Republic of Türkiye, *"A person whose liberty has been restricted for any reason whatsoever shall have the right to apply to a competent judicial authority with a view to obtaining a prompt decision on their situation and their immediate release if the restriction imposed upon them is not lawful"*. According to the TCPC, an objection can be lodged against a detention decision, and the time limit for objection is two weeks.[2421] According to Article 101/3, when detention is demanded, the suspect or accused shall benefit from the aid of a legal representative of their choice or one appointed by the bar association. For mentally disordered offenders, who are unable to exercise their rights for themselves, it is important to have such a regulation that gives their spouse and legal guardian the opportunity to challenge the detention decision. Hence, overall, these regulations regarding pre-trial detention match with the ECtHR test.[2422]

In England and Wales,[2423] the initial criminal law detention is regulated under the PACE 1984. Persons may be detained without charge for up to 24 hours, or with an extension,

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2418 *Khlaifia and Others v. Italy*, op. cit., §131.

2419 *R.M.D. v. Switzerland*, op. cit., §42.

2420 *Mehmet Hasan Altan v. Turkey*, op. cit., §162-163.
For instance, in the case of *Fox, Campbell and Hartley v. the United Kingdom*, the Court found no violation on the release after 44 hours of detention and before considered by a judge; however, in *Petkov and Profirov v. Bulgaria* judgement, the police detention for up to 24 hours while having no judicial remedy available to challenge the lawfulness was considered as a violation of Article 5/4. *See. Fox, Campbell and Hartley v. the United Kingdom,* op. cit., §45; *Petkov and Profirov v. Bulgaria,* App nos 50027/08 and 50781/09, (ECtHR, 24 June 2014), §67-71.

2421 Article 101/5, 104/2, 267, and 268 of the TCPC.

2422 The ECtHR also observes that the Turkish legal system complies with the criteria by stating that: *"The Court observes that in the Turkish legal system, anyone in pre-trial detention may apply for release at any stage of the proceedings and may lodge an objection if the application is rejected. He or she can thus have the lawfulness of the detention reviewed by the ordinary courts even while an appeal to the Constitutional Court is pending.", see. Kavala v. Turkey*, App no 28749/18, (ECtHR, 10 April 2019), §183.

2423 In England and Wales, the legal framework of deprivation of liberty standards ("DoLS"), which are designed to ensure a lawful basis for deprivation of liberty, implemented in April 2009. The main reason behind the DoLS was to close the gap identified by the ECtHR in 2004 with *HL v. the United Kingdom* judgement. These safeguards are intended to secure the best interest of the mentally disordered adults in a care home or hospital for care or treatment for which they lack capacity to consent, however who are not detainable under the MHA. Since DoLS are the standards set for the

up to 36 hours.[2424] The detention may be further extended up to 96 hours for serious cases, only by a judicial authority with legal justification. Furthermore, according to the Habeas Corpus Act 1679, individuals have the right to apply for a writ of habeas corpus, challenging unlawful or arbitrary detention. These laws ensure that initial detention by administrative authority (police) is permissible for a short duration and subject to judicial oversight and challenge, aligning with the principles derived from Article 5 of the ECHR.

In the Netherlands, the regulation of initial detention and the ability to challenge its lawfulness are governed by the DCPC, and it is guaranteed by the Article 15 of the Constitution.[2425] According to Article 58/2 of the DCPC, detention order shall be effective only for a maximum of three days. In case of urgent necessity, the order may be extended once by the public prosecutor for a maximum of three days. Article 69 provides the person with the right to challenge the lawfulness of the detention at any stage through a complaint procedure, similar to habeas corpus. The accused who requests lifting for the first time shall, unless the court immediately decides to grant it, be heard on the request, or at least summoned.[2426]

The aforementioned regulations of the three criminal justice systems guarantee *de jure* compliance with the principles set forth in Article 5 of the ECHR. Through the implementation of judicial review mechanisms and the protection of individual rights, these regulations ensure that the principles set forth in Article 5 of the ECHR are upheld.

3.3.6 Enjoyment of the Rights Without Discrimination (Article 14)

According to Article 14 of the ECHR, *the enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground*, including physical or mental disabilities. Article 1 of Protocol No. 12 regulates the general prohibition of discrimination. The second paragraph specifically regulates that no one shall be discriminated against by any public authorities. According to the ECtHR the notions of discrimination prohibited by both Article 14 of the ECHR and Article 1 of Protocol No. 12 shall be interpreted in the same manner.[2427]

The *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177)* is, unfortunately, only entered into force in the Netherlands, amongst the three compared criminal justice systems.[2428] Türkiye signed the Protocol in 2001, however

non-forensic detention, these are not explained in this dissertation. *See.* Szerletics, A., & O'Shea, T. (2011). *The Deprivation of Liberty Safeguards.* Retrieved July 2024, from Essex Autonomy Project: https://autonomy.essex.ac.uk/wp-content/uploads/2016/11/DoLS-GPR.pdf, p. 1.

2424 S. 41 and 42 of the PACE 1984.

2425 Article 15/2 of the *Grondwet* regulates that any person who has been deprived of his liberty otherwise than by court order may apply to the court for their release. In that case, they shall be heard by the judge within a period to be determined by law. The court shall order immediate release if it considers the deprivation of liberty to be unlawful.

2426 Article 69/2 of the DCPC.

2427 *Pilav v. Bosnia and Herzegovina*, App no 41939/07, (ECtHR, 09 June 2016), §40.

2428 *See.* https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=177 accessed 08 July 2024.

has not yet ratified it; and the United Kingdom has not even signed it. Needless to say, the High Contracting Parties can choose whether or not to ratify in order to be bound by all of these protocols. However, to proactively protect the enjoyment of the rights, it would be appropriate for the United Kingdom and Türkiye to ratify this Protocol as well.

The ECtHR does not find violations solely for Article 14, it is generally in conjunction with other rights. In cases regarding sentencing mentally disordered offenders, Article 14 may be violated, therefore, in conjunction with, for instance, Articles 3, 5, 6, and/or 13. For instance, under the Convention, the right of access to justice is guaranteed in the context of the right to a fair trial under Article 6 and right to an effective remedy under Article 13. The Court has, therefore, dealt with cases involving discrimination in access to justice under Article 14 in conjunction with Article 6.[2429] The ECtHR protects the right to be free from arbitrary deprivation of liberty based on discriminatory grounds, under Article 14 in conjunction with Article 5.[2430] In cases where the right to be free from inhuman or degrading treatment or punishment has been violated based on discriminatory grounds during detention, the Court held that there has been a violation of Article 14 in conjunction with Article 3.[2431] In several cases, however, the court analysed the circumstances under the substantive article and did not find it necessary to separately examine Article 14.[2432]

As mental disorder may be grounds for discrimination, related to criminal justice this has led to opposing arguments. For example, additional safeguards for vulnerable defendants are treating them differently than regular defendants. For substantive law it has even been argued that non-criminal responsibility or insanity doctrines are discriminatory.[2433] However, in general, these regulations are in place as a protection to harsher treatment – of course some security measures also for protection of the public, but the argument that reserving such measures for mentally disordered is discriminatory has already been addressed in subsection *3.1.3.2 Sentences of Preventive Detention* and was countered with referral to Article 5/1(e). Therefore, below only the applicable general regulations in the three systems related to discrimination are tested to this requirement.

Article 10 of the Constitution of the Republic of Türkiye regulates the equality before the law.[2434] According to the regulation, everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect,

2429 *Sâmbata Bihor Greek Catholic Parish v. Romania*, App no 48107/99, (ECtHR 12 January 2010).

2430 *Clift v. the United Kingdom*, op. cit.

2431 *"The authorities have an obligation, which was incumbent on them under Article 14 of the Convention taken in conjunction with Article 3, to take all possible measures to determine whether or not a discriminatory attitude had played a role in adopting the measure totally excluding the applicant from prison life."*; *X v. Turkey*, App no 24626/09, (ECtHR, 09 October 2012), §55.

2432 *See.* for example *Stasi v. France*, App no 25001/07, (ECtHR, 20 October 2011), *D.G. v. Ireland*, App no 39474/98, (ECtHR, 16 May 2002).

2433 For example based on the Convention on the Rights of Persons with Disabilities of the United Nations.

2434 *See.* ANNEX 1 – Relevant Articles of the Constitution of the Republic of Türkiye.

or any such grounds. Measures to be taken for children, the elderly, disabled persons, widows and orphans of martyrs, the invalids, and veterans shall not be considered as violation of the principle of equality. In addition, Article 122 of the TCC regulates hate crimes and discrimination as a crime. Any person who, on the grounds of hatred arising from differences in language, race, nationality, colour, sex, disability, political opinion, philosophical belief, religion or sect; a) prevents a person from selling, transferring or renting a movable or immovable property made available to the public, b) prevents a person from benefiting from a certain service made available to the public, c) prevents a person from being employed, d) prevents a person from engaging in an ordinary economic activity, shall be sentenced to imprisonment from one to three years. Even though, the scope of the article does not seem to be easily implemented in practice, it should be seen as a proactive act of the State to protect the human rights of the citizens.

Article 14 of the Human Rights Act ("HRA") 1998, which applies to England, Scotland, and Wales, regulates the prohibition of discrimination. Article 14 matches with Article 14 of the ECHR word by word, as the HRA 1998 was enacted to *give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.*[2435] The Equality Act 2010 also requires public authorities to take into account the need to eliminate prohibited behaviour and promote equality of opportunity when carrying out their functions. The concept of the Equality Act 2010 includes physical or mental impairments, according to Section 6. According to Section 20 of the Equality Act 2010, when the defendant has a disability, prosecutors should be aware that there can be some reasonable adjustments. Section 20 further provides duty requirements to avoid the disadvantages caused by disabilities of the defendant; by suggesting removing, altering, or providing a reasonable means of avoiding it. Section 21 considers it as a discrimination when authorities fail to comply with a duty to make reasonable adjustments. Prosecutors also need to be aware that these reasonable adjustments by the court may be necessary to realise the right of access to justice under Article 6 of the ECHR, as also reflected in the HRA 1998.

The very first article of the Dutch Constitution (*Grondwet*) regulates the equality. According to the regulation, everyone in the Netherlands must be treated equally in equal circumstances; discrimination of disability or any other basis is not permitted. Furthermore, it was elaborated in the Equal Treatment Act (*Algemene wet gelijke behandeling*). Even though this Act protects the persons from unequal treatment and discrimination; the Act mentions the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status; however not disabilities. Persons in the Netherlands can apply to their local anti-discrimination bureaus,[2436] the Equal Treatment Commission[2437],

2435 The Human Rights Act 1998, Introductory Text.

2436 *See.* "Examples of Good Practice in the Field of Protection and Promotion of Human Rights, In Response to the Invitation by the Commissioner for Human Rights – Example from the Netherlands: Municipal Anti-discrimination Services", p. 1, <https://www.coe.int/t/commissioner/Activities/GoodPractices/Netherlands_antidiscriminationservices.pdf>, accessed 09 July 2024.

2437 Proceedings before the Equal Treatment Commission are free of charge. However the rulings of the Commission are not legally binding.
For more information *see.* Dierx, J, & Rodrigez, P. (2003). The Dutch Equal Treatment Act in Theory

the National Ombudsman, local ombudsmen, or to the local police regarding discrimination.[2438] Furthermore, discrimination is regulated as a crime, under Article 137d of the DCC. To conclude, all three criminal justice systems seem to have the relevant regulations in their domestic law to prohibit discrimination.

It can be stated that all three criminal justice systems prioritise equality and have extensive regulations in place to safeguard the enjoyment of fundamental human rights without discrimination. Although there may be challenges in practice, a commitment to these values should enable the realisation of this goal.

SECTION 4: CONCLUSIONS OF THE COMPLIANCE ASSESSMENT

Chapter 4 of this dissertation addressed the question: *"To what extent do these three criminal justice systems comply with the ECHR test?"* To answer this question, the ECHR test, as designed in Chapter 2, has been used. In the previous sections particular issues for the chosen criminal justice systems were discussed. This section provides a summary of existing and potential incompatibilities with the ECHR test in the three criminal justice systems. Recommendations based on this compliance test will be listed in *Chapter 5*.

4.1 Key Findings for All Three Criminal Justice Systems

First and foremost, it is evident that all three criminal justice systems highly value fundamental human rights and have comprehensive regulatory frameworks in place to ensure the protection and enjoyment of fundamental human rights, including those of mentally disordered offenders. Therefore, regulations on (procedural) safeguards, and subsequent (legal) practices across these jurisdictions generally align with the ECHR test.

The compliance assessment of criminal justice systems in Türkiye, England and Wales, and the Netherlands reveals that most of the examined topics demonstrate compliance with the ECHR test. Nevertheless, there are some issues that require attention. This first subsection will present a summary of the findings that are applicable to all criminal justice systems. The subsequent subsections will provide a summary of the non-compliance and potential non-compliance with the ECHR peculiar to the respective criminal justice systems.

The problem of delays in admission is a common difficulty encountered by all three criminal justice systems. The case law of the ECtHR establishes that the admission of an individual to an appropriate institution must be conducted in a timely manner. Accordingly, any significant delay is incompatible with the required standards. It is not

and Practice. *European Roma Rights Centre*, <https://www.errc.org/roma-rights-journal/the-dutch-equal-treatment-act-in-theory-and-practice>, accessed 09 July 2024.

2438 *Ibid.*, p. 2.

permissible to justify the detention based (in part) on the mental disorder in ordinary prisons on the grounds of a lack of available space in an appropriate institution. It is, however, possible for individuals to be *temporarily* accommodated in an institution that has not been specifically designed for the accommodation of mentally disordered offenders, pending their transfer to the appropriate facility. Such an arrangement would comply with the ECHR test, as long as the waiting period is not excessively long, whilst the person is detained in this temporary institution. In practice, however, it would appear that all three criminal justice systems should urgently identify solutions to address the issue of excessively lengthy waiting periods, most logically through creating more (capacity in) appropriate institutions.

Furthermore, all three criminal justice systems encounter issues pertaining to culturally sensitive psychiatric care, with empirical evidence indicating that migrants may encounter difficulties in articulating emotions in a language that is not their native tongue. Cultural divergences also exert an influence on behavioural treatment, thereby introducing further intricacy to the therapeutic process. In order to more closely align with the standards set forth by the ECHR, all criminal justice systems should enhance language and cultural support in psychiatric settings, including the provision of regular access to qualified interpreters, thereby ensuring the delivery of adequate medical assistance.

4.2 Key Findings for Türkiye

In contrast to the legal systems of England and Wales and the Netherlands, the approach to sentencing and managing mentally disordered offenders in high-security hospitals in Türkiye did not originate in the 20th century, but rather in the 21st. Consequently, it is important to recognise that there may have been (and be) some initial challenges in implementing this new model. This dissertation aims to play a role in supporting this process of development of optimal services, in accordance with international standards and alignment with the ECHR. The recommendations flowing from these key findings aim therefore to contribute to the required amendments of the regulations.

As indicated previously in various subsections, there is a dearth of regulatory frameworks or guidelines governing the procedures and treatments at YGAP Hospitals. At the research proposal stage of this dissertation, there were no high-secure forensic hospitals. During the PhD trajectory, Türkiye began establishing them, yet no developments regarding regulations have occurred. After a five-year period, the YGAP Hospitals can no longer be considered 'new'. Therefore, the relevant authorities should implement a proactive approach to regulate the rights and regulations of forensic patients without delay. Given that the patients are unaware of their rights, related to the specific conditions and circumstances in which they are placed, a lack of awareness of these rights often results in a lack of legal recourse to object to infringements, especially under Article 5 of the ECHR.

These regulations require not only the limitation of the rights and obligations of forensic patients, but also the manner in which treatment should be conducted, the

circumstances under which involuntary treatment may be employed, the criteria for the use of isolation or other restrictive measures, the manner in which dangerousness is assessed, et cetera, and very significantly in relation to Article 5: criteria for prolongation, remission, termination or the conditional release of the detainee.

This lack of regulatory structure may be explained by the inherent characteristics of the Turkish approach. In Türkiye, initiatives are often established prior to the formulation of regulations, which are consequently shaped when the need arises. The public also anticipates that this process will take time. This lack of scrutiny can be attributed, therefore, to the fact that the infringement in question has not attracted significant attention.

It is peculiar that, between 2005 and 2018, the TCC required the establishment of highly secure forensic health institutions, yet there were no such institutions in place. From 2018 to 2024 these institutions were finally established, yet this time, there was no regulatory framework in place governing their organisation and treatment. It is therefore required that a regulation be issued by the YGAP Hospitals, with the joint organisation of the Ministry of Health, Ministry of Justice, and Ministry of Interior, as soon as possible.

Moreover, a paucity of available information, studies, and statistical data on the application of coerced medicine or treatment in the recently established YGAP Hospitals represents a significant challenge. The absence of academic or governmental publications on this subject leads to another problem: that these issues are not even being debated. Hence, this dissertation also aspires to be a catalyst for initiating an academic debate and a subsequently triggering of governmental initiative.

One of the most significant outcomes of the compliance test is the revelation that the existing regulatory framework related to the security measure in Türkiye lacks provisions for mandatory (periodic) (judicial) reviews with defined intervals.

Article 57 of the TCC delineates the security measures that are applicable to individuals with mental disorders. The second paragraph of the article stipulates that a mentally disordered individual who has been subjected to security measures may be discharged from the health institution, at the discretion of the execution judge, provided that the report prepared by the health commission of the institution deems their release to pose no risk to the community, or that the risk is significantly diminished. However, there is no stipulation for an automatic review or timeframe to assess dangerousness. And even then, the detainee is dependent on the initiative of the health commission, or on their own initiative to bring the case before a judicial authority. Accordingly, it is possible in theory that a person could be detained for a period of time that extends to the duration of a lifetime, without judicial review. This gives rise to a major issue concerning both Article 3 and Article 5/4. It is of the utmost importance that the Turkish government enacts the necessary amendments to ensure that it is in compliance with Article 3. This should entail introducing a mandatory (periodic) judicial review of the current indeterminate period, with a view to its prolongation, remission, termination or the conditional release of the detainee.

Another issue is that this criterion for discharge, regulated in Article 57, is only applicable to mentally disordered offenders who are found to have no criminal responsibility. Those with diminished responsibility, as set forth in Article 32/2,[2439] should remain in these institutions until the period set by the competent court has been completed. As a result, those with diminished responsibility are unable to request a review of their detention. This regulation could potentially be in conflict with Article 5/4 of the ECHR.

Even though the compliance assessment is only related to detention frameworks (also) based on mental disorder, to which Article 5/1(e) applies, as a sidenote the absence of any care or treatment options in Türkiye for mentally disordered offenders during the pre-trial and trial phase can be considered problematic in relation to the principle of equivalence of care, or even in relation to Article 3. Article 57 of the TCC establishes that security measures specific to mentally disordered offenders can be imposed only upon the issuance of a final verdict. However, the forensic evaluation before the trial may also be carried out in the YGAP Hospital. In order to ensure further care after the evaluation period, in practice, when dealing with individuals who present a danger to self or others, YGAP Hospitals petition the civil courts for a civil hospital order. But this diversion option is not used frequently, nor is it used before the forensic evaluation can take place, leaving many persons with mental disorders in (remand) prison settings. Therefore, next to increased possibilities for diversion, facilities for care and treatment within the (remand) prison system are recommended.

4.3 Key Findings for England and Wales

The sentencing and handling of mentally disordered offenders in high-security hospitals in England and Wales has been a long-standing practice. Over the years, the problems encountered have been successfully addressed, and as a result, there are few potential issues identified that could infringe the ECHR. So below, only a few issues will be mentioned that may give rise to concern in light of the ECHR.

It has been observed that the placement of individuals with learning disabilities and/or autism in secure settings has been a persistent challenge, particularly in light of concerns that such placements may not always be the most suitable option as they can do with less security. Consequently, establishing appropriate community alternatives is advised. Part of the issue is that these disorders are chronic, meaning that continued

2439 Article 32/2 of the TCC regulates: *"Even if not to such an extent as stated in the first paragraph, a person lacking ability to control or direct their actions in respect of the offence committed by them is sentenced to twenty-five years imprisonment instead of aggravated life imprisonment and to twenty years imprisonment instead of life imprisonment. In other cases, up to one sixth of the punishment to be imposed may be abated. The entire or part of the penalty imposed may be applied as a security measure specific to mentally disordered persons, provided that the sentence period remains the same."*

placement (in a less suitable facility) is likely. A situation of execution which affects the duration of detention may give rise to an issue under Article 5.

Another issue related to the hospital order is the treatability criterion. As it prevents the establishment of a detention based on unsound mind, Article 5/1(e), it is not immediately subject to the test. However, as the court has already established the mental disorder in such a case, it is questionable whether the lack of agreement of the intended hospital and treating physicians may prevent the offender from being placed in an appropriate institution. As prison is the most likely alternative, and care or treatment facilities within the prison system are scarce, this may also give rise to an issue under Article 3. It is evident that seeking the opinion of psychiatrists on the level of security is a justifiable course of action. Nonetheless, entrusting the decision of admission entirely to the hospital, whether or not to admit a forensic patient, may raise such a concern.

Similarly, only indirectly related to the test, is the issue of the indeterminate sentence called IPP, which was abolished in 2012, but which still affect those who were already subject to them. As they are not detained on the basis of a mental disorder, even if it is likely that many of these detainees may be diagnosed as such, long continued detention cannot be based on that. As the Article 5/1(a) remains, over time it becomes hard to prove that the continued detention on grounds of dangerousness is causally connected to the original conviction. The lack of a de facto prospect of release, therefore, could potentially breach Articles 3 and 5/1.

4.4 Key Findings for the Netherlands

The approach to sentencing and managing mentally disordered offenders in high-security hospitals in the Netherlands has its roots in legislation from around the turning of the 20th century. The TBS-order was introduced in 1928, while the predecessor of the civil care referral by the criminal court – the placement in a psychiatric hospital of non-responsible offenders – already existed since 1886. Many encountered issues have therefore already been resolved, but some issues may still be debated in light of the test. Most convictions of the Netherlands by the ECtHR in relation to this subject were related to the fact that regulations were in place, but in practice (in certain cases) not followed. Some of the issues related to the test based on Article 5/1(e) regarding the TBS-order listed below, are assessed somewhat alternatively as the TBS-order is the ECtHR considers its detention to be also based on Article 5/1(a).

The first issue regarding the TBS-order is the combining of the TBS-order with a (long) prison sentence, which is to be executed prior to the TBS order, in cases of diminished responsibility. The ECtHR has ruled that placement in an appropriated facility in such a case is required from the moment the TBS-order comes into effect, since that order is also based on Article 5/1(e). As this means that before that moment, offenders with mental disorders already established by the court may remain in prison, is a formalistic approach

by the court. In practice the situation may be remedied somewhat by the fact that in the Netherlands there are psychiatric centres within the prison system, but their capacity is not nearly enough to admit all future TBS-patients. Especially the substantive argument that a delay in placement will hinder the effectiveness of treatment and thus the length of further detention later – that is used by the ECtHR in delayed admission cases, is a fortiori applicable on this issue.

Another debated issue related to the TBS-order is the status of foreigners in the TBS centres, as they cannot be reintegrated into the Dutch society. Especially for those who cannot to be reintegrated in their country of origin for various reasons, there is a lack of perspective. Also, the treatment of foreign nationals in Dutch TBS centres is therefore confronted with considerable challenges, particularly due to the limitations on social integration leave for those without residence rights, which impede the delivery of adequate psychiatric care. It can be argued that this situation potentially constitutes a violation of Articles 3 and 5 of the ECHR.

A final debated issue related to the TBS-order is the effect of placement on the (formerly so called) long stay units of the Netherlands. In relation to the test, the absence of a treatment aim for reintegration into society is incompatible with the required standards. As this affects the possibilities of terminating the TBS measure and the prospect of release, it has also been argued that the decision to be placed in a long stay facility should be made by the judiciary instead of the ministry, pointing to the requirements of Article 5.

With regards to the civil care referral under Article 2.3 of the Wfz, a similar issue is found as related to the treatability criterion of England and Wales. Criminal courts can only authorize care, but do not have the authority to order civil care. Therefore, in relevant cases the refusal of an institution to admit the patient may prevent the use of the referral. It was disclosed that over a third of civil care referrals initiated by prosecutors are ultimately dismissed, even prior to submission to the criminal court system, primarily due to the presence of a negative medical assessment. There seems to be a reluctance amongst general mental health institutions to admit patients who fall under Article 2.3 of the Wfz. If the alternative is a TBS-order, it is not so much an issue of adequate medical assistance, as it is an issue of necessity or disproportionality – as the TBS-order is considered a much more severe framework. If the alternative is prison, the same issue arises as mentioned above with relation to options for adequate care.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

CHAPTER 5 **CONCLUSIONS AND RECOMMENDATIONS**

Verba volant, scripta manent.[2440]

SECTION 1: INTRODUCTION

The rationale behind this dissertation was to explore how the sentencing process with regards to mentally disordered offenders works within the criminal justice systems of Türkiye, England and Wales, and the Netherlands, while checking their compliance with the relevant European Convention on Human Rights framework.

The subsequent main research question of this dissertation is: "*What are the legal and practical consequences of being a mentally disordered offender related to sentencing in Türkiye, England and Wales, and the Netherlands; and how do provisions and practices compare to each other and to the relevant ECHR framework?*"

In order to respond to this complex research question, every chapter focused on different sub-questions. Chapter 2 answered the sub-question of: "*How do the ECHR and ECtHR case law interpret the applicable legal boundaries related to the sentencing of mentally disordered offenders?*", in order to create the framework of the dissertation. Eventually, in this chapter the following sub-question was answered:"*In the light of the ECHR and ECtHR case law, how can a test for the sentencing of mentally disordered offenders be established?*" Chapter 3 answered the comparative sub-question of "*What are the legal and practical consequences of being a mentally disordered offender related to sentencing in Türkiye, England and Wales, and the Netherlands?*" as well as subsequently sub-question: "*What can be learned from the comparison of three criminal justice systems?*" Since the Turkish criminal justice system is the most unknown, internationally, one of the aims of Chapter 3 was to present the Turkish system to the academia. Hence, the Turkish criminal justice system was explained in greater detail compared to the provided information on England and Wales and the Netherlands. Finally, Chapter 4 addressed the sub-question "*To what extend do these three criminal justice systems comply with the ECHR test*?". As can be derived from the phrasing of the sub-questions, the test created in Chapter 2 is applied in Chapter 4, but strictly limited to the sentences specifically intended for mentally disordered offenders, whereas Chapter 3 takes the broader context of sentencing into account.

Every chapter of this dissertation concluded with a set of conclusions based on the findings presented in that part. In order to avoid repetition, this chapter provides a concise overview of the key findings, followed by recommendations for improving the policies and regulations on sentencing mentally disordered offenders in order to ensure compliance with the ECHR rules and the ECtHR case law.

2440 The Latin proverb offers a concise and elegant formulation of a fundamental truth: verbal communication is volatile, whereas written communication persists.

SECTION 2: KEY FINDINGS

This section provides a brief answer to the research questions posed in the dissertation. Initially, the ECHR test for sentencing mentally disordered offenders, which was developed in Chapter 2, will be presented as a significant outcome of this dissertation. Subsequently, the key findings of the comparative analysis of the three criminal justice systems will be summarised. Finally, the pivotal findings of the compliance test will be outlined.

1.1 The ECHR Test for Sentencing Mentally Disordered Offenders

In light of the explanations provided in Chapter 2 regarding the rights established by the ECHR and ECtHR case law for sentencing mentally disordered offenders, as part of this thesis a framework was constructed for the compliance assessment of the three criminal justice systems.

1). The lawfulness of the detention of mentally disordered offenders (based, in part, on Article 5/1(e)) is contingent upon the following conditions being met:
   a). the individual in question must be shown, by objective medical expertise, to be of unsound mind; however, this is not a prerequisite for emergency detention. It is necessary to establish a true mental disorder before a competent authority on the basis of objective medical expertise.
   b). the individual's mental disorder must be of a kind or degree warranting compulsory confinement. Furthermore, the deprivation of liberty must be demonstrated to be necessary in the circumstances.
   c). the mental disorder, verified by objective medical evidence, must persist throughout the period of detention.
2). During the detention, the following conditions must be met according to Articles 3 and 5/1(e):
   a). Adequate medical assistance must be provided:
      i). To provide the "adequate medical assistance", it is not enough to only examine and make a diagnosis; it is also essential to provide suitable medical supervision by qualified staff, and
      ii). to provide proper treatment, there should be:
         1). comprehensive therapeutic strategy aimed at treating or preventing the aggravation,
         2). treatment aimed at the reintegration into society,
         3). no language barrier blocking the treatment
         4). no coerced (medication) treatment against one's will (Article 8)
   b). For someone detained under Article 5/1(e) the place of detention must be an appropriate institution: the title of the institution does not matter for the purposes of Article 5, only the possibility of treatment does.

i). admission should be done in appropriate time, no significant delay.
ii). appropriate care should be provided there.
iii). staffing situation should be similar to a general psychiatric hospital run in the same country.

3). The High Contracting Parties shall comply with certain relevant positive obligations related to mentally disordered offenders following Articles 2, 3, 5, 6, and 14:
a). Obligation to protect the life of individuals in a vulnerable position and the lives of vulnerable individuals (Article 2)
b). Obligation to protect individuals from proscribed ill-treatment or punishment (Article 3) [2441]
c). Obligation to offer perspective in cases of long detention and specifically life imprisonment (Articles 3, 5/1(e), and 5/4)
d). Obligations related to the right to legal aid (Article 6/3(c)) [2442]
e). Obligation to grant effective participation (Articles 5/1(e), 5/4 in conjunction with 6/1, 6/3(a), (b), (c))[2443]
f). Obligation to provide adequate safeguards in the legal process (Article 5/1(e) and Article 5/4)
g). Obligation to provide the right to 'speedily' challenge the lawfulness of the detention (Article 5/1(e) and 5/4)
h). Obligation to ensure the rights without discrimination of a mental disorder (Article 14)

As mentioned, the ECHR test was developed as a framework for this dissertation, with the aim to assess the compliance of the three chosen criminal justice systems. In fact, the framework may be employed to assess the compliance of other criminal justice systems as well. This ECHR test may assist other criminal justice systems in attaining the highest possible level of protection for fundamental human rights for this specific group of offenders, serving a sentence based (in part) on their mental disorder.

2441 It is also incumbent upon the state to ensure that detainees are held in conditions that are compatible with respect for their human dignity. Furthermore, the manner and method of executing the measure must not expose the detainees to 'distress' or 'hardship' of an intensity beyond the foreseeable amount of suffering inherent in detention. In addition, their health and well-being must be adequately safeguarded, taking into account the practicalities of imprisonment. This may be achieved, among other ways, by providing them with the necessary medical assistance.

2442 It is not always necessary for the judicial proceedings to be accompanied by the same guarantees as those required under Article 6/1 for civil or criminal litigations. Nevertheless, it is imperative that the individual in question be afforded access to a court of law and the opportunity to be heard in person or through the assistance of legal representation. In instances where an individual is unable to fully advocate for themselves due to mental disabilities, special procedural safeguards may be necessary to safeguard their interests. (Article 5/1(e) and Article 5/4)

2443 The "*necessary legal assistance*" shall be provided during criminal proceedings to protect the right to be informed and to effective participation. It is the responsibility of the High Contracting Parties to implement additional measures that guarantee the comprehensive and detailed information of mentally disordered offenders regarding the nature and cause of the charges against them.

1.2 Key Findings of the Comparison

Chapter 3 provided an overview of the criminal justice systems of Türkiye, England and Wales, and the Netherlands. This served first, to establish a significant foundation for the assessment of compliance with the ECHR test, but second, took a broader perspective to understand the imposition of sentences for mentally disordered offenders in the broader context of criminal (procedural) law and mental health law, in order to aid a comparative analysis.

As established at the outset of Chapter 3, the terms "mental disorder" is used in this dissertation to refer to all mental health conditions, as this term is more comprehensive. As a group often referred to in international literature, the term "mentally disordered offender" is employed as an umbrella term for individuals who are within the criminal justice system as suspects, defendants or convicts and have a mental disorder. They include those who are unfit, not criminally responsible, not imputable, or have diminished responsibility. However, in Chapter 4, for the most part, the compliance assessment is restricted to mentally disordered offenders serving a sentence that is (in part) based on the legal establishment of their mental disorder (to which the requirements of Article 5/1(e) apply). In this thesis the term 'sentence' is used in a broad sense to include all modalities available to the criminal (sentencing) court, like penalties, security measures and disposals to the (forensic) mental health system.

It is evident that each of the three criminal justice systems is characterised by a distinct set of regulations and challenges. Furthermore, each system has its own distinctive approach to safeguarding society and providing care for offenders with mental disorders. These systems employ security measures (hospital orders) or disposals to facilitate treatment and care for offenders, either in addition to or instead of a sentence. Section 6 of Chapter 3 sought to synthesise and emphasise the key differences between the criminal justice systems of Türkiye, England and Wales, and the Netherlands. Additionally, an in-depth analysis was provided on the fundamental aspects of criminal law, criminal procedural law, and execution law within these systems.

From the comparison of the general information associated with the three chosen criminal justice systems, the primary difference is their classification as either civil or common law jurisdictions. The criminal justice system in England and Wales provides an illustrative example of a common law system, whereas the Turkish and Dutch criminal justice systems are of a civil nature. The procedural system in England and Wales is therefore classified as an adversarial system, which includes the involvement of lay persons in the judicial process. In contrast, the Turkish and Dutch systems are characterised as inquisitorial and do not permit the participation of lay persons or juries, in criminal decision-making procedures. However, there are a few exceptions to this rule in the Netherlands, where lay participation in court proceedings is permitted in certain instances.

The most relevant difference in the area of substantive criminal law is related to the relationship between mental disorder, crime and punishment. In England and Wales, the insanity defence precludes the possibility of establishing guilt. In the event of insanity, the verdict would be not guilty by reason of insanity. Nevertheless, in the other jurisdictions, the debate extends to ascertain whether and under what circumstances the accused may be excused from criminal responsibility. In the Turkish criminal justice system, the concept of imputability is a prerequisite for an individual to be held accountable for their actions and thus subjected to criminal sanctions. Consequently, the absence of this quality is a personal exemption from such sanctions. Therefore, the establishment of a crime and the subsequent (conditions for) punishment are two distinct processes. Mentally disordered offenders rendered imputable are subject to security measures as a form of verdict, and thus cannot be acquitted. In the Netherlands, in accordance with Article 350 of the DCCP, if the criminal court determines that the offence charged has been proven to be a punishable offence and that the accused is criminally responsible, it shall impose the penalty or measure that is required for the offence. If the court finds that the offence has been proven but that the accused is not punishable for it, the accused shall be acquitted. However, when someone is not punishable based on the relation between mental disorder and offence as referred to in Article 39 of the DCC, the court may also impose a security measure.

Another relevant substantive dissimilarity is related to the concept of criminal responsibility. The Turkish criminal justice system defines mental disorder as a mental state in which an individual lacks the capacity to perceive the legal meaning and consequences of their actions, and has considerably lost the capacity to control their actions due to a mental disorder. Hence, the concept of imputability is defined as a combination of two factors: the *ability to perceive* (anlama yeteneği) and the *ability to will* (isteme yeteneği). In order to be considered imputable, a person must possess both the *cognitive capacity* and *volitional capacity*. In England and Wales, the legal basis for criminal responsibility is derived from the common law system. The M'Naghten Rule forms the basis for acquittal by reason of insanity. The N'Naghten test is based on the assumption that the subject is unable to comprehend the nature and quality of the act, or does not possess the capacity to understand that their actions are wrong. As is evident from the wording of the M'Naghten Rules, the focus is on the "knowing" element and does not extend to the "control over actions" aspect. Consequently, while cognitive capacity is acknowledged, the volitional capacity is not. Nevertheless, no comparable standard of responsibility exists in Dutch legislation; rather, it has been shaped by case law. This is remarkable for a civil law system. Recently, the *Hoge Raad* has actually set the standard for non-responsibility that includes a cognitive capacity (in Dutch literature described as *controle*, control instead of will and phrased by the Hoge Raad as 'to act in accordance with that understanding'). Accordingly, the court has determined that the most pertinent factor in determining the degree of criminal responsibility is not the mere existence of disorder, but rather the extent of impairment and, more specifically, the degree of inability.

Another notable distinction to be highlighted within the domain of substantive criminal law pertains to the concept of diminished responsibility. In the Dutch and Turkish criminal justice systems, this concept is applicable to all criminal acts, with the objective of reducing

the sentence and/or imposing a security measure. In contrast, in England and Wales, (the defence of) diminished responsibility is solely applicable to the offence of murder.

The final issue examined related to substantive criminal law was the distinction between penalty (retributive in character) and security measures (preventive). In England and Wales that distinction is not made, while it is made in Türkiye and the Netherlands. Where in these inquisitorial jurisdictions sanctions applicable to mentally disordered offenders are considered security measures, in England forms of preventive detention may be part of penalties and security and treatment for mentally disordered offenders are established through a connection with (general) mental health law: hospital order. Recently, in the Netherlands a civil care referral for the criminal court shows some similarities with the hospital order.

A significant difference related to criminal procedure is that in the Turkish and Dutch criminal justice systems, a guilty plea is not a recognised legal instrument. The court is the sole arbiter of guilt, and a confession is merely one piece of evidence in the case file. In England and Wales, however, defendants may opt to plead guilty to all or some of the charges during the investigation.

The concepts of fitness to plead and/or fitness to stand trial due to a mental disorder are distinct in each of the three criminal justice systems. The Turkish criminal justice system does not recognise the concept of fitness to plead, whereas in England and Wales, the unfitness to plead is regulated. However, very few individuals are found to be unfit to plead. In the Netherlands, an equivalent to an unfitness test does exist, which is noteworthy given the nature of the inquisitorial system, in which the fact that the judge is the fact-finder instead of a referee for the parties doing the inquiry renders the role of the defendant less active. However, even fewer individuals meet that threshold.

All three criminal justice systems have regulations pertaining to the remand of an individual to a medical observational facility for the purpose of diagnosing any underlying mental disorders and issuing expert reports in instances where such an evaluation is deemed necessary. However, the period of remand varies. In Türkiye, the period of stationary detention in a medical facility for the purpose of conducting a mental health examination shall not exceed three weeks. Extension of this period is permitted, with the total duration not exceeding three months, provided that the additional time is necessary and justified. In England and Wales, the maximum period of placement in a psychiatric facility is 28 days, with the possibility of an extension of up to 12 weeks at the discretion of the court. In the Netherlands, the maximum duration is 7 weeks, with the examining magistrate permitted to extend the order by a further 7 weeks.

The verdicts reached in the criminal justice systems of different countries also vary with regard to mentally disordered offenders. It should be noted that all three criminal justice systems have a number of verdicts that may be applied to all offenders. These include acquittal, dismissal, judicial fine, community service, and measures relating to assets. In Türkiye, the mentally disordered offender may be found guilty, found guilty but not criminally responsible (judgement of not imposing a penalty), found guilty but with diminished responsibility, and/or placed under a security measure. In England and Wales,

the mentally disordered offender can be found guilty, found not guilty by reason of insanity, or convicted of manslaughter for murder charges in cases of diminished responsibility. In the Netherlands, a mentally disordered offender may be found guilty, found guilty but not criminally responsible (dismissal of all charges), and/or subject to a TBS order – or combination sentence (imprisonment and TBS order) in cases of guilty but diminished responsibility.

With regard to the execution phase of the criminal justice system, it must be acknowledged that each system has its own distinctive approach to detention and care of mentally disordered offenders. In England and Wales, such institutions have a long and esteemed history, with the Dutch TBS clinics also enjoy a reputation on the international stage. However, in Türkiye, the recently established YGAP Hospitals represent a novel approach to the management of mentally disordered offenders.

In England and Wales, there is no clear distinction between forensic and non-forensic hospitals. Nevertheless, all forensic mental health facilities are integrated into the National Health Service, and there are no forensic hospitals within the prison system. In the Netherlands, forensic care may be administered in: a) the penitentiary system, mainly in the PPC's; b) the TBS system; and c) the (forensic) mental health system, which is subject to civil (mental) health legislation. Consequently, each system has its own dedicated facilities. In Türkiye, the recently established YGAP Hospitals represent a novel concept in the country's forensic healthcare system. Even though the concept of highly secured health institutions was initially codified in the Turkish Criminal Code of 2005, the first construction projects commenced in 2018. Currently, there are six operational YGAP hospitals.

There are of course also differences in the external and internal legal position of the mentally disordered offenders placed in these institutions. As some important aspects of these – termination and coerced medication for example – are part of the compliance test, be addressed in the next sub-section.

1.3 Key Findings of the Compliance Test

Chapter 4 of this dissertation addressed the sub-question of "To what extent do these three criminal justice systems comply with the ECHR test?" The principal aim of Chapter 4 was to present a comprehensive analysis of the imposition and execution of the relevant sentences within the three chosen criminal justice systems, emphasising their compliance with the ECHR framework. In order to provide a response to this sub-question, the ECHR test, as outlined in Chapter 2, was employed. This dissertation primarily addresses the issue of compliance, both with the established provisions and with the prevailing practices. To this end, the ECtHR judgments were utilized as the principal source of information regarding the practices of the chosen criminal justice systems. Furthermore, the CPT reports, domestic judgments, and domestic reports were referenced to provide additional insight into the practices. It was not the purpose of this chapter to highlight

incompatibilities with the intention of offering criticism; rather, it sought to provide inspiration for criminal justice systems by offering examples of best practice and to enhance the enjoyment of fundamental human rights. The intention is that this chapter will be of benefit not only to the three chosen criminal justice systems, but more widely to other systems as well.

This study revealed that all three criminal justice systems highly value the protection of fundamental human rights and have established comprehensive regulatory frameworks to ensure the safeguarding and promotion of these rights, including those of mentally disordered offenders. Consequently, it can be stated that while the majority of the examined topics are in compliance with the ECHR test, there are some issues that require further attention. Rather than reiterating these findings, they will be provided as recommendations to three criminal justice systems to ensure their alignment with the standards set forth by the ECHR in the following section.

SECTION 3: LEARNING FROM THE STUDY

Under this section, relevant key findings derived from previous chapters will be presented as recommendations. The recommendations presented here are derived from Chapter 2, which created the ECHR test, and Chapter 4, which assesses the compatibility of relevant provisions and practices in sentencing mentally disordered offenders in three criminal justice systems with the ECHR test. First some general recommendations are made, after which specific recommendations related to the three criminal justice systems are put forward. If an issue is detected in one of the three systems, where applicable, relevant lessons from (one of) the other countries are brought into that recommendation, as a result of the comparison in Chapter 3.

2.1 Recommendations to Comply with the ECHR Test

2.1.1 General Recommendations

In accordance with the established ECHR test created in Chapter 2, which is based on the ECHR regulations and the corresponding ECtHR cases related to the topic of sentencing mentally disordered offenders, the following general recommendations have been formulated. These recommendations are applicable to all High Contracting Parties in order to ensure compliance with the ECHR and the ECHR case law.

Recommendation 5 is derived from the examination of the three criminal justice systems, as presented in Chapter 4. However, as it is applicable to all High Contracting Parties, it is presented under the general recommendations.

Recommendation 1: 'Human rights do not need to be earned or granted; they are the birthright of all human beings simply because they are human beings'[2444] irrespective of their circumstances. This includes those who have offended, those with mental disorders and those who are mentally disordered offenders, without any form of discrimination. It is therefore imperative that these rights are granted to these individuals, not only through amendments to legislation but also by ensuring that this legislation is complied with in practice.

Recommendation 2: In order to ensure the enjoyment of the most fundamental human rights and to safeguard the ECHR rights *that are not theoretical or illusory but practical and effective,*[2445] it is crucial to implement special procedural safeguards that protect the interests of individuals who are not fully capable of advocating for themselves due to mental disorder.

The High Contracting Parties are under an obligation to implement additional safeguards related to criminal proceedings to guarantee that mentally disordered offenders are furnished with comprehensive information regarding the nature and cause of the charges against them.

Aligned with this obligation is the duty of the relevant authorities to ensure that any mentally disordered offender detained in a psychiatric institution is provided with actual legal assistance in relation to any procedures pertaining to the prolongation, suspension or termination of their detention.

Recommendation 3: All criminal justice systems should fasten the process of placement of offenders detained in a legal framework based on their mental disorder to an *appropriate institution* where *adequate medical assistance* is provided. The admission shall be done in appropriate time.[2446] Accordingly, any substantial postponement is inconsistent with the required standards.

It is not permissible to justify the detention of a mentally disordered offender whose placement is in an ordinary prison on the grounds of a lack of available space in an appropriate institution. The placement in institutions that have not been specifically designed for the accommodation of mentally disordered offenders, pending transfer to the appropriate facility, provided that the waiting period is not excessively long, would be in compliance with

2444 Kelly (2016), p. 2.

2445 *V.K. v. Russia,* op. cit., §35.

2446 The waiting period is determined according to the specific circumstances of each case. Consequently, it would be not appropriate to establish a timeframe that is applicable to all criminal justice systems and cases. In the *Pankiewicz v. Poland* case, the ECtHR deemed a two-month and twenty-five day delay to be excessive. *See. Pankiewicz v. Poland*, op. cit., §45.

the ECHR test. However, in practice, it appears that all three criminal justice systems require urgent consideration of solutions to address the issue of excessively lengthy waiting periods, mainly through creating more (capacity in) appropriate institutions.

Recommendation 4: The High Contracting States are obliged to implement appropriate and effective positive measures to provide persons detained on the basis of their mental disorder with treatment. The appropriate institutions shall provide proper treatment, which is effective and consistent, that aims at reintegration into society with the prospect of release and with a comprehensive therapeutic strategy aimed at treating the disorder or preventing aggravation.

Recommendation 5: Appropriate institutions should implement appropriate and effective positive measures to ensure that language barriers do not impede proper treatment.

This recommendation should be perceived less as a morality of duty than as a morality of aspiration.[2447] Empirical evidence indicates that migrants are likely to encounter difficulties in articulating emotions in a language that is not their native tongue. Furthermore, cultural divergences have an impact on behavioural treatment, thereby introducing additional complexity to the therapeutic process. Consequently, all criminal justice systems should enhance language and cultural support in psychiatric settings in order to ensure the delivery of adequate medical assistance. It should thus be accepted not as a morality of duty, but a morality of aspiration

Recommendation 6: In order to assess the recovery or determine the level of dangerousness, the offender on whom a sentence of detention based on their mental disorder is imposed shall be assessed periodically and persons shall have the access to periodic judicial review.

Recommendation 7: The release should take place immediately when the objective medical expertise brought before the judicial review shows recovery and significant decline in dangerousness, and therefore, there is no medical reason for continuance of the detention (under Article 5/1(e)).

2447 A distinction exists between the morality of duty and the morality of aspiration. The morality of duty establishes fundamental principles without which an ordered society is untenable. In contrast, the morality of aspiration is the morality of excellence, of the fullest realisation of human capabilities. A failure to actualise one or more of these capabilities would not be considered wrongdoing; rather, it would be regarded as a shortcoming or failure to actualise potential. *See.* Murray (1965), p. 624-625; Van der Burg (2009), p. 174.

2.1.2 Recommendations Specific to the Studied Criminal Justice Systems

2.1.2.1 Recommendations for the Criminal Justice System in Türkiye

The approach to sentencing and treating mentally disordered offenders in high-security hospitals in Türkiye diverges from that of England and Wales, as well as the Netherlands, in that it originated in the 21st century. It is therefore important to recognise that there may be some challenges in implementing this new model initially, however in time it should reach a point of enhanced effectiveness in accordance with international standards. The findings of this dissertation support the process of development and alignment with the ECHR. It is hoped that this dissertation and its recommendations will contribute to the necessary amendments of the regulations.

This study is initiated with the objective of analysing the Turkish sentencing system for mentally disordered offenders and facilitating its development. It is not intended to highlight incompatibilities with the intention of criticising it. Rather, it aims to provide inspiration for criminal justice systems by offering examples of best practice and to ensure a higher level of protection of human rights.

Recommendation 1: A regulatory framework should be established to govern the implementation and execution of the security measure for mentally disordered offenders.

In order to safeguard the most fundamental human rights of mentally disordered offenders, it is imperative that an adequate regulatory framework governing their care provision be enacted without delay. This is necessary for the implementation of security measures applicable to mentally disordered offenders in YGAP Hospitals. It is crucial that the aforementioned regulation addresses the manner in which treatment should be conducted, the circumstances under which involuntary treatment may be employed, assessment of the dangerousness level, the criteria for the use of isolation, and criteria for commutation, remission, termination or the conditional release of the detainee, and the automatic periodic assessment of their statutes and dangerousness levels.

Given that the patients are unaware of their rights, this could easily result in a lack of legal recourse to object to infringements.

Recommendation 1a. These regulations should be integrated in the EPSM.

The Law on Execution of Penalties and Security Measures ("EPSM", *Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun*) regulates the principles to be followed in the execution of prison sentences and security measures. Article 1 provides the purpose of the Law which is to regulate the procedures and principles regarding the execution of penalties and security measures. Despite both the title and the purpose of the law referring to 'security measures', the text itself does not contain any specific regulation pertaining

to such measures, including the security measure specific to the mentally disordered offenders.

As explained in Chapter 3, the obligations and rights of the convicts are regulated under both the EPSM and its By-Law.[2448] However, the part where these obligations are regulated in the EPSM is titled *"Rights, Guarantees, and Restrictions of the Convict in Penal Institutions"*. Consequently, during my visit to the YGAP Hospital in Ankara, it became evident that these rights are not extended to convicts placed in the YGAP Hospital under security measures, given that it is not a penal institution. It would be an optimal course of action to implement a regulatory framework that governs the implementation and execution of security measures for mentally disordered offenders in YGAP Hospitals in a new part of the EPSM, rather than in a new law. This would serve to safeguard the rights, especially related to the restrictions, of the convict.

The establishment of a regulatory framework is, thus, recommended to govern the implementation and execution of security measures for mentally disordered offenders. The dearth of academic and governmental publications on the subject represents an additional challenge. The fact that these issues are not even being debated is a matter of grave concern and requires immediate attention.

The recommendations for the criminal justice system in Türkiye will include suggestions derived from the comparative analysis of other criminal justice systems, as delineated in Chapter 3. The following list identifies the most significant issues that require regulatory oversight within the framework, as these can also be identified for the comparable frameworks in England and Wales and the Netherlands:

Recommendation 1b. There should be regulations on the automatic or periodic judicial review to evaluate the level of dangerousness.

One of the most significant outcomes of the compliance test is the identification of a significant gap in the existing regulatory framework related

2448 In accordance with the regulations, the convicts are entitled to consult with a lawyer and notary, participate in cultural and artistic activities, express themselves freely, utilise the library and benefit from periodical or non-periodical publications, make telephone calls, access radio, television broadcasts and internet facilities, receive and send letters, faxes, and telegrams, accept gifts, practise their religion and beliefs, enjoy good health, work, pursue individualisation (right to individualisation), receive education, have visitors, engage in sports and activities, and request special leave.
See. Articles 59-96 of the EPSM, and Articles 72-116 of the By-Law on the Administration of Penal Institutions and the Execution of Penalties and Security Measures ("By-Law", *Ceza İnfaz Kurumlarinin Yöneti˙mi˙ İle Ceza ve Güvenli˙k Tedbi˙rleri˙ni˙n İnfazi Hakkinda Tüzük*).

to security measures in Türkiye for the provisions for mandatory (periodic) (judicial) reviews with defined intervals. This constitutes an issue concerning both Article 3 and Article 5/4.

The Turkish criminal justice system is lacking provisions for the systematic monitoring of both the status of detainees and their levels of dangerousness. In theory, therefore, it is possible that an individual could be detained for a period extending beyond their lifetime, without judicial review. Given the importance of this matter, in order to avoid any potential violations by the ECtHR, it is essential that Türkiye makes the necessary amendments to provide the (automatic) possibility of (actively seeking) judicial review at reasonable intervals with a view to its commutation, remission, termination or the conditional release of the detainee, with the assistance of a recent mental health report.

According to Article 4/6 of the Law on the Execution Judge, the execution judge is responsible for making decisions and carrying out the duties required of the judge or court, including decisions related to offsetting, statute of limitations, and the death of the convict, with regard to the execution of penalties and security measures. In consequence of the aforementioned regulation, the competent execution judge is the judicial authority responsible for approving the discharge request of the treating institution. However, due to the absence of a regulatory framework governing the execution of security measures, there is no automatic or periodic review by the institution or renewal assessment by the judicial authority. As the judicial review depends entirely on the initiative of the hospital, and the initiative of the detainee cannot be expected due to reduced capacities, judicial review would serve as a crucial safeguard for unnecessary lengthy detention.

Regarding this issue the findings of the comparative study could be of assistance, as it would be beneficial to consider the regulations in the criminal justice systems in England and Wales and the Netherlands. The release procedure for hospital orders in England and Wales is markedly disparate; nevertheless, the (option for) judicial review remains consistent.[2449] With its place within the criminal justice system, the Dutch TBS system

2449 The (unrestricted) hospital order is initially granted for a period of six months. However, it may be renewed by the responsible clinician. Following the renewal, the patient is entitled to seek a judicial review by the Mental Health Review Tribunal.
In instances where a restriction order is appended to a hospital order, the decision-making authority regarding the patient's liberty is not vested in the clinical discretion of the attending medical professionals. A restriction order effectively transforms a hospital order into an indefinite duration, negating the necessity for renewals. The patient may be discharged in one of three ways: 1) by the responsible person with the agreement of the Secretary of State (under s. 23), 2) by the Secretary of State (under s. 42), or 3) by the Tribunal (under s. 73 or s. 75).

seems the most relevant comparison for the Turkish security measure. The TBS order is renewed every two years by the court of imposition. As an appeal mechanism, the Penitentiary Chamber exists, which consists of three judicial members and two behavioural scientific members. Discharge is possible when the TBS order is not renewed.

Recommendation 1c. There should be regulations on coerced treatment and restrictive measures.

The absence of a regulatory framework governing the procedure at YGAP Hospitals, including the manner in which treatment should be conducted, the circumstances under which involuntary treatment may be employed, and the criteria for the use of isolation or other restrictive measures, presents a significant challenge.

The *Beginselenwet verpleging ter beschikking gestelden* ("BVT", the Principles Act for TBS Patients) of the Netherlands, which provides the regulatory framework for the care of mentally disordered offenders within the TBS-system, can be considered a pertinent example in this context.[2450]

Recommendation 2. Detention of mentally disordered offenders during the pre-trial and trial phases should take place in a suitable environment.

Currently in the Turkish criminal justice system, security measures specific to mentally disordered offenders can only be imposed upon the issuance of a final verdict. Placement in a suitable environment within the criminal justice system is only ensured for this group awaiting the verdict during the period of evaluation. Only the possibility for a civil hospital order exists, but as these hospitals do not have the required level of security, they cannot (reasonably) be used for all defendants in need of are. And in the (remand) prisons, there are no hospital wings or centres (as are in place in England and Wales and the Netherlands respectively). Therefore, the current situation is deficient in terms of providing adequate care for mentally disordered offenders during the pre-trial and trial phases.

Although the compliance assessment in Chapter 4 was only related to detention frameworks based on mental disorder, to which Article 5/1(e) applies, it is noteworthy that the absence of any care or treatment options in Türkiye for mentally disordered offenders during the pre-trial and trial phase may raise concerns regarding the principle of equivalence of care, or

2450 The treatment of the inpatient may only proceed with the aforementioned individual's consent, or in instances where the patient signed an advanced directive, presents an acute danger to self or others or would otherwise be restricted for an unreasonable amount of time. Article 16a and further of the BVT.

even Article 3. It is therefore important to highlight that, although the pre-trial detention is governed by Article 5/1(c) of the ECHR – and not subparagraph (e), the pre-trial detention should still be in an environment more suitable for care than a prison.

This pre-trial detention can be facilitated and regulated in such a way that it is imposed either within a suitable environment within the penitentiary system – to be created – or through transfer to an YGAP hospital setting, or through a more secure facility within the regular mental health system. Both the criminal justice systems of England and Wales and the Netherlands serve as exemplars in this regard. In England and Wales, the mentally disordered offender may be transferred to the mental health care, by disposals; and in the Netherlands, the mentally disordered offender may be placed under pre-trial detention in the Penitentiary Psychiatric Centre (*Penitentiair Psychiatrisch Centrum*), while also regulations on transfer exist.

2.1.2.2 Recommendations for the Criminal Justice System in England and Wales

The sentencing of mentally disordered offenders to, or placement in, high-security hospitals in England and Wales has been a long-standing practice. Throughout the years, the challenges and issues that have arisen have been successfully addressed. Consequently, the recommendations that emerge from this analysis are correspondingly fewer in number.

Recommendation 1: The treatability criterion for the hospital order should be reconsidered.

Despite the fact that the treatability (or availability of appropriate treatment) criterion precludes the establishment of a detention based on Article 5/1(e); in cases where the court has already established a mental disorder, the lack of agreement between the intended hospital and the treating physicians may prevent the offender from being placed in a suitable environment. As the decision of admission is currently also dependent on the discretion of the hospital, there is no obligation to admit a forensic patient. This raises a significant concern regarding compatibility with Article 3 of the ECHR, since prison is the most likely alternative where care or treatment facilities (hospital wings) are scarce. It is therefore necessary to reconsider this treatability criterion in order to ensure the *requisite medical assistance* to the mentally disordered offenders. [2451]

2451 *"Article 3 of the Convention requires States to ensure that the health and well-being of prisoners are adequately secured by, among other things, providing them with the requisite medical assistance."*, *Murray v. the Netherlands*, op. cit., §105.

Recommendation 2: The continued placement of individuals with learning disabilities and/or autism in secure settings should be regulated with additional safeguards.

In order to comply with Articles 3 and 5/1(e) of the ECHR, mentally disordered offenders shall be placed in an appropriate institution where adequate care is provided. Treatment should be aimed at reintegration and less intrusive means should be employed when possible. The placement of individuals with learning disabilities and/or autism in secure settings without a proper treatment strategy raises an issue, particularly in light of concerns that such placements may not always be the most suitable option, as less secure options are possible. Either appropriate community alternatives should be established, or the prolonged detention of individuals with learning disabilities or autism in such facilities where there is no adequate care or therapy provided should be regulated with additional safeguards, for example similar to those regarding the Dutch long-stay patients (see next sub-section).

Recommendation 3: The status of those who received IPP sentences should be reconsidered.

Similarly to the first recommendation in this sub-section, this third recommendation is only indirectly related to the application of the test in Chapter 4. Despite the abolition of the indeterminate sentence of IPP in 2012, it remains in effect for those who were already subject to it. The continued detention of an individual on grounds of dangerousness – possibly related to mental disorder – may become increasingly challenging to justify, over time. The causal link between the continued detention and the original conviction may therefore diminish, thereby rendering it more challenging to demonstrably justify the detention. Consequently, the absence of a realistic possibility of release may constitute a breach of Articles 3 and 5/1.

2.1.2.3 Recommendations for the Criminal Justice System in the Netherlands

In the Dutch criminal justice system, the TBS order was introduced in 1928, while the precedent for civil care referrals by criminal courts – the placement of non-responsible offenders in psychiatric hospitals – can be traced back to 1886. Consequently, many of the issues encountered have already been resolved, although some may still be open to debate in light of the created ECHR test.

Recommendation 1: With regard to combination sentences, the postponement of the execution of the TBS order, whereby the prison sentence is carried out initially, should be reconsidered.

In assessing the issue of waiting periods for placement in an appropriate institution, the ECtHR seems to adopt a formalistic approach to the combination of a prison sentence, to be executed first, and a TBS order. Even though the mental disorder is already (legally) established during trial, the Court only requires placement in an appropriate institution necessary when the TBS, also based on Article 5/1(e), commences. Hence, such a person may be placed in a prison (governed by 5/1(a)) prior, for possibly a lengthy period.

This formalistic approach, much more based on the morality of duty instead of the morality of aspiration, is especially peculiar in relation to the substantive argumentation related to delayed placement after the commencing of the TBS order. In these cases, late admissions to the appropriate institutions and the delay in the commencement of treatment were found to be problematic, as the aggravation of the condition extends treatment duration and correspondingly prolongs the TBS order.[2452] This is exactly the argument that is also used against the combination of a lengthy prison sentence with a TBS order.

As a result of the comparative analysis, it can be proposed that the Turkish system for sentencing offenders with diminished responsibility may serve as a model for consideration. Article 32/2 of the TCC reads that "*the entire or part of the penalty imposed may be applied as a security measure specific to mentally disordered persons, provided that the sentence period remains the same*". Hence, in cases involving diminished responsibility, the criminal court may opt to impose a security measure in lieu of imprisonment. However, the period must remain the same. The hybrid order in England and Wales can also function as a similar example. Currently, criminal courts in the Netherlands can only advise for an earlier placement to the TBS clinic. Consequently, it could be recommended for the Dutch criminal justice system to implement an amendment that would provide the criminal courts with the discretion to order immediate placement in a TBS-clinic (and possibly set a tariff for the TBS-order). This would enable mentally disordered offenders to receive the proper care in the appropriate institution immediately, instead of serving that fixed period of time in a prison setting.

2452 *Morsink v. the Netherlands,* op. cit., §68; *Brand v. the Netherlands*, op. cit., §58-65; *Nelissen v. the Netherlands,* op. cit., §60.

Recommendation 2: The situation of foreign nationals who are subject to compulsory detention in TBS centres and have no prospect of reintegration into society requires further attention.

This is due to the fact that the aforementioned foreign nationals are prohibited from remaining in the Netherlands and are often unable to return to their country of origin for various reasons. The therapeutic objective of resocialisation is also a requirement of Articles 3 and 5/1(e). The domestic jurisprudence establishes that the objective of re-socialisation for this group should be the reintegration into the country of origin, without lowering the standard of care. In instances where the convict is unable to return to their country of origin, it may be appropriate to consider granting a temporary residence permit for the duration of their treatment, with the aim of facilitating the practice of resocialisation leave. This approach appears to be the most appropriate and humane way to address the potential human rights concerns of foreign nationals.

In cases where such individuals no longer meet the criteria set forth in Article 5/1(e), it is crucial to prioritize their reintegration into Dutch society to prevent infringements. This may entail issuing temporary residence permits, when facilitating safe returns to their countries of origin are not a realistic perspective.

Recommendation 3: The regulations of the (formerly so called) long-stay status within the TBS system should be subject to reconsideration.

The practice of detaining mentally disordered offenders in forensic secure institutions on the grounds of their perceived dangerousness, without a therapeutic treatment objective aimed at reintegration into society constitutes an issue with Articles 3 and 5/1(e). Therefore, in Dutch policy additional safeguards, with an independent assessment of the prolonged necessity of the placement and the possibility of review of prolonged placement by the RSJ every two years, are implemented. However, given that not aiming for reintegration into society is a factor that may influence the possibility of terminating the TBS order and the prospect of release, placement into long-stay facilities should be a judicial decision, rather than a ministerial decision. This approach would be in alignment with the requirements set out in Article 5.

Recommendation 4: The civil care referral under Article 2.3 of the Wfz should be regulated as on order, and not as an authorisation.

Dutch criminal courts lack the authority to order civil mental care, as they can only authorise it. While the criminal court may make a referral, the decision regarding acceptance of the patient is reserved for the institution. It appears that there is a reluctance among general mental health institutions to admit patients who fall under Article 2.3 of the Wfz. If the alternative to the civil care referral is a TBS order, the issue will not be the adequacy of medical assistance, but rather the necessity or disproportionality of the order itself, given that a TBS order is a much more severe framework. On the other hand, if the alternative is imprisonment, an issue arises with regard to the possibility of adequate care.

Therefore, it could be recommended that the civil care referrals be reversed to an order, as it is the case in Türkiye and England and Wales, and was the case in the regulation from which it was derived (former Article 37 of the DCC). Of course, the target group, which is now different, could be expanded beyond the non-responsible in the old situation. But most importantly, this would provide a more definitive and enforceable mechanism.

ADDENDA

1 ACADEMIC SUMMARIES

1.1 Summary

This PhD dissertation focuses on the comparative analysis of the regulations and practices concerning the sentencing of mentally disordered offenders in Türkiye, England and Wales, and the Netherlands, while also assessing these regulations against the framework of the European Convention on Human Rights (ECHR). The research is scientifically relevant as it not only highlights the distinctive legal approaches across different jurisdictions but also aims to enhance understanding of the Turkish criminal justice system, which is less known internationally. The research is societally relevant as it leads to recommendations for aligning legislation and practices regarding the sentencing of mentally disordered offenders with the ECHR-framework in all countries, which is especially helpful in this developing area in Türkiye.

The motivation for this research therefore lies in Türkiye with its previous inadequacies in dealing with mentally disordered offenders. Before 2018, Türkiye lacked secured mental health institutions, which led to offenders being either released back into society or detained in prisons, violating Turkish Criminal Code (TCC) regulations. In 2018, Türkiye established its first highly secured forensic psychiatry hospital (YGAP), but the COVID-19 pandemic delayed the intended rehabilitation of the system. This situation underscores the necessity of examining the Turkish sanctioning system, particularly in relation to mental health.

The dissertation seeks to fill a gap in literature regarding Turkish criminal law by comparing it with the more established systems of England and Wales and the Netherlands. The Netherlands represents a continental European tradition with a one-phase trial process, while England and Wales follow a common law tradition where trial and sentencing are separate. Each system has distinct views on criminal responsibility and varying sanctions for mentally disordered offenders. The Netherlands is noted for its *terbeschikkingstelling* (TBS) system, a legal framework for high-risk mentally disordered offenders, which has gained international recognition.

The dissertation is structured into five chapters. **Chapter 1** introduces the research questions and the relevance of the study. **Chapter 2** establishes an analytical framework based on ECHR regulations and relevant case law, focusing on articles that pertain to the rights of mentally disordered offenders. **Chapter 3** provides a detailed comparative analysis of the three jurisdictions, highlighting their relevant provisions and practices related to sentencing mentally disordered offenders. **Chapter 4** evaluates the compliance of the three systems with the ECHR framework, applying the test developed in Chapter 2. Finally, **Chapter 5** concludes with a summary of findings and recommendations for aligning these legal systems more closely with human rights standards.

Chapter 2 develops an *ECHR test* specifically for sentencing mentally disordered offenders, outlining the rights and obligations that are set out in the ECHR and the ECtHR case law.

According to the ECHR test, the High Contracting Parties shall comply with certain relevant positive obligations related to mentally disordered offenders following Articles 2, 3, 5, 6, and 14. These are the obligation to protect the life of individuals in a vulnerable position and the lives of vulnerable individuals (Article 2), the obligation to protect individuals from proscribed ill-treatment or punishment (Article 3), the obligation to offer perspective in cases of long detention and specifically life imprisonment (Articles 3, 5/1(e), and 5/4), the obligations related to the right to legal aid (Article 6/3(c)), the obligation to grant effective participation (Articles 5/1(e), 5/4 in conjunction with 6/1, 6/3(a), (b), (c)), the obligation to provide adequate safeguards in the legal process (Article 5/1(e) and Article 5/4), the obligation to provide the right to 'speedily' challenge the lawfulness of the detention (Article 5/1(e) and 5/4), and the obligation to ensure the rights without discrimination on the basis of a mental disorder (Article 14).

According to the ECHR test, the lawfulness of the detention of offenders in a sanctioning framework specifically intended for persons with a mental disorder (based on Article 5/1(e)) is contingent upon the following conditions being met: **a)** the individual in question must be shown, by objective medical expertise, to be of unsound mind; however, this is not a prerequisite for emergency detention. It is necessary to establish a true mental disorder before a competent authority on the basis of objective medical expertise; **b)** the individual's mental disorder must be of a kind or degree warranting compulsory confinement. Furthermore, the deprivation of liberty must be demonstrated to be necessary given the circumstances; **c)** the mental disorder, verified by objective medical evidence, must persist throughout the period of detention.

According to Articles 3 and 5/1(e), adequate medical assistance must be provided in an appropriate institution, during the detention. To provide the "adequate medical assistance", it is not sufficient to only examine the individual and make a diagnosis; it is also essential to provide suitable medical supervision by qualified staff. Furthermore, to provide proper treatment, there should be a comprehensive therapeutic strategy aimed at treating or preventing the aggravation of the condition, a treatment (plan) aimed at the reintegration into society, an absence of any language barrier that could block the treatment, and no coerced (medication) treatment against the will of a competent individual (Article 8). For persons detained under Article 5/1(e), the place of detention must be an appropriate institution. The title of the institution is not relevant for the purposes of Article 5; the primary consideration is the institution's capacity to provide treatment. To qualify as an appropriate institution, admission to that institution should be executed in appropriate time without significant delay, the appropriate care should be provided there, and the staffing situation should be similar to a general psychiatric hospital run in the same country.

As mentioned, the ECHR test was developed as an analytical framework for this dissertation, with the objective of evaluating the compliance of the three selected criminal justice systems. This framework can also be utilised to assess the compliance of other criminal justice systems. Consequently, this created ECHR test may assist other criminal justice systems in achieving the highest possible level of protection of fundamental human rights for mentally disordered offenders.

Chapter 3 commences with the establishment of the overarching terminology. The term "mentally disordered offender" is utilised in this dissertation to denote offenders within the criminal justice system who have a mental disorder. This group includes individuals who are deemed unfit, not criminally responsible, not imputable, or have diminished responsibility. The term 'sentence' is employed in a broad sense to encompass all modalities available to the criminal (sentencing) court, including penalties, security measures and disposals to the (forensic) mental health system.

The remainder of the chapter compares the legal and practical consequences of being a mentally disordered offender in Türkiye, England and Wales, and the Netherlands. It highlights key differences arising from their distinct legal traditions — civil law in Türkiye and the Netherlands versus common law in England and Wales. All three criminal justice systems are characterised by a distinct set of regulations, practices and challenges, and each system has its own distinctive approach to safeguarding society and providing care for offenders with mental disorders. Security measures or disposals (hospital orders) are employed to facilitate treatment and care for offenders, either in addition to or instead of a sentence.

One of the most relevant differences in the area of substantive criminal law is related to the relationship between mental disorder, crime and punishment. In England and Wales, the insanity defence precludes the possibility of establishing guilt; in the event of insanity, the verdict would be not guilty by reason of insanity. However, in other jurisdictions, the debate extends to ascertain whether and under what circumstances the accused may be excused from criminal responsibility. Another notable distinction within the substantive criminal law field pertains to the concept of diminished responsibility. In the Dutch and Turkish criminal justice systems, this concept is applicable to all criminal acts, with the objective of reducing the sentence and/or imposing a security measure. In contrast, in England and Wales, the defence of diminished responsibility is solely applicable to the offence of murder. A further distinction pertaining to substantive criminal law is the demarcation between penalties (retributive in nature) and security measures (preventive). In England and Wales, this distinction is not observed; however, it is delineated in Türkiye and the Netherlands.

The procedural system in England and Wales is classified as an adversarial system, which also includes the involvement of lay persons in the judicial process. In contrast, the Turkish and Dutch systems are characterised as inquisitorial and do not permit the participation of lay persons, or juries, in criminal decision-making procedures. However, there are a few exceptions to this rule in the Netherlands, where lay participation in court proceedings is permitted in certain instances. A significant divergence in criminal procedural law is the guilty plea. In the Turkish and Dutch criminal justice systems, a guilty plea does not constitute a recognised legal instrument, thereby affording the court exclusive authority in determining guilt. In contrast, in England and Wales, defendants have the option to plead guilty to all or some charges during the investigation phase.

The concepts of fitness to plead and/or fitness to stand trial due to a mental disorder differ in each of the three criminal justice systems. The Turkish criminal justice system does not recognise the concept of fitness to plead, whereas in England and Wales and in

the Netherlands, the doctrine of unfitness to plead is regulated, albeit very few individuals are found to be unfit to plead (especially in the inquisitorial system of the Netherlands).

All three criminal justice systems have regulations pertaining to the remand of an individual to a medical observational facility for the purpose of diagnosing any underlying mental disorders and issuing expert reports in instances where such an evaluation is deemed necessary. However, the period of remand for such an examination varies.

The verdicts reached in the criminal justice systems also vary with regard to mentally disordered offenders. It should be noted that all three criminal justice systems have a number of verdicts and/or types of sentences that may be applied to all offenders. These include acquittal, dismissal, judicial fine, community service, and measures relating to assets. In Türkiye, the mentally disordered offender may be found guilty, found guilty but not criminally responsible (judgement of not imposing a penalty), found guilty but with diminished responsibility, and/or placed under a security measure. In England and Wales, the mentally disordered offender can be found guilty, found not guilty by reason of insanity, or convicted of manslaughter for murder charges in cases of diminished responsibility. In the Netherlands, a mentally disordered offender may be found guilty, found guilty but not criminally responsible (but not guilty in the sense of blameworthy, leading to the verdict of 'dismissal of all charges'), and/or subject to a TBS order – or combination sentence (imprisonment and TBS order) in cases of diminished responsibility.

Each system employs a distinct approach to the detention and care of mentally disordered offenders, during the phase of execution. In England and Wales, such institutions have a long and esteemed history, with the Dutch TBS clinics also enjoying a reputation on the international stage. However, in Türkiye, the recently established YGAP Hospitals represent a novel approach to the management of mentally disordered offenders. In England and Wales, the distinction between forensic and non-forensic hospitals is not clearly delineated. However, all forensic mental health facilities are integrated into the National Health Service, and there are no forensic hospitals within the prison system. In the Netherlands, forensic care may be administered in three different settings: within the penitentiary system, within the TBS system; and within the (forensic) mental health system, which is subject to civil (mental) health legislation. In Türkiye, the recently established YGAP Hospitals are regulated within the framework of the forensic hospital regime, and there are no forensic hospitals within the prison system.

Chapter 4 evaluates how well the three criminal justice systems adhere to the ECHR test, mainly limited to sentencing frameworks that are specifically intended for mentally disordered offenders. These are the security measure specific to the mentally disordered offenders in Türkiye, the hospital order in England & Wales in its various modalities, the TBS-order and the civil care referral by the criminal court (Article 2.3 Wfz) in the Netherlands. Overall, the analysis indicates that all three systems have established regulatory frameworks that value the protection of fundamental human rights and offer comprehensive regulatory systems. The compliance assessment of criminal justice systems in Türkiye, England and Wales, and the Netherlands reveals that the majority of the

examined topics demonstrate compliance with the ECHR test. There are, however, certain issues that require further consideration.

The issue of delays in admission, mainly due to capacity shortages, represents a common challenge faced by all examined criminal justice systems. The case law of the ECtHR establishes that the admission of an individual to an appropriate institution must be executed in a timely manner. Moreover, all three criminal justice systems confront challenges related to culturally sensitive psychiatric care. Cultural divergences also exert an influence on behavioural treatment, thereby introducing further complications to the therapeutic process. In order to achieve closer alignment with the standards set forth by the ECHR, improvements must be made to create more capacity in appropriate institutions and provide language and cultural support in these settings.

For the Turkish criminal justice system, it is crucial to recognise that there may have been (and are) some initial challenges in implementing this new model of YGAP Hospitals. It is the purpose of this dissertation to facilitate the development of optimal services that are in accordance with international standards and the ECHR. The criminal justice system in Türkiye needs a regulatory framework governing the implementation of security measures for mentally disordered offenders. The establishment of these regulations is necessitated by two principal imperatives: firstly, to delineate the rights of forensic patients, and secondly, to establish the manner in which treatment should be conducted. The regulations should also address the circumstances under which involuntary treatment may be employed, the criteria for the use of isolation or other restrictive measures, the manner in which dangerousness is assessed, and criteria for prolongation, remission, termination or the conditional release of the detainee. Furthermore, the dearth of accessible information, studies and statistical data pertaining to the implementation of placement, treatment and restrictive measures in recently established YGAP Hospitals signifies a substantial challenge.

The compliance test has exposed a critical shortcoming in the existing regulatory framework governing security measures in Türkiye: the absence of provisions for mandatory (periodic) judicial reviews with defined intervals. Accordingly, it is possible in theory that a person could be detained for a period of time that extends to the duration of a lifetime, without judicial review. This gives rise to a major issue concerning both Article 3 and Article 5/4. It is imperative that the Turkish government implements the crucial amendments to ensure compliance with the ECHR.

A further issue is that the criterion for discharge is only applicable to mentally disordered offenders with no criminal responsibility. Those with diminished responsibility should remain in these institutions until a minimum period set by the competent court has been completed. Consequently, those with diminished responsibility are unable to request a review of their detention. This regulation could potentially be in conflict with Article 5/4 of the ECHR.

In England and Wales, the placement of individuals with learning disabilities and/or autism in secure settings has been found to be a persistent challenge, particularly due to concerns that such placements may not always be the most suitable option as they can do with less security. Consequently, the establishment of appropriate community

alternatives is advised. Another issue related to the hospital order is the treatability criterion. The treatability criterion for hospital orders presents challenges, as it may prevent the placement of offenders in suitable environments. Given the court's prior determination of the offender's mental disorder, the absence of consensus between the court and the intended hospital physicians could potentially impede the placement of the offender in a suitable institution. This is particularly problematic when considering that prison is the most probable alternative, and the availability of care or treatment facilities within the prison system is limited. This situation may consequently give rise to an issue under Article 3. In England and Wales, the issue of indeterminate sentences, the IPP, which was abolished in 2012 yet continues to impact those who were previously subject to it, has also been addressed. In the case of prolonged detentions, it becomes challenging to prove that the continued detention on grounds of dangerousness is causally connected to the original conviction (as a requirement of article 5/1(a)), over time. The absence of a de facto prospect of release, therefore, could potentially breach Articles 3 and 5/1.

For the Dutch criminal justice system, the primary issue identified concerning the TBS order pertains to its conjunction with a (long) prison sentence, which is to be executed prior to the TBS order, in cases of diminished responsibility. The argument that a delay in placement will hinder the effectiveness of treatment and thus the length of subsequent detention – the argument employed by the ECtHR in cases concerning delayed admission – is, a fortiori, applicable to this issue. Another controversial issue related to the TBS-order is the status of foreigners in the TBS centres, as they cannot be reintegrated into Dutch society. This is particularly problematic for those who cannot be reintegrated in their country of origin for various reasons, leaving them with a lack of future prospects. The treatment of foreign nationals is therefore confronted with considerable challenges, particularly due to the limitations on social integration leave for those without residence rights, which impede the delivery of adequate psychiatric care. Consequently, it is argued that this situation potentially constitutes a violation of Articles 3 and 5 of the ECHR. Another issue underlined is the impact of placement on the (formerly so-called) long stay units. The Netherlands faces issues related to the long-stay status within TBS facilities, where detention may occur without a clear therapeutic aim for reintegration, raising concerns under Articles 3 and 5/1(e) of the ECHR. Consequently, the argument has been posited that the decision to place an individual in a long stay facility should be made by the judiciary rather than the ministry. The final issue identified in the Dutch criminal justice system pertains to the civil care referral procedure as outlined in Article 2.3 of the Wfz. It is important to note that while criminal courts are empowered to authorise care, they lack the authority to order civil care. Consequently, in cases where an institution declines to admit a patient, such a refusal may preclude the implementation of the referral. In cases where the alternative is a TBS-order, the primary concern is not the adequacy of medical assistance, but rather the necessity or proportionality of the order, given the severity of the TBS-order framework. If the alternative is imprisonment, the issue with regard to options for adequate care arises.

The dissertation concludes with several recommendations listed in **Chapter 5**. These recommendations are aimed at enhancing the compliance of these systems with ECHR standards, also using insights and examples from the comparison between the three criminal justice system. These recommendations include establishing robust regulatory frameworks in Türkiye, reconsidering the treatability criterion in England and Wales, and addressing the long-stay provisions in the Netherlands. The overarching goal is to ensure that the rights of mentally disordered offenders are upheld effectively, thereby fostering a more humane and just criminal justice system across these jurisdictions.

This comprehensive PhD dissertation not only sheds light on the complexities of sentencing mentally disordered offenders but also emphasizes the need for continual reform and alignment with international human rights standards, as well as the benefits of comparative legal research in this respect.

1.2 Samenvatting

Dit proefschrift richt zich op een vergelijkende analyse van de strafrechtelijke wet- en regelgeving en praktijk met betrekking tot daders met een psychische stoornis in Türkiye, Engeland en Wales, en Nederland, waarbij dit bovendiengetoetst wordt aan het Europees Verdrag voor de Rechten van de Mens (EVRM). Het onderzoek is wetenschappelijk relevant omdat het niet alleen de verschillende juridische benaderingen in de drie genoemde jurisdicties belicht, maar er ook mee wordt beoogd het begrip van het Turkse strafrechtsysteem, dat internationaal minder bekend is, te vergroten. Het onderzoek is maatschappelijk relevant omdat het leidt tot aanbevelingen om wetgeving en praktijk met betrekking tot daders met een psychische stoornis in alle landen in overeenstemming te brengen met het EVRM-kader, wat vooral nuttig is voor het zich op dit gebied ontwikkelende Türkiye.

De aanleiding en motivatie voor dit onderzoek ligt in Türkiye, vanwege enerzijds die ontwikkelingen en anderzijds de eerdere tekortkomingen in dit land in hoe er strafrechtelijk wordt omgegaan met daders die aan een psychische stoornis lijden. Vóór 2018 beschikte Türkiye namelijk niet over beveiligde instellingen voor geestelijke gezondheidszorg, wat ertoe leidde dat daders ofwel weer werden vrijgelaten in de maatschappij ofwel werden opgesloten in gevangenissen, wat in strijd was met het Turkse Wetboek van Strafrecht (TCC). In 2018 richtte Türkiye het eerste zwaar beveiligde ziekenhuis voor forensische psychiatrie (YGAP) op, maar de COVID-19 pandemie vertraagde de beoogde implementatie. Deze situatie onderstreept de noodzaak om het Turkse straf-en sanctiesysteem te onderzoeken, met name in relatie tot geestelijke gezondheid.

Dit proefschrift beoogt zodoende een hiaat in de literatuur over het Turkse straf- en sanctierecht op te vullen door het te vergelijken met de meer gevestigde systemen van Engeland en Wales en Nederland. Nederland vertegenwoordigt een continentale Europese traditie met een strafproces in één fase, terwijl Engeland en Wales een common law traditie volgen waarin proces en veroordeling gescheiden zijn. Elk systeem heeft verschillende opvattingen over strafrechtelijke verantwoordelijkheid en verschillende

sancties voor daders met een psychische stoornis. Nederland staat bekend om zijn terbeschikkingstelling (tbs) systeem, een internationaal erkend wettelijk sanctiekader voor daders met een psychische stoornis met een hoog risico.

Het proefschrift is opgebouwd uit vijf hoofdstukken. **Hoofdstuk 1** introduceert de onderzoeksvragen en de relevantie van het onderzoek. **Hoofdstuk 2** stelt een analytisch kader vast op basis van EVRM-regelgeving en relevante jurisprudentie, waarbij de nadruk ligt op die artikelen die rechtstreeks betrekking hebben op de rechten van daders met een psychische stoornis. **Hoofdstuk 3** geeft een gedetailleerde vergelijkende analyse van de drie jurisdicties en benadrukt hun relevante bepalingen en praktijken met betrekking tot de veroordeling van daders met een psychische stoornis. **Hoofdstuk 4** evalueert de overeenstemming van de drie systemen met het EVRM-kader, waarbij de in hoofdstuk 2 ontwikkelde test wordt toegepast. **Hoofdstuk 5** sluit af met een samenvatting van de bevindingen, waarna aanbevelingen worden geponeerd om deze rechtsstelsels meer in overeenstemming te brengen met de mensenrechtenstandaarden.

Hoofdstuk 2 ontwikkelt een *EVRM-toets* specifiek voor de veroordeling van daders met een psychische stoornis, waarbij de rechten en plichten worden geschetst die zijn vastgelegd in het EVRM en de jurisprudentie van het Europees Hof voor de Rechten van de Mens (EHRM). Volgens deze toets dienen de Verdragspartijente voldoen aan bepaalde relevante positieve verplichtingen met betrekking tot daders met een psychische stoornis die voortvloeien uit de artikelen 2, 3, 5, 6 en 14. Deze verplichtingen komen neer op de verplichting om het leven van daders met een psychische stoornis te beschermen. Dit zijn de verplichting om het leven van personen in een kwetsbare positie en het leven van kwetsbare personen te beschermen (artikel 2), de verplichting om personen te beschermen tegen folteringen of onmenselijke of vernederende behandelingen of bestraffingen (artikel 3), de verplichting om perspectief op vrijlating te bieden in gevallen van langdurige detentie en in het bijzonder levenslange gevangenisstraf (artikelen 3, 5/1(e) en 5/4), de verplichtingen met betrekking tot het recht op rechtsbijstand (artikel 6/3(c)), de verplichting om daadwerkelijke inspraak te verlenen (artikel 5/1, onder e), artikel 5/4 juncto 6/1, artikel 6/3, onder a), b) en c)), de verplichting om passende waarborgen te bieden in de rechtsgang (artikel 5/1, onder e) en artikel 5/4), de verplichting om het recht te verlenen om de rechtmatigheid van de detentie "onverwijld" aan te vechten (artikel 5/1, onder (e) en artikel 5/4) en de verplichting om de rechten te waarborgen te zijn gevrijwaard van discriminatie op grond van een geestesstoornis (artikel 14).

Volgens de EVRM-toets is de rechtmatigheid van de detentie van daders op grond van een specifiek voor hen vanwege hun psychische stoornis ontwikkeld sanctiekader (gebaseerd op artikel 5/1, onder e)) afhankelijk van de volgende voorwaarden: **a)** de persoon in kwestie moet door objectieve medische expertise als ontoerekeningsvatbaar worden aangetoond; dit is echter geen voorwaarde voor detentie in geval van een crisis (maatregel). Er moet ten overstaan van een bevoegde autoriteit op basis van objectieve medische expertise worden vastgesteld dat er werkelijk sprake is van een geestesstoornis; **b)** de geestesstoornis van de betrokkene moet van een aard of graad zijn die gedwongen opsluiting rechtvaardigt. Bovendien moet worden aangetoond dat de vrijheidsberoving gezien de omstandigheden

noodzakelijk is; **c)** de geestelijke stoornis, aangetoond aan de hand van objectief medisch bewijsmateriaal, moet gedurende de gehele detentieperiode voortduren.

Volgens artikel 3 en artikel 5/1(e) moet er tijdens de detentie adequate medische hulp worden geboden in een geschikte instelling. Om "adequate medische zorg" te bieden, is het niet voldoende om de persoon alleen te onderzoeken en een diagnose te stellen; het is ook essentieel om passend medisch toezicht te bieden door gekwalificeerd personeel. Om de juiste behandeling te bieden, moet er bovendien een alomvattende therapeutische strategie zijn, gericht op het behandelen of voorkomen van verergering van de aandoening, een behandeling (of behandelplan) gericht op re-integratie in de samenleving, afwezigheid van taalbarrières die de behandeling zouden kunnen blokkeren, en de afwezigheid van gedwongen (medicatie)behandeling tegen de wil (Artikel 8). Voor personen die gedetineerd zijn onder artikel 5/1(e) moet de plaats van detentie een geschikte instelling zijn. De titel van de instelling is niet relevant voor de doeleinden van artikel 5; de primaire overweging is de capaciteit van de instelling om behandeling te bieden. Om in aanmerking te komen als een geschikte instelling, moet de opname in die instelling binnen een redelijke termijn plaatsvinden, zonder noemenswaardige vertraging, moet de juiste zorg worden verleend en moet de personeelssituatie vergelijkbaar zijn met die van een algemeen psychiatrisch ziekenhuis in hetzelfde land.

Zoals gezegd werd in dit hoofdstuk de EVRM-toets ontwikkeld als analytisch kader voor dit proefschrift, met als doel de naleving van de drie geselecteerde strafrechtsystemen te evalueren. Dit kader kan daarnaast ook worden gebruikt om de naleving van andere strafrechtsystemen te beoordelen. Bijgevolg kan deze gecreëerde EVRM-toets andere strafrechtssystemen helpen het hoogst mogelijke niveau van bescherming van fundamentele mensenrechten voor daders met een psychische stoornis te bereiken.

Hoofdstuk 3 begint met het vaststellen van de overkoepelende terminologie. De term "daders met een psychische stoornis" wordt in dit proefschrift gebruikt om daders binnen het strafrechtelijk systeem aan te duiden die een geestelijke stoornis hebben. Deze groep omvat personen die procesonbekwaam, niet strafrechtelijk verantwoordelijk, niet toerekeningsvatbaar of verminderd toerekeningsvatbaar worden geacht. De term 'straf' wordt in brede zin gebruikt om alle modaliteiten te omvatten die de strafrechter ter beschikking staan, inclusief straffen, veiligheidsmaatregelen en overplaatsingen naar de (forensische) geestelijke gezondheidszorg.

De rest van het hoofdstuk vergelijkt de juridische en praktische gevolgen van het zijn van een dader met een psychische stoornis in Türkiye, Engeland en Wales, en Nederland. Hierin worden belangrijke verschillen belicht die voortkomen uit hun verschillende juridische tradities – civiel recht in Türkiye en Nederland versus common law in Engeland en Wales. Alle drie de strafrechtsystemen worden gekenmerkt door een verschillende compositie van regels, praktijken en uitdagingen, en elk systeem heeft zijn eigen kenmerkende benadering van het beschermen van de samenleving en het bieden van zorg aan daders met een psychische stoornis. Veiligheidsmaatregelen of dwangopname (plaatsing in een psychiatrisch ziekenhuis) worden gebruikt om behandeling en zorg voor daders mogelijk te maken, naast of in plaats van een straf.

Een voor deze dissertatie relevant verschil op het gebied van materieel strafrecht betreft de relatie tussen geestelijke stoornis, misdaad en straf. In Engeland en Wales sluit de verdediging wegens ontoerekeningsvatbaarheid de mogelijkheid uit om schuld vast te stellen; in het geval van ontoerekeningsvatbaarheid wordt de verdachte om die reden niet schuldig verklaard. In de andere rechtsgebieden strekt het debat zich echter uit tot de vraag of en onder welke omstandigheden de verdachte kan worden vrijgesteld van strafrechtelijke verantwoordelijkheid. Een ander opmerkelijk onderscheid binnen het materiële strafrecht betreft het concept van verminderde verantwoordelijkheid. In het Nederlandse en Turkse strafrechtsysteem is dit concept van toepassing op alle strafbare feiten, met als mogelijke consequentie strafvermindering en/of het opleggen van een veiligheidsmaatregel. In Engeland en Wales daarentegen is het verweer van verminderde verantwoordelijkheid alleen van toepassing op het misdrijf moord. Een ander onderscheid met betrekking tot het materiële strafrecht is de afbakening tussen straffen (retributief van aard) en veiligheidsmaatregelen (preventief). In Engeland en Wales wordt dit onderscheid niet gemaakt, maar in Türkiye en Nederland wel.

Het procedurele systeem in Engeland en Wales wordt geclassificeerd als een contradictoir systeem, dat ook de betrokkenheid van leken bij de rechtsgang omvat. Het Turkse en Nederlandse systeem worden daarentegen gekenmerkt als inquisitoir waarbij de deelname van leken of jury's in strafrechtelijke besluitvormingsprocedures niet is toegestaan. Er zijn echter enkele uitzonderingen op deze regel in Nederland, waar leken in bepaalde gevallen wel mogen deelnemen aan gerechtelijke procedures. Een belangrijk verschil in het strafprocesrecht is de schuldbekentenis. In de Turkse en Nederlandse strafrechtssystemen vormt een schuldpleidooi geen erkend rechtsinstrument, waardoor de strafrechter de exclusieve bevoegdheid heeft om schuld vast te stellen. In Engeland en Wales daarentegen hebben verdachten de mogelijkheid om tijdens de onderzoeksfase schuldig te pleiten op alle of sommige aanklachten.

De concepten van geschiktheid om te pleiten en/of geschiktheid om terecht te staan als gevolg van een geestelijke stoornis verschillen in elk van de drie strafrechtssystemen. Het Turkse strafrechtsysteem erkent het concept van geschiktheid om te pleiten niet, terwijl in Engeland en Wales en in Nederland het leerstuk van ongeschiktheid om te pleiten is geregeld, hoewel er maar heel weinig individuen ongeschikt worden bevonden om te pleiten (vooral in het inquisitoire systeem van Nederland).

Alle drie de strafrechtsystemen hebben regels met betrekking tot het in voorarrest plaatsen van een individu in een medische observatie-instelling met als doel het diagnosticeren van onderliggende psychische stoornissen en het uitbrengen van deskundigenrapporten in gevallen waarin een dergelijke evaluatie noodzakelijk wordt geacht. De periode van voorarrest voor een dergelijk onderzoek varieert echter.

De vonnissen in de strafrechtssystemen variëren ook met betrekking tot daders met een psychische stoornis. Opgemerkt moet worden dat alle drie de strafrechtsystemen een aantal vonnissen en/of soorten straffen kennen die op alle daders kunnen worden toegepast. Deze omvatten vrijspraak, ontslag van alle rechtsvervolging, gerechtelijke boete, taakstraf en vermogensmaatregelen. In Türkiye kan een dader met een psychische stoornis schuldig worden bevonden, of schuldig worden bevonden maar niet strafrechtelijk verantwoordelijk,

schuldig worden bevonden maar met verminderde verantwoordelijkheid, en/of onder een veiligheidsmaatregel worden geplaatst. In Engeland en Wales kan de dader met een psychische stoornis schuldig worden bevonden, niet schuldig worden bevonden op grond van ontoerekeningsvatbaarheid, of veroordeeld worden voor doodslag in het geval van moord met verminderde verantwoordelijkheid. In Nederland kan een dader met een psychische stoornis schuldig worden bevonden, schuldig worden bevonden maar niet strafrechtelijk verantwoordelijk (maar niet schuldig in de zin van verwijtbaar, wat leidt tot het vonnis 'ontslag van alle rechtsvervolging', en/of worden onderworpen aan een tbs of een combinatievonnis (gevangenisstraf en tbs) in gevallen van verminderde verantwoordelijkheid.

Elk systeem hanteert een andere benadering van de detentie en zorg voor daders met een psychische stoornis tijdens de fase van de executie. In Engeland en Wales hebben dergelijke instellingen een lange en ook internationaal gewaardeerde geschiedenis, evenals de Nederlandse tbs-instellingen. In Türkiye vertegenwoordigen de recent opgerichte YGAP ziekenhuizen daarentegen een geheel nieuwe benadering van de behandeling van daders met een psychische stoornis. In Engeland en Wales is het onderscheid tussen forensische en niet-forensische ziekenhuizen niet duidelijk. Alle forensische instellingen voor geestelijke gezondheidszorg zijn geïntegreerd in de National Health Service en er zijn geen forensische ziekenhuizen in het gevangeniswezen. In Nederland kan forensische zorg op drie verschillende manieren worden verleend: binnen het penitentiaire systeem, binnen het tbs-systeem en binnen de (forensische) geestelijke gezondheidszorg, die valt onder de civiele (geestelijke) gezondheidswetgeving. In Türkiye worden de recent opgerichte YGAP ziekenhuizen gereguleerd binnen het kader van het forensisch ziekenhuisregime en er zijn geen forensische ziekenhuizen binnen het gevangenissysteem.

Hoofdstuk 4 evalueert de mate waarin de drie strafrechtsystemen zich houden aan de EVRM-toets, voornamelijk beperkt tot de strafmaatkaders die specifiek bedoeld zijn voor daders met een psychische stoornis. Dit zijn de veiligheidsmaatregel specifiek voor daders met een psychische stoornis in Türkiye, het ziekenhuisbevel in Engeland & Wales in zijn verschillende modaliteiten, en tot slot de tbs-maatregel en de civiele zorgverwijzing door de strafrechter (artikel 2.3 Wfz) in Nederland. Over het geheel genomen blijkt uit de analyse dat alle drie de stelsels adequate wet- en regelgevingskaders hebben vastgesteld die de bescherming van fundamentele mensenrechten hoog in het vaandel dragen. Uit de beoordeling van de naleving van de strafrechtsstelsels in Türkiye, Engeland en Wales en Nederland blijkt dat het merendeel van de onderzochte onderwerpen voldoet aan de EVRM-toets. Er zijn echter bepaalde kwesties die nadere aandacht blijken te vereisen.

De kwestie van vertragingen bij de opname, voornamelijk als gevolg van capaciteitstekorten, vormt een gemeenschappelijke uitdaging voor alle onderzochte strafrechtsstelsels. De rechtspraak van het EHRM bepaalt dat de opname van een individu in een geschikte instelling tijdig moet gebeuren. Bovendien worden alle drie de strafrechtsystemen geconfronteerd met uitdagingen op het gebied van cultureel gevoelige psychiatrische zorg. Culturele verschillen hebben ook invloed op gedragsbeïnvloeding, waardoor het therapeutische proces nog ingewikkelder wordt. Om de normen van het EVRM beter na te leven, moeten er verbeteringen worden aangebracht om meer capaciteit

te creëren in de geschikte instellingen en om taalkundige en culturele ondersteuning te bieden in deze instellingen.

Voor het Turkse strafrechtsysteem is het cruciaal om te erkennen dat er enkele initiële uitdagingen waren (en zijn) bij het implementeren van dit nieuwe model van YGAP ziekenhuizen. Het doel van dit proefschrift is het ondersteunen en faciliteren van de verdere ontwikkeling in overeenstemming met internationale standaarden en het EVRM. Het strafrechtsysteem in Türkiye heeft een regelgevend kader nodig voor de implementatie van veiligheidsmaatregelen voor daders met een psychische stoornis. Het opstellen van deze regelgeving is noodzakelijk om twee redenen: ten eerste om de rechten van forensische patiënten af te bakenen, en ten tweede om vast te leggen hoe de behandeling moet worden uitgevoerd. De regels moeten ook betrekking hebben op de omstandigheden waaronder onvrijwillige behandeling kan worden toegepast, de criteria voor het gebruik van isolatie of andere beperkende maatregelen, de manier waarop gevaarlijkheid wordt beoordeeld en criteria voor verlenging, kwijtschelding, beëindiging van de veiligheidsmaatregel, of voorwaardelijke vrijlating van de gedetineerde. Bovendien vormt het gebrek aan toegankelijke informatie, studies en statistische gegevens over de implementatie van plaatsing, behandeling en beperkende maatregelen in recent opgerichte YGAP-ziekenhuizen een aanzienlijke uitdaging.

De conformiteitstoets heeft een wezenlijke tekortkoming in het bestaande regelgevingskader voor veiligheidsmaatregelen in Türkiye blootgelegd: het ontbreken van bepalingen voor verplichte (periodieke) rechterlijke toetsing met vastgestelde tussenpozen. Bijgevolg is het in theorie mogelijk dat iemand levenslang in hechtenis wordt gehouden zonder rechterlijke toetsing. Dit geeft aanleiding tot zorgen in het licht vanzowel artikel 3 als artikel 5/4 EVRM. Het is absoluut noodzakelijk dat de Turkse regering de cruciale wijzigingen doorvoert om naleving van het EVRM te waarborgen.

Een andere kwestie in Türkiye is dat het ontslagcriterium alleen van toepassing is op daders met een psychische stoornis zonder strafrechtelijke verantwoordelijkheid. Degenen met verminderde verantwoordelijkheid moeten in de YGAP instellingen blijven tot een door de bevoegde rechtbank vastgestelde minimumperiode is verstreken. Bijgevolg kunnen personen met verminderde verantwoordelijkheid geen herziening van hun detentie vragen. Deze regeling is mogelijk in strijd met artikel 5/4 van het EVRM.

In Engeland en Wales is gebleken dat de plaatsing van personen met leermoeilijkheden en/of autisme in beveiligde instellingen een hardnekkige uitdaging vormt, met name vanwege de bezorgdheid dat dergelijke plaatsingen niet altijd de meest geschikte optie zijn omdat ze voor deze daders met minder beveiliging zouden kunnen volstaan. Daarom wordt geadviseerd om passende alternatieven in de gemeenschap te creëren. Een andere kwestie in verband met het bevel tot opname is het behandelbaarheidscriterium. Het behandelbaarheidscriterium voor intramurale bevelen vormt een uitdaging, omdat het de plaatsing van delinquenten in geschikte omgevingen kan verhinderen. Gezien de voorafgaande vaststelling van de geestelijke stoornis van de veroordeelde door de rechtbank, kan het ontbreken van consensus tussen de rechtbank en de beoogde ziekenhuisartsen de plaatsing van de veroordeelde in een geschikte instelling mogelijk belemmeren. Dit is vooral problematisch wanneer men bedenkt dat de gevangenis het meest waarschijnlijke

alternatief is en de beschikbaarheid van zorg- of behandelingsfaciliteiten binnen het gevangenissysteem beperkt is. Deze situatie kan bijgevolg aanleiding geven tot spanning met artikel 3 EVRM. In Engeland en Wales is ook aandacht besteed aan de kwestie van de onbepaalde straffen, de IPP, die in 2012 werd afgeschaft, maar nog steeds gevolgen heeft voor degenen die er voorheen aan onderworpen waren. In het geval van langdurige detentie wordt het een uitdaging om te bewijzen dat er na verloop van tijd een causaal verband bestaat tussen de voortgezette detentie op grond van gevaarlijkheid en de oorspronkelijke veroordeling (een vereiste van artikel 5/1(a)). Het ontbreken van een feitelijk vooruitzicht op mogelijke invrijheidstelling kan daarom mogelijk in strijd zijn met de artikelen 3 en 5/1.

Voor het Nederlandse strafrechtsysteem heeft het belangrijkste probleem met betrekking tot tbs te maken met de combinatie ervan met een (lange) gevangenisstraf, die moet worden uitgevoerd voorafgaand aan tbs, in gevallen van verminderde verantwoordelijkheid. Het argument dat uitstel van plaatsing de effectiviteit van de behandeling en daarmee de duur van de totale vrijheidsbeneming zal belemmeren – het argument dat het EHRM hanteert in zaken over uitgestelde opname – is a fortiori van toepassing op deze kwestie. Een andere controversiële kwestie met betrekking tot tbs is de status van vreemdelingen in deze instellingen, aangezien zij niet kunnen worden gere-integreerd in de Nederlandse samenleving. Dit is vooral problematisch voor degenen die om verschillende redenen niet kunnen worden gere-integreerd in hun land van herkomst, waardoor ze een gebrek aan toekomstperspectief hebben. De behandeling van vreemdelingen gaat daarom gepaard met aanzienlijke uitdagingen, in het bijzonder door de beperkingen op het inburgeringsverlof voor mensen zonder verblijfsrechten, die zodoende het verlenen van adequate psychiatrische zorg belemmeren. Bijgevolg wordt gesteld dat deze situatie mogelijk een schending vormt van de artikelen 3 en 5 van het EVRM. Een andere kwestie die wordt benadrukt is de impact van plaatsing op de (voorheen zogeheten) long stay units. Nederland wordt geconfronteerd met problemen in verband met de status van langdurig verblijf binnen tbs-instellingen, waar detentie kan plaatsvinden zonder een duidelijk therapeutisch doel voor re-integratie, hetgeen zorgen oproept op grond van de artikelen 3 en 5/1(e) van het EVRM. Bijgevolg is het argument aangevoerd dat de beslissing om iemand in een inrichting voor langdurig verblijf te plaatsen door de rechterlijke macht moet worden genomen en niet door het ministerie. De laatste kwestie die in het Nederlandse strafrechtsysteem naar voren is gekomen, heeft betrekking op de verwijzingsprocedure voor civiele zorg zoals beschreven in artikel 2.3 van de Wfz. Het is belangrijk om op te merken dat strafrechters wel de bevoegdheid hebben om zorg toe te staan, maar niet om civiele zorg te bevelen. In gevallen waarin een instelling weigert een patiënt op te nemen, kan een dergelijke weigering dus de uitvoering van de verwijzing in de weg staan. In gevallen waar het alternatief een tbs is, is de eerste zorg niet de adequaatheid van medische hulp, maar eerder de noodzaak of proportionaliteit van het bevel, gezien de ernst van het tbs kader. Als het alternatief gevangenisstraf is, rijst de vraag naar de mogelijkheden voor adequate zorg.

Het proefschrift sluit af met een aantal aanbevelingen in **hoofdstuk 5**. Deze aanbevelingen zijn gericht op het verbeteren van de naleving van de EVRM-normen door de drie onderzochte strafrechtssystemen, mede gebruikmakend van inzichten en voorbeelden uit

de vergelijking daartussen. Deze aanbevelingen omvatten het opzetten van robuuste regelgevende kaders in Türkiye, het heroverwegen van het behandelbaarheidscriterium in Engeland en Wales, en het aanpakken van de lange verblijfsduur bepalingen in Nederland. Het overkoepelende doel is ervoor te zorgen dat de rechten van daders met een psychische stoornis effectief worden gehandhaafd, waardoor een humaner en rechtvaardiger strafrechtsysteem in deze rechtsgebieden wordt bevorderd.

Dit uitgebreide proefschrift werpt niet alleen licht op de complexiteit van het veroordelen van daders met een psychische stoornis, maar benadrukt ook de noodzaak van voortdurende hervorming en afstemming op internationale mensenrechtennormen, evenals de waarde van rechtsvergelijkend onderzoek in dit opzicht.

1.3 Özet

Bu doktora tezi, Türkiye, İngiltere ve Galler ile Hollanda'daki akıl hastası suçluların cezalandırılmasına ilişkin düzenleme ve uygulamaların karşılaştırmalı analizini yaparken, aynı zamanda bu düzenlemeleri Avrupa İnsan Hakları Sözleşmesi (AİHS) çerçevesinde değerlendirmektedir. Farklı hukuki sistemlerdeki uygulamaları karşılaştırması ve aynı zamanda uluslararası alanda daha az bilinen Türk ceza adaleti sisteminin daha iyi anlaşılmasını amaçlaması bakımından bu çalışma, bilimsel açıdan önem arz etmektedir. Buna ek olarak, akıl hastası suçluların cezalandırılmasına ilişkin mevzuat ve uygulamaların AİHS çerçevesine uygun hale getirilmesine yönelik tavsiyeler sunduğu için, toplumsal açıdan da önem arz etmektedir. Bu tavsiyeler, özellikle Türkiye gibi bu alanda gelişmekte olan ülkeler için faydalı olacaktır.

Bu tez konusunun seçilmesindeki ana sebep, akıl hastası suçluların cezalandırılması hususunda Türkiye'de geçmiş yıllarda yaşanan yetersizliklerdir. 2018 yılından evvel Türk Ceza Kanunu'nda (TCK) bahsedilmesine rağmen, Türkiye'de yüksek güvenlikli akıl hastalıkları hastanesi bulunmamaktaydı ve bu durum suçluların ya topluma geri dönmesine ya da TCK düzenlemelerine aykırı olarak cezaevlerinde tutulmalarına neden olmaktaydı. 2018 yılında Türkiye'de ilk yüksek güvenlikli adli psikiyatri hastanesi (YGAP) kurulmuş, ancak COVID-19 salgını nedeniyle bu hastanelerin hizmete girmesi gecikmiştir. Bu gerekçeyle, Türkiye'deki ceza hukuku yaptırımlarının, özellikle akıl hastası suçlular için incelenmesi, önem arz etmektedir.

Bu çalışma, Türk ceza hukukuna ilişkin yabancı dillerde yapılan yayınların eksikliğinden kaynaklanan uluslararası alandaki az bilinirlik sorununu, Türk ceza hukukunu İngiltere ve Galler ile Hollanda hukuk sistemlere karşılaştırarak çözmeyi amaçlamaktadır. Hollanda, tek aşamalı yargılama sürecine sahip Kıta Avrupası hukuk sistemi geleneğini temsil ederken; İngiltere ve Galler, yargılama ve cezalandırmanın ayrı aşamalara ayrıldığı Anglo-Sakson hukuk sistemini temsil etmektedir. Her hukuk sisteminde cezai sorumluluk konusuna farklı yaklaşımlar geliştirildiğinden, akıl hastası suçlular için farklı yaptırımlar düzenlenmiştir. Hollanda'nın bu konudaki önemi ise tehlikelilik arz eden akıl hastası suçlulara yönelik geliştirdiği ve uluslararası olarak bilinen *terbeschikkingstelling* (TBS) sistemidir.

Tez, toplamda beş bölümden oluşmaktadır. **Birinci Bölüm**de tezin araştırma soruları ve bu çalışmanın önemi sunulmaktadır. **İkinci Bölümde** ise, akıl hastası suçluların sahip olduğu hakları belirlemek üzere, AİHS düzenlemeleri ve Avrupa İnsan Hakları Mahkemesi (AİHM) içtihatlarına dayalı analitik bir çerçeve oluşturmaktadır. **Üçüncü Bölüm,** üç farklı hukuk sistemindeki akıl hastası suçluların cezalandırılmasına ilişkin hükümleri ve bunların uygulamalarını ayrıntılı olarak incelemekte ve karşılıklı analizini sunmaktadır. **Dördüncü Bölümde**, İkinci Bölümde geliştirilen AİHS testi, seçilen üç hukuk sistemine uygulanarak, bu sistemlerin AİHS çerçevesine uygunluğu değerlendirilmektedir. Son olarak **Beşinci Bölüm,** tez çalışmasının sonuçlarını özetlemekte ve bu hukuk sistemlerinin insan hakları standartlarıyla daha uyumlu hale getirilmesine yönelik tavsiyeler sunmaktadır.

İkinci Bölümde AİHS'te düzenlenen ve AİHM içtihadıyla yorumlanan hak ve yükümlülükler belirlenerek, akıl hastası suçluların cezalandırılmasına yönelik bir *AİHS testi* geliştirilmiştir. Oluşturulan bu AİHS testine göre, Yüksek Sözleşmeci Taraflar, AİHS'in 2., 3., 5., 6. ve 14. maddeleri uyarınca akıl hastası suçlularla ilgili bazı pozitif yükümlülüklere uymakla yükümlüdür. Bu yükümlülükler; (2. madde uyarınca) korunmaya muhtaç durumdaki ve dezavantajlı bireylerin yaşam haklarını koruma yükümlülüğü, (3. madde uyarınca) bireyleri işkence ve insanlık dışı ya da aşağılayıcı muamele veya cezalardan koruma yükümlülüğü, (3, 5/1(e), ve 5/4 maddeleri uyarınca) uzun tutukluluk ve özellikle müebbet hapis cezalarında kişilere umut hakkı sağlama yükümlülüğü, (6/3(c) maddesi uyarınca) adli yardım hakkı sağlama yükümlülüğü, (6/1 ve 6/3(a), (b), (c) maddeleri ile bağlantılı olarak 5/1(e) ve 5/4 maddeleri uyarınca) yargılamaya etkin katılım hakkı sağlama yükümlülüğü, (5/1(e) ve 5/4 maddeleri uyarınca) etkin güvenceler sağlama yükümlülüğü, (5/1(e) ve 5/4 maddeleri uyarınca) özgürlüğünden alıkonulmanın hukuka uygunluğunun 'ivedilikle' incelenmesi için mahkemeye başvurma hakkı sağlama yükümlülüğü ve (14. madde uyarınca) akıl hastalığına dayalı ayrımcılık yapılmaksızın hakları güvence altına alma yükümlülüğüdür.

AİHS testine göre, akıl hastası suçlulara yönelik düzenlenen özgürlükten alıkoymaya yönelik bir yaptırımın hukuka uygunluğu (5. maddenin 1. fıkrasının (e) bendine göre) aşağıdaki koşulların yerine getirilmesine bağlıdır: **a)** söz konusu bireyin gerçek bir akıl hastalığının bulunduğunun, yetkili bir makam tarafından, objektif tıbbi uzmanlığa dayanılarak tespit edilmesi gerekmektedir; ancak bu acil durumlar için bir ön koşul değildir; **b)** bireyin akıl hastalığı zorunlu alıkonulmayı gerektirecek türde veya derecede olmalıdır. Ayrıca, özgürlükten mahrum bırakmanın, koşullar göz önüne alındığında gerekli olduğu gösterilmelidir; ve **c)** objektif tıbbi kanıtlarla doğrulanan akıl hastalığı, özgürlükten alıkonulma devam ettikçe varlığını sürdürmelidir.

3. madde ile 5. maddenin 1. fıkrasının (e) bendine göre, bireyin özgürlüğünün kısıtlandığı süreçte uygun bir kurumda "yeterli tıbbi yardım" sağlanmalıdır. Yeterli tıbbi yardım sağlamak için, sadece bireyi muayene etmek veya teşhis koymak yeterli değildir; aynı zamanda nitelikli personel tarafından uygun tıbbi gözetim sağlanması da gereklidir. Ayrıca, uygun tedavinin sağlanması için, hastalığın tedavisine yönelik veya ağırlaşmasını önlemeyi amaçlayan kapsamlı bir tedavi planının olması, bu tedavinin (ve planının) topluma yeniden kazandırmayı amaçlaması, tedaviyi engelleyebilecek herhangi bir dil engelinin bulunmaması ve (8. madde uyarınca) zorla (ilaçla) tedavinin rıza gösterme

ehliyetine sahip bir kişinin iradesine karşı uygulunmaması gereklidir. 5. maddenin 1. fıkrasının (e) bendi kapsamında özgürlüğünden alıkonulan bireyler için alıkonulma yeri 'uygun' bir kurum olmalıdır. Kurumun ismi, 5. maddenin uygulanması açısından önem arz etmemektedir; burada öncelikli husus, kurumun gerekli tedaviyi sağlayabilme yetkinliğidir. Bir kurumun 'uygun' olarak nitelendirilebilmesi için, bu kuruma yatış işlemlenin ciddi bir gecikme olmaksızın makul bir sürede gerçekleştirilmesi, kurum içerisinde yeterli bakımın sağlanması ve kurumda çalışmakta olan personel sayısının aynı ülkedeki genel bir psikiyatri hastanesiyle benzer olması gerekmektedir.

Daha önce de belirtildiği gibi, AİHS testinin bu çalışma için analitik bir çerçeve olarak geliştirilmesinin nedeni, seçilen üç ceza adaleti sisteminin AİHS'e uygunluğunu değerlendirmektir. Oluşturulan bu AİHS testi, diğer ceza adaleti sistemlerinin uygunluğunu değerlendirmek için de kullanılabileceğinden, akıl hastası suçlular için temel insan haklarının mümkün olan en yüksek düzeyde korunmasını sağlamada diğer ceza adaleti sistemlerine de yardımcı olabilecek niteliktedir.

Üçüncü Bölüm, tez içerisinde kullanılan önemli terimlerin belirlenmesi ve tanımlanmasıyla başlamaktadır. "Akıl hastası suçlu" kavramı bu çalışmada, ceza adaleti sistemi içerisine girmiş olan, akıl hastalığı nedeniyle kendisini mahkemede savunma kapasitesini veya duruşmaya etkin katılım gösterebilme yeteneğini kaybetmiş olan (İngiltere ve Galler hukukundaki '*unfitness*'), cezai sorumluluğu olmayan, isnat yeteneği bulunmayan veya cezai sorumluluğu azalan suçluları kapsayacak şekilde kullanılmaktadır. 'Cezalandırma' kavramı ise; cezalar, güvenlik tedbirleri ve (adli) psikiyatri sistemine sevkler de dahil olmak üzere, ceza mahkemesinin kullanabileceği tüm yaptırımları kapsayacak şekilde geniş anlamda kullanılmıştır.

Bölümün geri kalanında Türkiye, İngiltere ve Galler ile Hollanda hukuk sistemlerinde akıl hastası suçlu olmanın hukuki ve fiili sonuçları karşılaştırılmaktadır. Öncelikle, Türkiye ve Hollanda'daki Kıta Avrupası Hukuk sistemi ile İngiltere ve Galler'deki Anglo-Sakson hukuk sistemi arasındaki özgün hukuk geleneklerinden kaynaklanan farklılıkların altı çizilmiştir. Her üç ceza adaleti sisteminde farklı düzenlemeler, uygulamalar ve karşılaşılan farklı zorluklar bulunmaktadır ve herbir sistemin, toplumu koruma ve akıl hastası suçluların bakımını sağlama hususunda kendine özgü bir yaklaşımı vardır. Bu yaklaşımlar, cezaya ek olarak verilen veya ceza yerine geçen, suçluların tedavisi ve bakımını kolaylaştırmaya yönelik düzenlenen güvenlik tedbirleri veya (hastaneye yatırılma kararlarını içeren) sevklerdir.

Maddi ceza hukuku alanındaki en önemli farklılıklardan birisi, akıl hastalığı ile suç ve ceza arasındaki ilişkiyle ilgilidir. İngiltere ve Galler'de akıl hastalığı savunması *(insanity defence)* suçluluğun kanıtlanması ihtimalini ortadan kaldırmaktadır. Akıl hastalığı savunmasının kabul edilmesi durumunda verilecek hüküm, akıl hastalığı nedeniyle beraat (*not guilty by reason of insanity*) olacaktır. Ancak, diğer yargı alanlarında, sanığın cezai sorumluluktan muaf tutulup tutulamayacağı ve hangi koşullarda muaf tutulabileceği tartışmasına yer verilmektedir. Maddi ceza hukuku alanında tespit edilen bir diğer kayda değer ayrım, azalan fakat tamamen ortadan kalmayan cezai sorumluluk kavramıyla ilgilidir. Hollanda ve Türk ceza adaleti sistemlerinde bu kavram, cezanın azaltılması ve/veya güvenlik tedbiri uygulanması amacıyla tüm suç türlerine uygulanabilir. Buna karşın,

İngiltere ve Galler'de azalan sorumluluk savunması sadece kasten öldürme suçu için geçerlidir. Maddi ceza hukukuna ilişkin bir başka fark da (doğası gereği ödetici) cezalar ile (önleyici) güvenlik tedbirleri arasındaki ayrımdır. Türkiye ve Hollanda'da bu ayrımın yapılmasına karşın, İngiltere ve Galler'de bu ayrım bulunmamaktadır.

İngiltere ve Galler'deki ceza usul hukuku, çekişmeli yargılama usulü (*adversarial)* olarak nitelendirilmektedir ve hâkim olmayan kişiler de yargılama aşamasında rol alırlar. Buna karşılık, Türkiye ve Hollanda'daki sistemler, tahkik sistemi (*inquisitorial*) olarak nitelendirilmekte ve hâkim olmayan kişilerin ya da jürilerin cezai karar alma sürecine katılmalarına izin verilmemektedir. Ancak, Hollanda'da bazı durumlarda hâkim olmayan kişilerin yargılamaya katılımına izin verildiğinden, bu kuralın birkaç istisnası bulunmaktadır. Ceza usul hukukundaki diğer bir önemli farklılık da suçluluğun itiraf edilmesinin (*guilty plea*) sonuçlarıdır. Türk ve Hollanda ceza hukuku sistemlerinde, suçun ikrarı, hukuken kabul edilmiş bir yol değildir; dolayısıyla suçluluğun tespitinde mahkemenin münhasıran yetkisi bulunmaktadır. Buna karşın, İngiltere ve Galler'de sanıklar, soruşturma aşamasında suçların hepsini ya da bir kısmını kabul etme seçeneğine sahiptir.

Akıl hastalığı nedeniyle savunma yapmaya ve/veya yargılanmaya ehil olma kavramları her üç ceza adaleti sisteminde de farklılık göstermektedir. Türk ceza adaleti sistemi bu ehil olma kavramını tanımazken; İngiltere ve Galler ile Hollanda'da savunma yapmaya ehil olmamanın nasıl tespit edileceği ve bunun sonuçları düzenlenmiştir. Ancak, (özellikle Hollanda'nın tahkik sisteminde) savunma yapmaya ehil olmadığı kararı neredeyse yok denilecek kadar azdır.

Karşılaştırılan üç ceza adaleti sisteminde de, akıl hastalıklarının teşhis edilmesinin ve bu hususta bilirkişi raporunun yazılmasının gerekli görüldüğü hallerinde bireylerin gözlem altına alınmasına ilişkin hukuki düzenlemeler bulunmaktadır. Ancak, bu tür bir inceleme için gözlem altına alınma süresi, her hukuk sisteminde farklıdır.

Ceza yargılaması sonucunda akıl hastası suçlulara verilebilecek hükümler de farklılık göstermektedir. Her üç ceza adaleti sisteminde tüm suçlulara uygulanabilecek bir takım genel hüküm ve/veya ceza türleri bulunmaktadır. Bunlar arasında beraat, düşme, adli para cezası, kamu hizmeti ve mal varlığına ilişkin tedbirler yer almaktadır. Türkiye'de, akıl hastası suçluların işledikleri suçlar bakımından; mahkumiyetine hükmolunabilir, ceza verilmesine yer olmadığına karar verilebilir ve/veya güvenlik tedbirine hükmolunabilir. İngiltere ve Galler'de, akıl hastası suçluların işledikleri suçlar bakımından; mahkumiyetine hükmolunabilir, akıl hastasılığı nedeniyle suçsuzluğu tespit edilebilir veya kasten öldürme suçu isnadında ceza sorumluluğunun azalmış olması gerekçesiyle taksirle öldürme suçundan mahkum edilebilir. Hollanda'da, akıl hastası suçluların işledikleri suçlar bakımından; mahkumiyetine hükmolunabilir, cezai sorumluluğunun azaldığı durumlarda (hapis cezası ve TBS'in birleştirilmesinden oluşan) karma cezaya hükmolunabilir, suçları ispatlansa dahi cezai açıdan sorumluluğunun bulunmaması gerekçesiyle tüm suçlamaların düşürülmesi kararı verilebilir ve/veya TBS'e hükmolunabilir.

Önceden de belirtildiği üzere, infaz aşamasında akıl hastası suçluların özgürlüğünden alıkonulması ve bakımı için herbir ceza hukuku sistemi farklı bir yol izlemektedir. İngiltere ve Galler'de bulunan akıl hastası suçlulara yönelik infaz kurumlarının uzun ve

saygın bir geçmişi bulunmaktadır; Hollanda'nın TBS klinikleri ise uluslararası düzeyde bir üne sahiptir. Türkiye'de yakın zamanda kurulan YGAP Hastaneleri ise, akıl hastası suçluların bakımında yeni bir yaklaşımı temsil etmektedir. İngiltere ve Galler'de adli psikiyatri hastaneleriyle genel hastaneler arasındaki ayrım net bir şekilde belirlenmemiştir. Fakat, tüm adli psikiyatri merkezleri Ulusal Sağlık Hizmetine (*National Health Service*) çatısı altında bulunmaktadır ve ceza infaz kurumlarında adli hastaneler bulunmamaktadır. Hollanda'da adli bakım hizmeti; ceza infaz kurumlarında, TBS kurumlarında ve medeni hukuk mevzuatına tabi olan (adli) ruh sağlığı kurumlarında olmak üzere, üç farklı kurumda sağlanabilmektedir. Türkiye'de yeni kurulan YGAP Hastaneleri adli hastane rejiminde düzenlenmekte ve Türkiye'deki ceza infaz kurumları içerisinde adli hastane bulunmamaktadır.

Dördüncü Bölümde üç ceza adaleti sisteminin AİHS testine, özellikle akıl hastası suçlulara yönelik öngörülen yaptırımlar özelinde, ne kadar uyum gösterdiği tespit edilmektedir. Bu yaptırımlar, Türkiye'deki akıl hastası suçlulara özgü düzenlenen güvenlik tedbiri, İngiltere ve Galler'de farklı türleri bulunan hastaneye yatırılma kararı *(hospital order)*, Hollanda'da ise TBS kararı ve (Wfz'nin 2.3. maddesi uyarınca) ceza mahkemesi tarafından medeni hukuk düzenlemelerine dayanılarak hükmedilebilinecek tedavi sevki kararıdır. Yapılan analiz sonucunda varılan genel sonuç, her üç hukuk sistemin de temel insan haklarının korunmasına değer atfettiği ve kapsamlı hukuki düzenlemelere hali hazırda sahip oldukları yönündedir. İncelenen konuların büyük çoğunluğunda, Türkiye, İngiltere ve Galler ile Hollanda'daki ceza adaleti sistemlerinin AİHS testine uygun olduğu tespit edilmiştir. Ancak, bazı hususların, daha ayrıntılı şekilde ele alınması gerekir.

Yetersiz yatak kapasitesi nedeniyle kurumlara gecikmeli olarak yatırılma sorunu, incelenen tüm ceza adaleti sistemlerinde tespit edilen ortak bir meseledir. AİHM içtihadına göre, bireyinlerin uygun bir kuruma kabulünün zamanında gerçekleştirilmesi şarttır. Ayrıca, her üç ceza adaleti sisteminde de kültürel açıdan duyarlı psikiyatrik tedaviyle ilgili zorluklarla karşılaşıldığı tespit edilmiştir. Kültürel farklılıklar, davranışsal tedavi sürecini etkilediğinden, tedaviyi daha da zorlaştırmaktadır. AİHS tarafından belirlenen standartlara daha fazla uyum sağlamak için, 'uygun' olarak nitelendirilen kurumlardaki yatak kapasitesinin arttırılması ve bu kurumlarda dil desteği ve kültürel destek sağlamak amacıyla iyileştirmeler yapılmalıdır.

Türk ceza adaleti sistemi için, yeni açılan YGAP Hastanelerinin başlangıç aşamasında bazı zorluklar doğurmuş (ve hala doğurmakta) olduğunu kabul etmek, çok önemlidir. Bu tezin amaçlarından bir tanesi de, uluslararası standartlara ve AİHS'e uygun en ideal koşullara erişilmesine katkı sağlamaktır. Bu doğrultuda, akıl hastası suçlulara yönelik güvenlik tedbirlerinin uygulanmasına dair bir mevzuatın düzenlenmesine öncelik verilmelidir. Adli psikiyatri hastalarının haklarının ve alacakları tedavinin nasıl yürütülmesi gerektiğinin belirlenmesi için bu düzenlemelerin yapılması zorunludur. Bu mevzuat aynı zamanda hangi koşullar altında zorunlu tedavinin uygulanabileceğini, tecrit veya diğer kısıtlayıcı tedbirlerin uygulanma şartlarını, tehlikeliliğin önemli derecede azaldığının tespitinin nasıl yapılacağını, verilen tedavinin uzatılmasının, hafifletilmesinin veya sona erdirilmesinin şartlarını ve tedavi alınan kurumdan şartlı tahliyeyle

salıverilmeye ilişkin kriterleri de düzenlemelidir. Bu hususta önemle bahsedilmesi gereken bir diğer sorun ise, yeni kurulan YGAP Hastanelerine dair yatış, tedavi imkanları ve kısıtlayıcı tedbirlerin uygulanmasına ilişkin erişilebilir bilgi, istatistiki veri ve makale eksikliğidir. Bu konuda yapılan bilgi edinme başvurularına da yanıt alınamamaktadır.

Bunlara ek olarak, güvenlik tedbirlerinin de infazını düzenleyen Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun'da, belirli aralıklarla zorunlu olarak yapılması gereken (periyodik) tıbbi kontrole dair bir hüküm bulunmaması, önemli bir eksiklik olarak tespit etmiştir. İlgili düzenlemenin eksikliği, teorik olarak, bir kişinin yargı denetiminden geçmeksizin ömrü boyunca yüksek güvenlikli hastanede özgürlüğünden alıkonulmasının mümkün olduğu anlamına gelmektedir. Bu durum, AİHS'in hem 3. maddesi hem de 5. maddenin 4. fıkrası bakımından önemli bir soruna arz etmektedir. Bu gerekçeyle, AİHS'e uygunluğu sağlamak amacıyla bu önemli değişikliklerin hayata geçirmesi zorunludur.

Tespit edilen bir diğer sorun ise serbest bırakılmaya dair TCK'nın 57. maddesinde düzenlenen "toplum açısından tehlikeliliğin ortadan kalktığının veya önemli ölçüde azaldığının" tespiti kriterinin yalnızca isnat yeteneği bulunmayan akıl hastası suçlular için geçerli olmasıdır. İsnat yetenği azalmış olanlar bireyler, TCK'nın 32. maddesinin 2. fıkrası uyarınca yetkili ceza mahkemesi tarafından belirlenen süre tamamlanınca kadar bu kurumlarda kalmalıdırlar. Sonuç olarak, cezai sorumluluğu azalmış olan akıl hastası suçlular, hükmedilen süre içersinde uygulanmakta olan güvenlik tedbirinin gözden geçirilmesi talebinde bulunamazlar. Bu durum, AİHS'in 5. maddesinin 4. fıkrası kapsamında sorun teşkil etmektedir.

İngiltere ve Galler'de, öğrenme güçlüğü ve/veya otizmi olan bireylerin güvenlikli kurumlara yerleştirilmesi, süregelen bir sorun olarak tespit edilmiştir. Bu tür özgürlükten alıkoyma uygulamalarının daha az güvenlikli kurumlarda da infaz edilebilmesi mümkün olduğundan, en uygun seçenek olarak değerlendirilmemiştir. Bu nedenle, toplum içinde daha uygun alternatiflerinin oluşturulması tavsiye edilmiştir. Hastaneye yatış kararının verilmesiyle ilgili tartışılan bir diğer husus da 'tedavi edilebilirlik' kriteridir. Ceza mahkemesinin hastaneye yatış kararı verebilmesi için ön koşul olarak talep edilen bu tedavi edilebilirlik tespiti, suçluların uygun kurumlara yerleştirilmesini engelleyebileceğinden, sorunlara yol açmaktadır. Mahkemenin halihazırda suçlunun akıl hastalığına dair yaptığı tespit göz önünde bulundurulduğunda, mahkeme ile kurum doktorları arasında fikir birliğinine varılamaması, bireyin uygun bir kuruma yerleştirilmesinin önüne geçebilecektir. Bu durumun sorun arz etmesinin bir diğer nedeni ise, hastaneye yatırılmanın alternatifinin büyük olasılıkla cezaevi olması ve cezaevi kurumlarında bakım veya tedavi olanaklarının oldukça sınırlı olmasıdır. Sonuç olarak bu durum, AİHS'in 3. maddesi kapsamında soruna yol açabilecektir. İngiltere ve Galler'de 2012 yılında yürürlükten kaldırılan, ancak daha önce bu uygulamaya tabi olan kişileri hala etkilemeye devam eden süresiz cezalar (IPP) hususu da tezde ele alınmıştır. Uzun süreli tutukluluklar söz konusu olduğunda, (5. maddenin 1. fıkrasının (a) bendini hükmünce) bireyin tehlikeliliği gerekçesiyle devam eden özgürlük kısıtlamalarının, ilk mahkumiyet hükmüyle olan nedensel bağlantısının kanıtlanabilmesi, zaman geçtikçe çok zorlaşmaktadır. Dolayısıyla, fiili bir salıverilme ihtimalinin bulunmaması, AİHS'in 3. maddesini ve 5. maddesinin 1. fıkrasını ihlal edebilir.

Hollanda ceza adaleti sistemi için TBS kararı ile ilgili olarak tespit edilen en önemli sorun, cezai sorumluluğun azaldığı durumlarda TBS kararının, TBS kararından önce infaz edilmesi gereken (uzun süreli) hapis cezasıyla birlikte hükmedilmesidir. AİHM'in gecikmeli kabulle ilgili davalarda kullandığı argüman, TBS kurumuna yerleştirilmedeki gecikmeler için de *a fortiori* geçerlidir; zira bu gecikmeler, tedavinin etkinliğini azaltarak, kurumda geçirilecek süreyi artırmaktadır. TBS ile ilgili bir başka tartışmalı konu da, TBS kurumlarına yerleştirilen, ancak Hollanda toplumuna yeniden uyum sağlaması mümkün olmayan yabancı uyrukluların içinde bulundukları durumudur. Çeşitli gerekçelerle kendi ülkelerine dönemeyecek olan ve bu nedenle gelecek beklentileri olmayan kişiler için, bu durum özellikle sorun teşkil etmektedir. Topluma uyum sağlamak amacıyla verilen sosyal izinlere, suç işledikleri için Hollanda'da ikamet etme hakkını kaybeden yabancı uyruklular için getirilen sınırlamalar, bu bireylerin etkin psikiyatrik tedavi görmesini engellemektedir. Sonuç olarak bu durum, AİHS'in 3. ve 5. maddelerinin ihlali sonucunu doğurabilecektir. Tezde altı çizilen bir diğer husus da (eskiden) uzun süreli yatış birimleri olarak adlandırılan birimlere yerleştirilmenin doğurduğu sonuçlardır. TBS kurumlarında uzun süreli kalan bireylerin, topluma yeniden kazandırılmaya yönelik bir tedavi amacı güdülmeden özgürlüğünden alıkonulması, AİHS'in 3. maddesi ve 5. maddesinin 1. fıkrasının (e) bendi kapsamında sorun teşkil etmektedir. Bu nedenle, bir bireyi uzun süreli olarak bir kuruma yerleştirme kararının bakanlıktan ziyade yargı tarafından verilmesi gerektiği belirtilmiştir. Hollanda ceza adaleti sistemi için tespit edilen bir diğer sorun ise, Wfz'nin 2.3. maddesinde düzenlenen, medeni kanun hükümleri uyarınca verilebilecek hastaneye sevk kararı ile ilgilidir. Ceza mahkemeleri, akıl hastası suçluların için bakım kararı verme yetkisine sahipken; medeni kanun hükümlerine göre verilen bu sevk kararı infaz kabiliyetini haiz değildir. Bu nedenle, bir kurumun akıl hastası bir suçluyu kabul etmeyi reddetmesi halinde, ceza mahkemesinin sevk kararının uygulanması engellenmektedir. İlgili sevk kararının alternatifin TBS hükmü olması halinde öncelikli mesele, verilecek tıbbi yardımın yeterli olup olmayacağı değil, TBS hükmünün ağırlığı nedeniyle bunun gerekliliğinin ve orantılılığının sorgulanmasıdır. Alternatifin hapis cezası olması durumunda ise, yeterli bakımın sağlanıp sağlanamayacağına dair sorun ortaya çıkacaktır.

Tez, **Beşinci Bölümde** sıralanan çeşitli tavsiyelerle sona ermektedir. Bu tavsiyeler, üç ceza adaleti sisteminin karşılaştırılmasından elde edilen sonuçlar ve örnekleri de kullanarak, bu sistemlerin AİHS standartlarına uygunluğunu artırmayı amaçlamaktadır. Bu tavsiyeler arasında Türkiye'de kapsamlı bir mevzuatın düzenlenmesi, İngiltere ve Galler'de tedavi edilebilirlik kriterinin yeniden ele alınması ve Hollanda'da uzun süreli yatış hükümlerinin gözden geçirilmesi de yer almaktadır. Genel amaç, akıl hastası suçluların haklarının etkili bir şekilde korunmasını sağlamak ve böylece daha insancıl ve adil bir ceza adaleti sisteminin teşvik edilmesidir.

Bu kapsamlı doktora tezi, yalnızca akıl hastası suçluların cezalandırılmasındaki zorluklara ışık tutmakla kalmayıp, aynı zamanda uluslararası insan hakları standartlarına uyum sağlamanın gerekliliğinin, sürekli reform ihtiyacının ve karşılaştırmalı hukuk araştırmalarının bu konudaki faydalarının altını çizmektedir.

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3 LIST OF ABBREVIATIONS

AA	appropriate adults
AHCP	Appropriate Healthcare Professional
AGWO	Advisory Committee on the Provision of Data on Refusing Observers (*Adviescommissie Gegevensverstrekking Weigerende Observandi*)
AMATEM	Research Centre of Alcohol and Substance Addicts *(Alkol ve Madde Bağımlıları Araştırma Merkezi)*
Bopz	Special Admission to Psychiatric Hospitals Act (*Bijzondere Opnemingen in Psychiatrische Ziekenhuizen*)
BPS	British Psychological Society
BVT	Beginselenwet verpleging ter beschikking gestelden (the Principles Act for TBS Patients)
By-Law	By-Law on the Administration of Penal Institutions and the Execution of Penalties and Security Measures (*Ceza İnfaz Kurumlarinin Yönetimi İle Ceza Ve Güvenlik Tedbirlerinin İnfazi Hakkinda Tüzük*)
C&JA	Coroners and Justice Act
CCP	Code for Crown Prosecutors
CJA	Criminal Justice Act
CPIA	Criminal Procedure and Investigations Act
CPS	Crown Prosecution Service
CPT	The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CrimPR	Criminal Procedure Rules 2020
C(S)A	Crime (Sentences) Act
COE	Council of Europe
CPIA	Criminal Procedure and Investigations Act
CRPD	Convention on the Rights of Persons with Disabilities
DCC	Dutch Criminal Code *(Wetboek van Strafrecht*)
DCCP	Dutch Code of Criminal Procedure *(Wetboek van Strafvordering*)
DJI	Judicial Institutions Department (*Dienst Justitiële Inrichtingen)*
DSM	Diagnostic and Statistical Manual of Mental Disorders
EBI	Extra Security Institution (*Extra Beveiligde Inrichting)*
ECHR	European Convention on Human Rights
ECoHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EPSM	Law on Execution of Penalties and Security Measures *(Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun*)
ERO	Evidential Review Officer
EU	European Union
EWCA	England and Wales Court of Appeal
EWCA Crim	England and Wales Court of Appeal Criminal Division
FPC	Forensic Psychiatric Centre (*Forensisch Psychiatrisch Centrum*)

FPK	Forensic Psychiatric Clinic (*Forensisch psychiatrische kliniek*)
FOBA	Forensic psychiatric support unit (*forensische observatie en begeleidings afdeling*)
FoI	Freedom of Information
FTT	First-tier Tribunal
GVM	*Gedragsbeïnvloedende en Vrijheidsbeperkende Maatregel*
HRA	Human Rights Act
ICCPR	International Covenant on Civil and Political Rights
IPP	imprisonment for public protection
JCHR	Joint Committee on Human Rights
L&D	Liaison and Diversion
LAP	National Placement Advisory Committee (*Landelijke Adviescommissie Plaatsing*)
MCA	Mental Capacity Act
MHA	Mental Health Act
MHTR	Mental Health Treatment Requirement
NGRI	not guilty by reason of insanity
NIFP	The Netherlands Institute for Forensic Psychiatry and Psychology *(Nederlands Instituut voor Forensische Psychiatrie en Psychologie)*
no.	number
NRGD	The Netherlands Register of Court Experts (*Nederlands Register Gerechtelijk Deskundigen*)
NVvP	The Dutch Association for Psychiatry (*Nederlandse Vereniging voor Psychiatrie*)
OM	The Netherlands Public Prosecution Service (*Openbaar Ministerie*)
p.	page
para.	paragrapgh
PACE	Police and Criminal Evidence Act
Pbw	Dutch Penitentiary Principles Act (*Penitentiaire beginselenwet*)
PI	Dutch Penitentiary Institution (*Penitentiaire Inrichting*)
PPC	Penitentiary Psychiatric Centre (*Penitentiair Psychiatrisch Centrum*)
PPD	Law on Police Powers and Duties
PPO	Prisons and Probation Ombudsman
RSJ	Council for the Administration of Criminal Justice and Protection of Juveniles (*Raad voor Strafrechtstoepassing en Jeugdbescherming*)
s.	section
SA	Sentencing Act
TBMM	Grand National Assembly of Türkiye *(Türkiye Büyük Millet Meclisi)*
TBS	terbeschikkingstelling
TCC	Turkish Criminal Code *(Türk Ceza Kanunu)*
TCCP	Turkish Code of Criminal Procedure *(Ceza Muhakemesi Kanunu)*
TCivC	Turkish Civil Code *(Türk Medeni Kanunu)*

TİHEK	Human Rights and Equality Institution of Türkiye (*Türkiye İnsan Hakları ve Eşitlik Kurumu)*
THAP	*Tutuklu ve Hükümlü Adli Psikiyatri*
TÜİK	Turkish Statistical Institute
UDHR	Universal Declaration of Human Rights
YGAP	Highly Secured Forensic Psychiatry Hospital *(Yüksek Güvenlikli Adli Psikiyatri Hastanesi)*
Wfz	Dutch Forensic Care Act (*Wet Forensische Zorg)*
WHO	World Health Organization
WODC	*Wetenschappelijk Onderzoek- en Documentatiecentrum*
Wvggz	Compulsory Mental Health Care Act (*Wet verplichte geestelijke gezondheidszorg*)
Wzd	Care and Coercion of Psychogeriatric and Mentally Disordered Patients Act (*Wet zorg en dwang psychogeriatrische en verstandelijk gehandicapte cliënten*)

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5 CURRICULUM VITAE

Candan Yılmaz was born and raised in Türkiye. She obtained her Bachelor's degree in Law from Ankara University in 2014. She simultaneously pursued a second Bachelor's degree in International Relations at Anadolu University, graduating in 2015. Upon completion of her studies, she undertook the mandatory internship and subsequently obtained her licence to practise as a lawyer from the Ankara Bar Association in 2015. She undertook postgraduate studies in criminal and criminal procedure law at Ankara University, defending her Master's thesis, entitled *Çocuk Düşürtme ve Düşürme Suçları (TCK m. 99-100) [Crime of Abortion and Miscarriage (TCC art. 99-100)]*, in 2019. During her master's studies, she held the position of lecturer, teaching courses in substantive criminal law and criminal procedure law courses for a period of three years. In 2019, she completed her second master's degree in Forensics, Criminology, and Law program at Maastricht University. Her thesis, entitled *"Comparison between anonymous witness and absent witness from the European Court of Human Rights point of view: Should they be treated equally?"*, was later published as an article. In November 2019, she commenced her PhD trajectory at the University of Groningen. During this period, she worked as a lecturer in the Criminal Law course for Bachelor's students, and the European Human Rights Law course for Master's students. Additionally, she acted as a supervisor for both Bachelor's and Master's theses. Between 2020 and 2021, she held a visiting researcher position at the University of Cambridge.

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Candan Yılmaz
Groningen, January 2025

ANNEXES

ANNEX 1 – RELEVANT ARTICLES OF THE CONSTITUTION OF THE REPUBLIC OF TÜRKIYE[2453]

Part One. General Principles
X. Equality before the law
ARTICLE 10
Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.

Women and men have equal rights. The State has the obligation to ensure that this equality exists in practice. Measures to be taken for this purpose shall not be interpreted as contrary to the principle of equality.

Measures to be taken for children, the elderly, the disabled, widows and orphans of martyrs, the invalids, and veterans shall not be considered contrary to the principle of equality.

No privilege shall be granted to any individual, family, group or class.

State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their procedures.

Part Two. Fundamental Rights and Freedoms
Chapter One. General Provisions
I. Nature of Fundamental Rights and Freedoms
ARTICLE 12
Everyone is entitled to fundamental rights and freedoms, which are intrinsic to their personality and cannot be infringed upon, revoked, or renounced.

Fundamental rights and freedoms also comprise the duties and responsibilities of the individual towards society, their family, and other persons.

II. Limitation of Fundamental Rights and Freedoms
ARTICLE 13
Fundamental rights and freedoms may be restricted only by law and only in conformity with the reasons mentioned in the relevant articles of the Constitution, without infringing upon their essence. These restrictions shall not contravene to the letter and spirit of the Constitution, the requirements of the democratic order of the society, the requirements of the secular nature of the republic, and to the principle of proportionality.

2453 The translations provided in the Annexes made by the author.
The last updates were made on 1 December 2024.

III. Prohibition of Abuse of Fundamental Rights and Freedoms
ARTICLE 14
None of the rights and freedoms enshrined in the Constitution shall be exercised in the form of activities aimed at violating the indivisible integrity of the State with its territory and nation, and at endangering the existence of the democratic and secular order of the Republic which is based on human rights.

None of the provisions of the Constitution shall be interpreted in such a way as to enable the State or persons to engage in any activity aimed at the abolition of the fundamental rights and freedoms recognised by the Constitution or to limit them more extensively than provided for in the Constitution.

The sanctions to be imposed on those who engage in activities contrary to these provisions shall be regulated by law.

IV. Suspending the Exercise of Fundamental Rights and Freedoms
ARTICLE 15
In times of war, mobilisation, or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended to the extent required by the situation, or measures may be taken contrary to the guarantees provided for in the Constitution, provided that the obligations arising from international law are not violated.

Even under the circumstances indicated in the first paragraph, the right to life and the integrity of the physical and moral existence of the person shall be inviolable, except in cases of death resulting from acts in accordance with the laws of war; no one shall be compelled to disclose their religion, conscience, thoughts or opinions, nor be accused thereof; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court verdict.

Chapter Two. Rights and Duties of the Individual
I. Inviolability of the Person, Physical and Moral Existence
ARTICLE 17
Everyone has the right to life and the right to protect and improve their physical and moral existence.

Except in cases of medical necessity and in cases prescribed by law, the bodily integrity of the person shall be inviolable; the person shall not be subjected to scientific and medical experiments without their consent.

No one shall be subjected to torture or ill-treatment; no one shall be subjected to punishment or treatment incompatible with human dignity.

The provisions of the first paragraph shall not apply to acts of killing in cases of self-defence, in the execution of arrest and detention warrants, in the prevention of the escape of a prisoner or convict, in the suppression of an uprising or rebellion, or in cases of necessity where the use of arms is permitted by law during the execution of orders given by the competent authority in extraordinary circumstances.

III. Personal Liberty and Security
ARTICLE 19
Everyone has the right to personal liberty and security.

The form and conditions thereof shall be prescribed by law:

The execution of sentences and security measures restricting liberty imposed by the courts; the arrest or detention of the person concerned as a requirement of a court order or an obligation stipulated by law; the execution of a decision to rehabilitate a minor under supervision or to bring them before the competent authority; fulfilment of a measure taken in accordance with the principles specified in the law for the treatment, education or rehabilitation in an institution of a mentally ill person, a drug or alcohol addict, a vagrant or a person who may spread disease, who poses a danger to society; the arrest or arrest of a person who seeks to enter or has entered the country in violation of the procedure, or for whom a deportation or extradition order has been issued; no one may be deprived of their liberty.

Individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention. Arrest of a person without a decision by a judge may be executed only when a person is caught in *flagrante delicto* or in cases where delay is likely to thwart the course of justice; the law shall specify the conditions thereof.

Individuals arrested or detained shall be promptly notified of the grounds for their arrest or detention and the charges against them in writing, or if this is not immediately possible, orally, and in the case of collective offences, at the latest until they are brought before a judge.

A person arrested or detained shall be brought before a judge within forty-eight hours at the latest and within four days at the most in the case of offences committed collectively, excluding the time required for transfer to the court nearest to the place of arrest. No one shall be deprived of their liberty after the expiry of these periods without the judgement of a judge. These periods may be extended in times of state of emergency and war.

The next of kin shall be notified immediately when a person has been arrested or detained.

Persons under detention shall have the right to request trial within a reasonable time and to be released during investigation or prosecution. Release may be conditioned by a guarantee as to ensure the presence of the person at the trial proceedings or the execution of the court sentence.

A person whose liberty has been restricted for any reason whatsoever shall have the right to apply to a competent judicial authority with a view to obtaining a prompt decision on their situation and their immediate release if the restriction imposed upon them is not lawful.

Any damage suffered by persons subjected to treatment other than these provisions shall be compensated by the State in accordance with the general principles of the compensation law.

XIII. Provisions on the Protection of Rights
A. Freedom to Seek Justice
ARTICLE 36
Everyone has the right to bring claims and defend themselves as plaintiffs or defendants before the judicial authorities and to a fair trial by the use of legitimate means and procedures.

No court shall refuse to hear a case within its jurisdiction.

B. Principle of Natural Judge
ARTICLE 37
No one shall be brought before any authority other than the judicial courts to which they are legally subject.

Extraordinary tribunals with jurisdiction which have the effect of bringing a person before an authority other than the court to which he is legally subject shall not be established.

C. Principles on Offences and Penalties
ARTICLE 38
No one shall be punished for a act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed.

The above paragraph shall also apply to the statute of limitations for offences and penalties and to the consequences of a criminal conviction.

Penalties and security measures substituting penalties, shall be prescribed only by law.

No one shall be presumed guilty until their guilt is established by verdict.

No one shall be compelled to make a statement incriminating themselves or their relatives specified in the law or to present evidence to that effect.

Findings obtained in violation of the law shall not be accepted as evidence.

Criminal responsibility shall be personal.

No one shall be deprived of their liberty merely on the ground of their inability to full a contractual obligation.

The death penalty and general confiscation shall not be imposed.

The administration shall not impose any sanction resulting in restriction of personal liberty. Exceptions to this provision may be introduced by law regarding the internal order of the Armed Forces.

Except for the obligations required by being a party to the International Criminal Court, a citizen shall not be extradited to a foreign country for an offence.

XV. Protection of Fundamental Rights and Freedoms
ARTICLE 40
Everyone whose constitutional rights and freedoms have been violated has the right to demand that the opportunity to appeal to the competent authority be provided without delay.

The State is obliged to indicate in its procedures the legal remedies and authorities to which the persons concerned may apply and the time limits.

Damages caused to persons as a result of wrongful acts committed by public officials shall be compensated by the State in accordance with the law. The State reserves the right of recourse to the responsible official.

Part Three. Fundamental Organs of the Republic
Chapter One. Legislative Power
II. Duties and Powers of the Grand National Assembly of Türkiye
D. Ratification of International Treaties
ARTICLE 90
The ratification of treaties to be concluded with foreign states and international organisations on behalf of the Republic of Türkiye shall be subject to adoption by the Grand National Assembly of Türkiye by a law approving the ratification.

Treaties regulating economic, commercial or technical relations, that do not exceed one year in duration, may be put into effect through promulgation, provided that they do not place an undue burden on the State Finances and do not affect the personal status and property rights of Turkish nationals in foreign countries. In such cases, these treaties shall be brought to the knowledge of the Grand National Assembly of Türkiye within two months of their promulgation.

Treaties based on an international treaty, and economic, commercial, technical, or administrative treaties, which are concluded on the basis of the authorization granted by law, shall not require ratification by the Grand National Assembly of Türkiye; however, treaties concluded pursuant to this paragraph concerning economic, commercial or the rights of private persons shall not be put into force unless promulgated.

The first paragraph shall apply to all treaties amending Turkish codes.

International treaties that have been duly put into effect shall have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds of unconstitutionality. In the event of a discrepancy between the provisions of international treaties on fundamental rights and freedoms that have been duly put into force and those of domestic legislation, the former shall prevail.

ANNEX 2 – RELEVANT ARTICLES OF THE TURKISH CRIMINAL CODE[2454]

FIRST VOLUME: General Provisions
SECOND CHAPTER: Principles of Criminal Responsibility
SECOND SECTION: Grounds that Lift or Diminish Criminal Responsibility
ARTICLE 32 – MENTAL DISORDER
(1) A person who, due to mental disorder, is lacking the ability to perceive the legal meaning and consequences of the act committed or whose ability to control their actions in relation to this act is significantly diminished shall not be subject to any punishment. However, security measures shall be imposed on such individuals.

(2) The person whose capacity to control their actions, in relation to the act committed by them, has significantly diminished, although not to the degree outlined in the first paragraph, shall be sentenced to twenty-five years imprisonment instead of *aggravated life*

2454 The translations provided in the Annexes made by the author.
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imprisonment[2455] and to twenty years imprisonment instead of life imprisonment. In other cases, the penalty to be imposed may be abated by up to one-sixth. The penalty may also be imposed partially or entirely as a security measure specific to the mentally disordered persons, provided that the sentence period remains the same.

ARTICLE 34 – TEMPORARY CAUSES AND BEING UNDER INFLUENCE OF ALCOHOL OR DRUGS

(1) No punishment shall be imposed to a person lacking ability to perceive the legal meaning and consequences of the offence or having considerably lost the capacity to control their actions due a temporary reason or under the influence of alcohol or drugs taken against their own will.

(2) The provisions of the first paragraph shall not apply to a person who commits an offence under the influence of alcohol and drugs taken voluntarily.

THIRD CHAPTER: Sanctions

SECOND SECTION Security Measures

ARTICLE 57- SECURITY MEASURES SPECIFIC TO PERSONS WITH MENTAL DISORDERS

(1) A security measure shall be imposed on a person who is mentally disordered at the time of committing the act, for the purpose of protection and treatment. Persons with mental disorders on whom security measures have been imposed shall be placed under protection and treatment in *high security health institutions*[2456].

2455 According to the TCC and the EPSM there are three types of imprisonment:
Transitory: a specified period of time.
1°. Life imprisonment
2°. Aggravated life imprisonment: the prisoner is required to remain in a cell that is designed to accommodate one person in a high-security prison.
Following the abolition of the death penalty in 2002, the new "aggravated" life imprisonment category was introduced to address the resulting gap in the legal framework. The rights of persons sentenced to aggravated life imprisonment are more limited than those of persons sentenced to life imprisonment. These rights include the right to call and the right to have a visitor, as well as the right to engage in social activities and to see other prisoners. However, these rights are subject to certain restrictions. For instance, a person sentenced to aggravated life imprisonment may only visit two prisoners per day, and these prisoners must be selected beforehand. Furthermore, conditional release, or release on probation, is a possibility after 30 years for those sentenced to aggravated life imprisonment, but this is not the case for those sentenced to life imprisonment, for whom the minimum release period is 24 years.

2456 The concept of the *"high security health institutions"* is a direct translation of the terminology used in the TCC. According to the law, the health institution must not only have high security in place to segregate individuals, but also have the necessary physical, electronic, and security equipment in order to protect them against any potential harm, whether from other individuals or from employees.

(2) A mentally disordered person on whom security measures have been imposed, may be discharged by the decision of the execution judge upon the report issued by the medical board of the institution where they are placed, provided that the report states that their dangerousness to the society has been either lifted or significantly diminished.

(3) The report of the medical board must include information regarding the necessity of medical control and follow-up in terms of security, according to the nature of the mental disorder and the act committed, and if such measures are deemed necessary, the duration and intervals thereof.

(4) Medical control and follow-up shall ensure that such persons are sent by the Public Prosecutor's Office to a health institution with technical equipment and authorised specialists at the time and intervals indicated in the report.

(5) In instances where it is determined through medical control and follow-up that the person's dangerousness for the society has increased due to the mental disorder, a security measure for the purpose of protection and treatment shall be ruled again by the execution judge based on the report prepared. In such cases, the procedures outlined in the first and following paragraphs of this article shall be repeated.

(6) Upon the board report prepared in the high-security health institution where the person is placed in accordance with the provisions of the first and second paragraphs, the imprisonment sentence may also be imposed as a security measure specific to the mentally disordered persons by the decision of the execution judge, in part or fully, provided that the duration of the imprisonment sentence remains the same.

(7) As a security measure, persons addicted to alcohol or drugs or stimulants who commit offences shall be placed under treatment in a health institution specialised for alcohol or drugs or stimulants addicts. The treatment of these persons shall continue until they recover from alcohol or drug or stimulant addiction. These persons may be released by the decision of the execution judge upon the report to be issued by the medical board of the institution where they are placed.

ANNEX 3 – RELEVANT ARTICLES OF THE TURKISH CODE OF CRIMINAL PROCEDURE[2457]

FIRST BOOK: General Provisions
PART THREE: Witness-stand, expert examination and judicial inspection
CHAPTER TWO: Expert examination
ARTICLE 63 – APPOINTMENT OF THE EXPERT
(1) In cases that require expertise, special or technical knowledge, it may be ruled ex officio or upon the request of the public prosecutor, the participant, the representative of the participant, the suspect or the defendant, the defence counsel or the legal representative of the defendant to obtain the opinion and vote of the expert. However, no expert shall be appointed on matters that can be concluded with general knowledge or experience or with the legal knowledge required by the profession of a judge. Persons with a law degree shall not be appointed as an expert unless they certify that they have a separate expertise outside the field of law.

(2) The appointment of the expert and the determination to appoint more than one expert with justification shall belong to the judge or the court. The same procedure shall be applied when the requests for the appointment of more than one expert witness are rejected.

(3) During the investigation phase, the public prosecutor may also exercise the powers set forth in this article.

ARTICLE 66 – DECISION TO APPOINT THE EXPERT AND CONDUCTING THE EXPERT EXAMINATIONS
(1) The decision to conduct an expert examination shall specify the questions to be answered which require expertise, special or technical knowledge, the subject matter of the examination and the period of time within which the task is to be completed. This period may not exceed three months, depending on the nature of the matter. Where special reasons so require, this period may, at the request of the expert, be extended by a maximum of three months by the justified decision of the authority appointing the expert.

(2) The expert who fails to submit their report within the specified period of time may be substituted immediately. In this case, the expert shall submit a report explaining the actions they have taken so far and shall immediately return the goods and documents delivered to them due to their duty. Furthermore, without prejudice to the provisions on civil and criminal liability, it may be decided not to grant any payment to the expert

2457 The translations provided in the Annexes made by the author.
The last updates were made on 1 December 2024.

under the heading of fees and expenses, and the regional board of experts shall be requested to impose the necessary sanctions, stating the justifications.

(3) The expert shall fulfil their duty in relation to the authority that has appointed them, shall inform this authority about the developments in their examinations when necessary, and may request that measures deemed useful be taken.

(4) The expert may also consult persons other than the suspect or the accused in order to obtain information for the performance of their duty. Should the expert wish to be enlightened on a matter which does not fall within their field of expertise, the judge, the court or the public prosecutor may allow them to consult persons who are qualified and recognised for their knowledge in this field. The persons so consulted shall take an oath and their reports shall be included in the file as an integral part of the expert's report.

(5) The persons concerned may also request the court to authorise the expert to obtain information from the persons who can provide the expert with technical information during the examinations whom they shall indicate by name or authorise the expert to carry out certain investigations.

(6) Where necessary, the expert may ask questions to the victim, suspect, or defendant through the presiding judge, judge, or public prosecutor. However, the presiding judge, judge, or public prosecutor may also allow the expert to ask questions directly. The medical expert assigned with the examination can ask questions directly to the victim, suspect, or defendant without the presence of the judge, public prosecutor, or defence counsel.

(7) Before the goods to be examined are given to the expert under seal, they shall be listed and counted. These matters shall be determined with a report. The expert is obliged to indicate the opening and replacing of the seals with a report and to issue a list.

ARTICLE 67- EXPERT REPORT AND SPECIALIST REPORT
(1) When the examination is completed, the expert shall hand over or send to the relevant authority their signed written opinion in which he described the procedure they have followed during the examination and its outcomes, by indicating that they have done the duties which were requested. The sealed items shall also be delivered or sent to the relevant authority and an official report will be made.

(2) If there is more than one expert appointed and they have different views or they have different opinions on common outcomes, they shall write this instance along with their reasons in the written expert report.

(3) In the written opinion, the expert shall not make any legal evaluation, which shall be conducted by the judge.

(4) During a hearing, the copies of the written expert opinion shall be given to the public prosecutor, intervening party, their representative, to the suspect or the accused, their defence counsel or the legal representative; or they may be sent to them by registered certified mail.

(5) After the expert has finished the examination; the public prosecutor, the intervening party or their representative, the suspect, the accused or their defence counsel, or the legal representative shall be given a specified time limit to object the written report or to demand new expert opinion. If the motion filed is denied, a judgment with the reasoning shall be given within three days.

(6) The public prosecutor, the intervening party or their representative, the suspect, the accused or their defence counsel, or the legal representative may ask a specialist of that field to write a scientific opinion which will be utilized to evaluate the subject matter of the trial, or be used for preparing a written expert opinion, or be used to evaluate the existed written opinion of the expert. However, they are not entitled to ask for additional time for this purpose.

CHAPTER THREE: Stationary mental examination, inspection of the body, judicial inspection and autopsy

ARTICLE 74 – STATIONARY MENTAL EXAMINATION

(1) If strong indications of suspicion are present, which tend to show that the suspect or the accused has committed the criminal conduct; then in order to clarify whether the suspect or the accused is mentally disordered, and if so, the duration of the illness, and whether this affected their actions, the Magistrate Judge during the pre-trial phase, and the Criminal Court during the trial phase, may order the suspect or the accused to be stationed in a public medical centre at the request of an expert, after hearing both the public prosecutor and the defence counsel.

(2) When the suspect or the accused has no defence counsel, a defence counsel shall be appointed, by the Bar Association upon the request of the judge or the court.

(3) The period of the stationary mental examination shall not exceed three weeks. If this period is not sufficient, upon the motion of the public medical centre, a ruling may be made and the additional terms not exceeding three weeks each may be given; the sum of the terms shall not exceed three months.

(4) The decision on stationary mental examination may be objected to; this motion suspends the execution of the decision.

SECOND BOOK: Investigation Phase

PART SIX: Defence

CHAPTER ONE: Selection, appointment, duties, and authorities of the defence council

ARTICLE 150 – APPOINTMENT OF A DEFENCE COUNSEL
(2) A defence counsel shall be appointed without the request of the suspect the accused when the suspect or the accused who does not have a defence counsel is a minor, or deaf-mute, or a person who is disabled to the extent that they cannot make their own defence.

BOOK THREE: Prosecution Phase
PART ONE: Conducting public prosecution
CHAPTER THREE: The order and discipline at the main hearing
ARTICLE 214 – THE READING OF REPORT, DOCUMENT AND OTHER WRITINGS
(1) The individuals who have signed the related document, other writings, or the report may be summoned to a hearing in order to give an oral explanation if it is deemed necessary after an official document or other writings containing explanations and opinions, or a report of a scientific examination, or reports of a medical doctor have been read out at the main hearing.

(2) If the report or the explanation and opinion had been produced by a commission, the court may suggest to the commission to delegate one of its members to explain the views of the commission.

(3) The explanations related to scientific opinions shall be submitted according to the provisions of Article 68 of this Code.

CHAPTER FOUR: Submitting and evaluation of evidence
ARTICLE 217 – THE POWER OF DISCRETION IN RELATION TO EVIDENCE
(1) The judge shall only rely upon evidence that is presented at the main hearing and has been discussed in their presence while forming their judgment. This evidence is subject to free discretion of the conscious opinion of the judge.

(2) The charged crime may be proven by using all kinds of legally obtained evidence.

PART TWO: Termination of Public Prosecution
CHAPTER ONE: Termination of the Hearing and Verdict
ARTICLE 223 – TERMINATION OF THE HEARING AND VERDICT
(1) A verdict shall be rendered after the end of the hearing is declared. Acquittal, not to impose a punishment, conviction, imposition of a security measure, inadmissibility, and dismissal of the case are verdicts.

(2) A verdict of acquittal shall be issued in the following cases:
a). The charged act is not defined as an offence in the law,
b). It is established that the charged offence was not committed by the accused,
c). Absence of intent or negligence of the offender for the offence charged,

d). Although the charged offence was committed by the accused, there is a reason of lawfulness in the incident,
e). It is not established that the charged offence was committed by the accused.

(3) A decision of not imposing a punishment shall be made for the accused in the following cases due to the fact that they lift the culpability:
a). The presence of minority, mental disorder or deafness and muteness or temporary reasons in connection with the charged offence,
b). The charged offence was committed by fulfilling an unlawful but binding order or in a state of necessity or under the influence of coercion or duress,
c). Exceeding the limit in self-defence due to excitement, fear, and panic,
d). Due to the absence of fault in cases of making a mistake.

(4) In cases where the offender cannot be sentenced despite the fact that the act committed continues to be an offence, a "decision not to impose a penalty" shall be made in the following cases:
a). Active remorse,
b). The existence of a personal ground of impunity,
c). Mutual insult,
d). The minority of the unjust nature of the act committed.

(5) If it is proven that the accused committed the charged offence, the accused shall be convicted.

(6) If it is proven that the accused committed the charged offence, a security measure shall be imposed INSTEAD OF OR IN ADDITION to a certain punishment.

(7) If there is a previous verdict or a lawsuit filed against the same accused for the same offence, the lawsuit shall be declared inadmissible.

(8) In the presence of the grounds for annulment stipulated in the Turkish Criminal Code or in cases where it is understood that the conditions for investigation or prosecution will not be fulfilled, the case shall be dismissed. However, if it is understood that the investigation or prosecution is conditional and the condition has not yet been fulfilled, a decision of suspension shall be made to wait for its fulfilment. This decision may be appealed.

(9) In cases where a verdict of acquittal can be rendered immediately, a decision of suspension, dismissal, or not to impose a penalty cannot be issued.

(10) A decision of non-jurisdiction directed to a jurisdiction other than the criminal jurisdiction shall be deemed as a verdict in terms of legal recourse.

ANNEX 4 – RELEVANT ARTICLES OF THE DUTCH CRIMINAL CODE[2458]

Wetboek van Strafrecht

BOOK ONE. GENERAL PROVISIONS

Part IIA. Measures

Chapter Two. Admission to a Psychiatric Hospital and Detention under an Entrustment Order

ARTICLE 37A

1). When the safety of others, or the general safety of persons or property so requires, the court may order an accused to be placed on remand if the judge finds that:
   1°) the accused had defective development or pathological disorder of their mental faculties during the commission of the offence; and
   2°) the offence committed by them is a punishable crime by a term of imprisonment of four years or more, according to the legal description or belongs to one of the crimes described in Articles 132, 285, first paragraph, 285b, and 395 of the Criminal Code, 175, second paragraph, subsection b, or third paragraph in conjunction with the first paragraph, subsection b, of the Road Traffic Act 1994, and 11, second paragraph, of the Opium Act.

2). In application of the previous paragraph, the court may refrain from imposing a punishment, even if it finds that the offence can be attributed to the accused.

3). For the purpose of the judgment referred to in the first paragraph, the court shall submit a reasoned, dated, and signed opinion of at least two behavioural experts of different disciplines, including a psychiatrist who have examined the person concerned. Such opinion shall be given by the behavioural experts jointly or by each of them separately. If this opinion is dated earlier than one year before the start of the hearing, the judge can only make use of it with the consent of the public prosecutor and the accused. Further rules may be set by or pursuant to an order in council regarding this governmental decree.

4). The third paragraph shall not apply if the person concerned refuses to cooperate in the examination to be conducted for the advice. As far as possible, the behavioural experts shall report jointly or separately on the grounds of the refusal. To the extent possible, the judge shall obtain another opinion or report which can inform them of the desirability or necessity of an order as referred to in the first paragraph and to the realization of which the person concerned is prepared to cooperate.

5). In issuing an order as referred to in the first paragraph, the court shall consider the content of the other opinions and reports issued on the personality of the suspect, as well as the seriousness of the offense committed or the multiplicity of prior convictions for crime.

2458 The translations provided in the Annexes made by the author.
The last updates were made on 1 December 2024.

6). If the person concerned is suspected of a crime directed against or causing danger to the integrity of the body as referred to in article 38e of the Criminal Code and he refuses to cooperate in any investigation as referred to in the fourth paragraph, the public prosecutor may order the chairman of the Multidisciplinary Committee referred to in the ninth paragraph, order that that committee issue an opinion to them on the presence and usefulness of personal data concerning a possible defective development or pathological disorder of the mental faculties of the person concerned, in respect of which the suspect is unwilling to cooperate in the provision. The members of the Multidisciplinary Committee are authorized to request personal data, including personal data concerning health, from doctors and behavioural experts and to take cognizance thereof. At the request of the Multidisciplinary Committee, the doctor or behavioural expert is obliged to provide the personal data of the person concerned to the Multidisciplinary Committee. No later than 30 days after the order referred to in the first sentence, the Multidisciplinary Committee shall issue a reasoned opinion to the public prosecutor on the presence and usefulness of the personal data in relation to the presence of a defective development or pathological disorder of the mental faculties during the commission of the offense. Of a charge referred to in the first sentence, the public prosecutor notifies the suspect, with the co-sending of the Multidisciplinary Committee's opinion.

7). The personal data of the person concerned provided to the Multidisciplinary Committee may only be used for the purpose of a report or advice as referred to in the fifth paragraph. For the application of the first sentence, the public prosecutor shall require written authorization, to be granted by the Penitentiary Chamber (*de penitentiaire kamer*) at its request. With this request, the public prosecutor shall submit the advice of the Multidisciplinary Committee. If the prosecutor, based on the advice of the Multidisciplinary Committee, refrains from making an application, he shall notify the accused and the Committee. In this article, Penitentiary means the three-judge court (*meervoudige kamer*) referred to Article 67 of the *Wet op de Rechterlijke Organisatie* (Judicial Organization Act), in the composition referred to in the third paragraph of that Article.

8). Before deciding, the Penitentiary Chamber shall hear the accused. The Penitentiary Chamber may hear the chairman of the Multidisciplinary Committee. The Penitentiary Chamber shall notify the accused in writing of its decision. The records shall remain under the Multidisciplinary Committee until the Penitentiary Chamber makes a final decision. If the Penitentiary Chamber authorizes the use of the personal data, the chairman of the Multidisciplinary Committee shall immediately provide the personal data to the behavioural experts referred to in the fourth paragraph. Within 90 days of an irrevocable rejection decision of the Penitentiary Chamber or a communication from the public prosecutor to the Committee that no demand is made as referred to in the sixth paragraph, the personal data concerning the health of the person concerned held by the committee shall be destroyed. The order of the Penitentiary Chamber may be appealed to the public prosecutor or the accused. Articles 446 to 448 of the *Wetboek van Strafvordering* (Code of Criminal Procedure) shall apply mutatis mutandis.

9). Our Minister[2459] shall establish a Multidisciplinary Committee whose task is to advise on the presence and usability of personal data concerning health. The Multidisciplinary Committee shall consist of two doctors, including a psychiatrist, a behavioural expert and two lawyers. The chairman of the Committee is a physician who is also a psychiatrist. By governmental decree, rules are laid down on the working method, confidentiality, and decision-making of the Multidisciplinary Committee, as well as on the data in the advice.

ARTICLE 37B

1). The court may order that the person detained under an entrustment order shall receive compulsory care if this care is necessary in the interest of the safety of others or the general safety of persons or property.
2). If the court has imposed a sentence of imprisonment in addition to the measure of an entrustment order with compulsory care, the court may include an opinion for the date on which the entrustment order with compulsory care should begin in its judgment.

ARTICLE 38

1). If the court does not issue an order as referred to in Article 37b, it shall set conditions pertaining to the conduct of the person detained under an entrustment order for the protection of the safety of others or the general safety of persons or property. The general condition is that the person detained under an entrustment order cooperates with fingerprinting for the purpose of establishing their identity or provides an identity document, as referred to in Article 1 of the *Wet op de Identificatieplicht* (Compulsory Identification Act) for inspection.
2). The court shall also appoint an institution designated in the judgment, which meets specific requirements to be set by or pursuant to general order in a council, to assist and support the person detained under an entrustment order in complying with the conditions.
3). If the judgment also imposes a custodial sentence, this may not exceed five years in the case referred to in the first paragraph of this Article.
4). If the judgment also imposes a custodial sentence for a period longer than three years, the court shall specify the nature of the care to be provided, which has been set as a condition, in the judgment.
5). A condition may be imposed by the judge only if the person has declared their willingness to comply with the condition.
6). The judge may, at the request of the public prosecutor or ex officio, order that the conditional placement be immediately enforceable.
7). An order, as referred to in the sixth paragraph, shall take effect at the time when the suspect is arrested for the implementation of such order, or at the time when the implementation of another order for deprivation of liberty, given in the same case, ends.
8). Further rules on the procedure of conditional release may be laid down by the governmental decree.

2459 Ministry of Justice and Security.

ARTICLE 38A

1). Under the conditions referred to in paragraph (1) of Article 38, the person detained under an entrustment order who admitted to an institution designated by the court, undergoes treatment provided by a professional designated in the judgment or takes medicine prescribed by the attending physician or permits this medicine to be administered to them by the attending physician.
2). Rules may be laid down by or pursuant to a governmental decree regarding the requirements to be met by an institution designated by the court.

ARTICLE 38D

1). The term of the detention under an entrustment order shall be for a period of two years from the day on which the imposing judgment becomes final.
2). On application of the Public Prosecution Service, the court may extend the term of the entrustment order for a period of either one year or two years at a time, if the safety of others or the general safety of persons or property requires so, except for the provisions of Article 38e or Article 38j.

ARTICLE 38E

1). The total term of the measure of detention under an entrustment order with compulsory care shall not exceed a period of four years, unless this order has been imposed for a serious offence against or endangering the physical integrity of one or more persons.
2). Except for the cases in which an order as referred to in Article 37b or Article 6:6:10, first paragraph, subsection e of the Code of Criminal Procedure has been issued, the total term of the entrustment order shall not exceed a period of nine years.
3). If the total term of the entrustment order is for an indeterminate period, the term of the detention under an entrustment order may be extended each time, if the safety of others or the general safety of persons requires so.

ARTICLE 38J

In the case of conditional termination of the compulsory care, the entrustment order may be extended for a period of one year or two years at each time.

CHAPTER FOUR. IMPOSITION OF A MEASURE INVOLVING RESTRICTION OF LIBERTY

ARTICLE 39

Not punishable is the person who commits an offence which cannot be attributed to them by reason of mental disorder, psychogeriatric disorder, or intellectual disability.

ANNEX 5 – RELEVANT ARTICLES OF THE DUTCH CODE OF CRIMINAL PROCEDURE[2460]

Wetboek van Strafvordering

First Book. General Provisions
Title I. Criminal Procedure in General
Fifth Section. Suspension of prosecution
Article 16

1). If the accused suffers from a mental disorder, psychogeriatric disorder, or intellectual disability to such an extent that they are unable to understand the purport of the prosecution against them, the court shall suspend the prosecution at any state.
2). As soon as the recovery of the accused is evident, the suspension shall be lifted.

Title III. Examination by the examining magistrate
Second Division. Performance of investigative acts by the examining magistrate
Article 196

Where it is necessary that an examination of the mental state of a suspect against whom pre-trial detention has been ordered will be conducted and this cannot be sufficiently carried out in any other way; the examining magistrate shall order, either ex officio or at the request of the public prosecutor or at the request of the accused, that the accused shall be transferred for observation to a psychiatric hospital to be designated in the order as referred to in Article 509f or an institution intended for clinical observation.

Article 198

1). The stay in the institution shall be considered temporary custody, may not exceed seven weeks, and shall end as soon as the accused must be released.
2). The examining magistrate may, either ex officio, at the request of the public prosecutor or at the request of the accused, extend the order referred to in Article 196 once by a maximum of seven weeks.
3). Article 197 shall apply mutatis mutandis to the order for extension pursuant to the preceding paragraph, with the proviso that the opinion of one or more experts may be dispensed with.
4). The examining magistrate may, either ex officio or at the request of the public prosecutor or at the request of the accused, at any time order that the stay in the institution shall end.
5). Our Minister of Security and Justice shall designate the institutions to which suspects may be transferred pursuant to an order referred to in Article 197.

2460 The translations provided in the Annexes made by the author.
The last updates were made on 1 December 2024.

Fifth Division. Experts

Article 227

1). The examining magistrate may, in the interests of the investigation, appoint one or more experts of their own discretion, at the request of the public prosecutor or at the request of the accused.

2). At the request of the accused to appoint an expert, they may recommend one or more persons as experts. Unless the interests of the investigation prevent it, the examining magistrate shall choose one or more of the experts from among the persons recommended by the accused. Article 51k second paragraph shall apply mutatis mutandis.

Article 229

1). Before issuing the report, the expert may apply to the examining magistrate for clarification of their assignment. The examining magistrate shall inform the public prosecutor and the accused of their response. The examining magistrate may also order an oral interview with the expert. The examining magistrate shall give the public prosecutor and the suspect the opportunity to be present.

2). In the interest of the investigation, the communication to the suspect referred to in the first paragraph may be delayed; for the same reason, the examining magistrate may waive the possibility of the public prosecutor and the suspect being present at the interview with the expert.

Article 230

1). After the expert has submitted their report to the examining magistrate, the examining magistrate shall send a copy thereof to the public prosecutor and the accused. Article 228(2) shall apply mutatis mutandis.

2). The suspect to whom the result of the examination has been notified shall be authorised to appoint an expert, who shall have the right to examine the sent report.

Article 232

The examining magistrate may hear the expert ex officio, at the request of the public prosecutor or at the request of the accused. The examining magistrate may order their summons. With regard to the expert and their hearing, Articles 211 to 213 shall apply mutatis mutandis.

Fourth division. Deliberation and ruling

Article 350

If the investigation referred to in article 348 does not lead to the application of article 349, paragraph 1, the court shall deliberate, on the basis of the charge and as a result of the examination at the hearing, on the question whether it has been proven that the offence was committed by the accused, and, if so, which punishable offence the proven fats constitute under the law; if it is determined that the offence is proven and punishable, the court shall deliberate on the punishability of the accused and on the imposition of punishment or measure as determined by law.

Article 351
If the court finds the charged offence proven to be a criminal offence and the accused criminally liable, the court shall impose the punishment or measure regulated for the offence.

Article 352
1). If the court finds it not proven that the accused has committed the offence they have been charged with, the court shall acquit them.
2). If the court finds the offence proven, but not punishable or the accused not punishable because of it, the court shall dismiss all charges. In the case referred to in Article 39 of the DCC, it may also impose a measure as provided for in Article 37, 37a, 37b or 77s of the DCC, when the statutory conditions have been met.

Book 6. Enforcement
Chapter 1. General provisions
First Title. Duties and powers
Article 6:1:1
1). The enforcement of judgments and punishment orders (*strafbeschikkingen*) shall be carried out by Our Minister.
2). To this end, the Public Prosecution Service shall provide Our Minister with the decision no later than 14 days after it has become enforceable.
3). Where appropriate, the Public Prosecutor's Office shall enclose the court's opinion on enforcement.

Article 6:1:2
Insofar as enforcement is permitted, the judgment shall be enforced as soon as possible.

Article 6:1:3
The execution shall take into account all eligible interests, including the safety of society, the interests of victims and relatives and the rehabilitation of the convicted person.

Article 6:1:6
1). An enforcement order issued by Our Minister which purports to arrest a suspect or convicted person shall contain:
   a). as precise an indication as possible of the person to be arrested;
   b). a statement of the decision or order on which the arrest is based;
   c). an indication of the place to which the arrested person is to be taken, or of the judge or official before whom they are to be led.
2). The person who has arrested a person in accordance with the order shall immediately lead the arrested person to the place or before the judge or official specified in the order.
3). Our Minister shall be promptly notified of the arrest by the person who made the arrest. If the person arrested claims not to be the person against whom the order is directed, Our Minister shall ensure that the identity of the person is unequivocally established.

4). The person to be arrested may be arrested outside the jurisdiction of a court. Articles 539n and 539o shall apply mutatis mutandis.

Second Title. Commencement, suspension, termination, and period of enforcement.

Article 6:1:16

1). Unless otherwise provided, no judgment may be enforced as long as any ordinary appeal against it remains open and, if it has been appealed, until it has been withdrawn or decided on.

...

Article 6:1:17

1). The enforcement of the punishment order (*strafbeschikking*) may not take place until fourteen days after the delivery in person or transmission of the copy of the punishment order, unless the power of opposition is waived.

2). An objection to the punishment order shall suspend or suspend enforcement, unless in the opinion of the Public Prosecutor's Office it is established that the objection was made after the expiry of the time limit set for it. At the hearing of the opposition, the Court may, at the request of the accused, determine that the enforcement of the punishment order shall be suspended or suspended. Suspension or suspension of enforcement shall end if the opposition is declared inadmissible.

3). The probation period of an instruction concerning the behaviour of the accused shall not run during the time when the person has been deprived of their liberty by right.

Article 6:1:19

1). The period of the TBS order[2461] shall not run during the time that:

a). the person placed under TBS order is deprived of their liberty by law for another reason and during the time they are absent without leave from such deprivation of liberty;

b). the conditional release has been deprived of their liberty by law and during the time they are absent without law as a result of such deprivation of liberty;

c). the conditional detainee is absent without permission from the institution for the care of detainees for more than one week at a time;

d). the conditional detainee is absent without leave from the institution where they have been admitted under the condition for more than one week consecutively;

e). the person who has been conditionally discharged from public confinement has been deprived of their liberty by operation of law and during the time they are absent without leave from such custody;

f). the person who has been conditionally discharged from state custody is absent without permission for more than one week at a time from the institution where they have been admitted pursuant to the condition.

2461 Entrustment order.

2). Contrary to the first paragraph, under a, the term of the TBS order shall run, however, if the person placed under detention:
   a). pursuant to an order as referred to in Article 6:2:8 or pursuant to the provisions of or under the Penitentiary Principles Act (*Penitentiaire beginselenwet*), has been admitted to an institution for the care of persons who have been placed under restraint or to another psychiatric hospital, unless they are absent without leave from that institution or hospital for more than one week;
   b). has been admitted to a psychiatric hospital after the period of detention has commenced, unless they are absent from that hospital unauthorized for more than one week.

Chapter 2. Deprivation of liberty penalties and measures.
First Title. Incarceration, commencement, interruption, and release.
Article 6:2:1

1). The admission of a person against whom an order for deprivation of liberty or a guilty verdict or judgment is to be enforced, in a facility or institution intended for that purpose as referred to in Article 1 of the Penitentiary Principles Act (*Penitentiaire beginselenwet*), Article 1.1 of the Forensic Care Act (*Wet forensische zorg*) or Article 1 of the Judicial Juvenile Institutions (Benefits) Act (*Beginselenwet justitiële jeugdinrichtingen*), shall take place pursuant to:
   a). either the order for arrest, detention in custody or pre-trial detention,
   b). either the guilty verdict or judgment or an extract thereof,
   c). or the order for enforcement from Our Minister.

...

Article 6:2:3

1). If the convicted person, after the final judgment but before the enforcement of a final verdict or judgment or sentencing to deprivation of liberty, has begun to suffer from a mental disorder, the court may order suspension of enforcement.
2). The suspension shall be ordered either at the request of the public prosecutor or at the request of the convicted person's legal counsel. Regarding the counsel, the provisions of the Third Title of the First Book shall apply.
3). After the recovery of the convicted person, at the request of the public prosecutor, the order of suspension shall be revoked by the same court.
4). If, despite the convicted person's mental disorder, the enforcement of another sentence is possible, the receiver shall be invited in the ordinary way to comply with the verdict or judgment. If the convicted person does not yet have a guardian, they shall be appointed for this purpose, if necessary, at the request of the public prosecutor.
5). With respect to the substitute punishment, paragraphs 1 to 3 shall apply.

Article 6:2:8

1). A person sentenced to imprisonment who fits the criteria because of a mental disorder, psychogeriatric disorder, or intellectual disability may be placed in an institution for the nursing of persons who have been placed under restraint. In that case, Article 6:2:16 shall apply mutatis mutandis.
2). If a convicted person sentenced to imprisonment is also subject to the measure of placement with a compulsory TBS-order, it shall be assessed at regular intervals whether the convicted person should be placed in an institution for the nursing of persons who have been placed under TBS-order.
3). The placement referred to in the first paragraph shall take place in accordance with the Forensic Care Act (*Wet forensische zorg*).
4). Against the decision to place, the decision to terminate it and the decision not to place in deviation from the advice of the court in accordance with the provisions of Article 37b, second paragraph of the Criminal Code, the convicted person may lodge an appeal with the Council for the Administration of Criminal Justice and Protection of Juveniles within four weeks after that decision has been communicated to them. Chapter XVI of the *Beginselenwet verpleging ter beschikking gestelden* ("BVT", the Principles Act for TBS Patients) shall apply mutatis mutandis.
5). The transfer and the appeal against it of convicted persons shall take place in accordance with the rules applicable to the transfer and the appeal against it of persons who have been discharged from public service in respect of whom an order has been issued for nursing.
6). This article shall apply mutatis mutandis to those sentenced to custody or substitute custody.

Third Title. Compulsory care and TBS order (*Verpleging van overheidswege en terbeschikkingstelling*)

Article 6:2:16

Our Minister shall see to it that the TBS patient who is under compulsory care receives the necessary treatment; the safety of society is observed, and the interests of victims are served. Our Minister may give special instructions to the head of the institution with regard to certain nurses in the interests of the safety of others or the general safety of persons or property or the interests of victims.

Article 6:2:17

1). Termination by the court of the TBS-order (*maatregel van terbeschikkingstelling*) shall not take place until after the order for public treatment has been conditionally terminated for at least one year.
2). The first paragraph shall not apply if the court, in deciding not to extend the entrustment order under Article 2.3 of the Forensic Care Act (*Wet forensische zorg*), issues a care authorization as referred to in Article 6:5, opening words and section a of the Compulsory Mental Health Care Act (*Wet verplichte geestelijke gezondheidszorg*), or a judicial authorization for admission and stay as referred to in Article 24 of the Care and Coercion of Psychogeriatric

and Mentally Disordered Patients Act (*Wet zorg en dwang psychogeriatrische en verstandelijk gehandicapte cliënten*).

3). A TBS order shall lapse upon the definitive pronouncement of a new TBS order.

Article 6:2:18

1). Our Minister may terminate the compulsory TBS order with order for coerced care in respect of a foreign national who does not have lawful residence in the Netherlands within the meaning of Article 8 of the Foreigners Act 2000 (*Vreemdelingenwet*).

2). Application of the first paragraph may only be made in respect of a foreign national for whom a suitable provision has been arranged by Our Minister in the country of origin, aimed at, at least reducing the disorder and the related risk of recidivism, and who has actually been deported from the Netherlands.

3). The termination will be subject to the condition that the foreign national leaves the Netherlands and does not return to the Netherlands.

...

Chapter 3. Freedom-restricting penalties, measures and conditions
Fourth Title. Supervision and arrest
Article 6:3:14

1). The public prosecutor's office is in charge of supervising compliance with:
   a). conditions imposed by:
      1°) postponement of the decision whether prosecution should take place;
      2°) a notification of no further prosecution,
      3°) suspension of pre-trial detention;
      4°) a conviction in which the court has determined that all or part of the sentence or measure will not be enforced;
      5°) interruption or conditional termination of the enforcement of a custodial sentence or measure;
      6°) the order for placement on remand;
      7°) grant of pardon.
   b). measures and directions concerning the conduct of the accused or convicted person or restricting their liberty;
   c). the additional penalty of disqualification from holding office or certain offices and from exercising certain professions, if the judge has ordered supervision.

2). If the court has ordered probation supervision, Our Minister shall instruct a foundation, certified institution or probation institution designated pursuant to an administrative order to conduct supervision and to supervise the suspect or convicted person for this purpose. The Public Prosecutor's Office and Our Minister may ex officio give an order as referred to in the first sentence or, if there is reason to do so, give the order to another designated foundation, certified institution or probation institution.

3). The supervised person is obliged to cooperate with the probation supervision, including cooperating in home visits and reporting to the probation institution as often and as long as the probation institution deems necessary. When providing supervision, the

certified institution performing juvenile probation or the probation institution shall establish the identity of the convicted person in the manner referred to in Article 27a, paragraph 1, sentence 1, and paragraph 2.

4). The foundation, certified institution or probation institution shall inform the public prosecutor about the supervision conducted. If it appears that the suspect or sentenced person does not comply with a condition, punishment, measure or instruction referred to in the first paragraph, does not cooperate in the supervision, or otherwise the interest of the safety of others or the general safety of persons or property so requires, the probation institution shall immediately notify the public prosecutor and Our Minister.

5). The public prosecutor may require any person to furnish such information as is reasonably necessary for the supervision of compliance referred to in the first paragraph. Section 96a, subsection 3, shall apply mutatis mutandis.

ANNEX 6 – RELEVANT ARTICLES OF THE DUTCH FORENSIC CARE ACT[2462]

Wet Forensische Zorg ("Wfz")

Chapter 1. Definitions
Article 1.1

1). In this Act and the provisions based thereon, the following definitions shall apply:
   a). TREATMENT PLAN: a plan drawn up as soon as possible after the commencement of treatment that is aimed at reducing the danger of the forensic patient resulting from the mental disorder, psychogeriatric condition or mental handicap to such an extent for others than the forensic patient or the general safety of persons or property that the forensic patient can return to society;
   b). FORENSIC PATIENT: means a person with an entitlement to forensic care;
   c). FORENSIC CARE: care as defined in paragraph 2;
   d). DETAINEE: a person in respect of whom the enforcement of a custodial sentence or measure involving deprivation of liberty is taking place in a penitentiary institution;
   e). *assessment*: a reasoned, dated and signed expert opinion, drawn up on the basis of an examination of the suspect, convict or detainee, in which the forensic care requirement and the necessary level of security are included;
   f). INSTITUTION: an institution designated by Our Minister as referred to in Article 1, paragraph 1, of the Care Quality, Complaints and Disputes Act, whose purpose is to provide forensic care;
   g). OUR MINISTER: the Minister of Security and Justice (*de Minister van Veiligheid en Justitie*);

2462 The translations provided in the Annexes made by the author.
The last updates were made on 1 December 2024.

h). OUR MINISTERS: the Minister of Security and Justice and the Minister of Health, Welfare and Sport;
i). PRIVATE INSTITUTION: an institution designated by Our Minister as referred to in Article 3.2, paragraph 1, whose nursing and treatment costs are reimbursed on the basis of a contract concluded by the care provider with Our Minister;
j). STATE INSTITUTION: an institution designated by Our Minister, under the management of Our Minister;
k). CRIMINAL TITLE (*strafrechtelijke titel*): a decision by a judge, public prosecutor or Our Minister that includes the provision of mental health care or addiction care;
l). DISMISSAL: a decision by the public prosecutor to refrain from further prosecution, as referred to in Article 167, second paragraph, of the Code of Criminal Procedure;
m).DISCHARGED: a forensic patient in respect of whom an order for state compulsory nursing, as referred to in Article 37b or 38c of the Code of Criminal Procedure, has been issued;
n). CONDITION: a restrictive provision accompanying a sentence, measure, dismissal or pardon, or the execution thereof, which requires a person to be admitted to an institution or to undergo treatment by a health care provider or to use or tolerate medicines prescribed or offered by a health care provider;
o). CARE PROVIDER: a legal entity which provides forensic care as referred to in or by virtue of Article 1, paragraph 2, in a commercial or professional capacity, an organizational association of natural persons which provides, or causes to be provided, forensic care as referred to in or by virtue of Article 1, paragraph 2, in a commercial or professional capacity, or a natural person which provides, or causes to be provided, forensic care as referred to in or by virtue of Article 1, paragraph 2, in a commercial or professional capacity.

2). Forensic care means care provided to an offender with a psychiatric condition or limitation, including addiction, or a mental disability, and which, whether or not as a condition, forms part of a sentence or a measure, or of the execution of a sentence or measure, or as a condition forms part of a dismissal, a suspension of pre-trial detention, or a pardon under the Pardon Act (*Gratiewet*), or forms part of a criminal order imposing a behavioural measure. The first sentence does not apply to care that, as a condition or otherwise, forms part of a punishment or measure referred to in the First Book, Title VIII A, of the Criminal Code. Forensic care includes the care referred to in Article 3:2 of the Compulsory Mental Health Care Act (*Wet verplichte geestelijke gezondheidszorg*) and Article 1, paragraph 4, and Article 2, paragraph 1, of the Care and Compulsion Act (*Wet zorg en dwang*). By or pursuant to general order in council, other forms of care may be designated as forensic care or excluded from it.

Article 2.1

1). Taking into account the character of the custodial sentence or measure, its implementation shall be used as much as possible for the recovery of the forensic patient and reduction of the risk of recidivism, for the safety of society.
2). Forensic care provides the necessary connection with other forms of mental health care.

Article 2.2

1). Forensic patients shall be provided with the forensic care to which they are designated by the criminal title.
2). Our Minister shall provide for the implementation of forensic care.
3). The forensic patient cannot be required to contribute to the costs of staying in an institution.

Article 2.3

1). If the court is of the opinion, that the criteria for issuing a care authorization under the Compulsory Mental Health Care Act have been met, it may, ex officio or following a petition from the public prosecutor, issue a care authorization pursuant to that Act as referred to in Article 6:5 opening words and part a of that Act, with application of that Act. This power may be applied in the context of criminal law enforcement by separate decision:
   1°) at the time of the court ruling convicting a person for a criminal offense;
   2°) at the time of the court ruling in accordance with Article 9a of the Criminal Code that no penalty is imposed;
   3°) to the judicial decision in which the accused is acquitted;
   4°) by the judicial decision dismissing the accused from all legal proceedings;
   5°) at the request of the public prosecutor;
   6°) if the judge does not renew the measure of placing on remand;
   7°) if the judge does not renew the conditional termination of the state mental health treatment;
   8°) if the judge does not renew the placement in an institution for juveniles;
   9°) if the judge does not renew the conditional termination of the measure placement in an institution for juveniles;
   10°) in the case of a judicial decision, at the request of the public prosecutor, to convert the measure placement in an institution for juveniles into the measure of placement at the institution for juveniles;
   11°) if the conditions referred to in Article 2.4 of the Wfz have expired.
2). If the judge is of the opinion that the criteria for issuing a judicial authorization for admission and stay as referred to in Article 24 of the Care and Coercion of Psychogeriatric and Mentally Disordered Patients Act (*Wet zorg en dwang psychogeriatrische en verstandelijk gehandicapte cliënten*) have been met, he may, ex officio or following a petition by the public prosecutor, issue a judicial authorization pursuant to that Act for the maximum duration of six months, with application of that Act. This power may be applied in the context of criminal law enforcement by a separate decision on one of the grounds specified in first paragraph, under 1° up to and including 11°.

Article 2.5

Six weeks before the expiration of the judicial title, the care provider shall make preparations for subsequent care, if the care provider or the practitioner is of the opinion that further care under the Long-Term Care Act (*Wet langdurige* zorg) or the Health Insurance Act (*Zorgverzekeringwet*) is necessary after the expiration of the criminal title.

Article 2.6

1). For the purpose of the *assessment*, the placement of forensic patients with care providers, the provision of forensic care, the declaration and payment of forensic care and the supervision of forensic care as provided pursuant to this Act, personal data of forensic patients, including special categories of personal data as referred to in Article 3.1 of the General Data Protection Regulation (Implementation) Act (*Uitvoeringswet Algemene verordening gegevensbescherming*) and of judicial data within the meaning of the Judicial and Criminal Records Act (*Wet justitiële en strafvorderlijke gegevens*), shall be processed.

2). Our Minister, the body referred to in first paragraph of Article 5.2, the care provider, the probation service and the Public Prosecution Service shall be responsible for the processing referred to in paragraph 1.

3). Our Minister shall provide to the care provider for the purpose of the placement of the forensic patient with that care provider, the provision of care to that patient, the declaration and payment of the forensic care, the criminal justice number of the forensic patient or, in the absence of such number, their other person-identifying number for criminal and penitentiary purposes to be designated by order in council, as well as the criminal title, its duration, any conditions imposed that relate to the forensic care, the *assessment* and the way in which the supervision of the execution is shaped.

4). When processing data for the purpose of claiming, the criminal justice number of the forensic patient or, in the absence of this number, their other person-identifying number for criminal and penitentiary purposes to be designated by order in council shall be used, the criminal title and its duration shall be processed, as well as the forensic care provided. For the purpose of claiming and paying for forensic care, the care provider is authorized to provide the data mentioned in the preceding sentence to Our Minister.

5). For the purpose of supervision and monitoring of forensic care, the Public Prosecutor's Office shall provide the probation service with the data to be designated by order in council, including special personal data, regarding the criminal title and duration thereof and regarding the forensic care to be provided under the criminal title.

6). If necessary for the purpose of monitoring compliance with the conditions regarding the provision of forensic care, the care provider shall provide the Public Prosecutor's Office or the probation institution with the data to be designated by general order in council regarding the treatment compliance of the forensic patient. This concerns in any case data regarding the dates the forensic patient received care or was absent and data regarding the cooperation of the forensic patient with the forensic care provided. The care provider shall also provide, after completion of the forensic care, or at an earlier stage at the request of the public prosecutor or on its own initiative if in its opinion this is necessary in connection with the prevention of recidivism, an opinion regarding the likelihood of repetition of the behaviour in connection with which the forensic care was imposed.

Chapter 3. Institutions
Article 3.1

1). Our Minister shall designate the institutions designated as state institutions for forensic care.
2). The designation, referred to in the first paragraph, shall make the *Beginselenwet verpleging ter beschikking gestelden* applicable, unless the law provides otherwise. If the institution is part of a penitentiary institution as an organizational unit, the designation may declare the *Penitentiaire beginselenwet* applicable.

Article 3.2

Our Minister shall designate the institutions intended to be private institutions for forensic care.

Chapter 5. *Assessment*
Article 5.1

1). For the purpose of the criminal title, the placement, the provision of care and its declaration, an *assessment* shall be drawn up.
2). The judge, the public prosecutor, or Our Minister shall decide on the forensic care to be provided on the basis of an assessment. If the judge, the public prosecutor, or Our Minister deviates from the assessment statement, the indication statement shall be brought into line with the criminal title by the body referred to in Article 5.2, paragraph 1.
3). The assessment referred to in the first paragraph, or in the event the second paragraph is applied, the assessment referred to in the second paragraph, shall also be sent to Our Minister for the purpose of the placement decision referred to in Article 6.1, first paragraph.
4). In the event that it only becomes evident at the hearing that forensic care must be provided and no assessment is available, the court may decide in deviation from the second paragraph that forensic care will be provided. In that case, Our Minister shall order an assessment for the purpose of the placement decision as referred to in Article 6.1, paragraph 1, as soon as possible after the court's decision.
5). Our Minister shall forward the assessment he has received to the care provider, where the forensic patient has been placed, for the purpose of the provision of care and its declaration.

Article 5.2

1). A body to be designated by Our Minister is authorized to issue an assessment to the judge, public prosecutor or Our Minister.
2). Our Minister is authorized to order a new assessment if, in His judgment or in the judgment of the care provider, it no longer provides the necessary forensic care. Before ordering a new assessment, the care provider and the forensic patient shall be heard on the matter.
3). Articles 196, 197, 198, 317, 509g and 509h of the Code of Criminal Procedure apply mutatis mutandis to the examination for the purpose of the assessment.

4). In urgent cases, the public prosecutor may order that forensic care be provided before an assessment has been issued and the criminal title has been granted.

Chapter 6. Placement, transfer and relocation
Article 6.1

1). The placement of forensic patients with a care provider shall be made by or on behalf of Our Minister, on the basis of a dated decision. Our Minister shall take the decision referred to in the first sentence only after he has been presented with an assessment.
2). Immediately after the decision referred to in the first paragraph, Our Minister will inform the care provider in writing of the criminal title, any conditions imposed, and the manner in which supervision will be given.
3). After placement of the forensic patient, the care provider is obliged to provide the indicated care and security. The institution is obliged to admit the forensic patient and provide forensic care.
4). Our Minister may impose an administrative fine on the healthcare provider if the healthcare provider fails to comply with the obligation to admit and provide forensic care referred to in paragraph 3.

Article 6.2

1). The placement referred to in Article 6.1, paragraph 1, shall in any case include in the considerations:
   a). the requirements of the protection of society against the dangerousness of the forensic patient for the safety of others than the forensic patient or the general safety of persons or property;
   b). the requirements of the provision of forensic care to the forensic patient given the nature of the mental disorder or intellectual disability diagnosed in them;
   c). the forensic care needs and security level as included in the assessment.
2). With respect to the transfer of the forensic patient to another care provider, the first paragraph shall apply mutatis mutandis.
3). In connection with the requirements referred to in paragraph 1(a), Our Minister may set conditions at the time of placement or transfer, with which provision of forensic care to the forensic patient must comply.
4). At the request of Our Minister, the public prosecutor shall give advice on the level of security or on the conditions to be imposed, as referred to in the third paragraph.
5). The data included in the indication are only used by Our Minister for the purpose of the decision referred to in Article 6.1, paragraph 1, and for making prognoses.

Article 6.4

...

3). Our Minister may grant an authorization to the head of the institution to terminate the treatment and discharge the forensic patient from the institution, if:
   a). the working period of the criminal title has ended;

b). a forensic patient has not been forcibly admitted and he has requested termination of admission;
c). the termination of treatment and discharge relate to persons who have been discharged and on whom the judge has imposed a condition pursuant to Article 38, paragraph 1, of the Criminal Code, persons who have been discharged and on whom the judge has imposed a condition pursuant to Article 14c, Article 38g and Article 38p of the Criminal Code and one of the following circumstances occurs:
1°) the mental disorder or mental disability of the forensic patient has diminished to such an extent that, also taking into account the safety of others than the forensic patient or the general safety of persons or property, it is justified to allow them to return to society;
2°) the continuation of the forensic patient's stay in the institution poses a danger to the maintenance of order or safety in the institution or the treatment of other patients and placement elsewhere is provided for;
3°) the interests of the forensic patient dictate that their treatment be continued elsewhere and placement elsewhere is provided for;
4°) the treatment of the forensic patient shows insufficient results and placement elsewhere is provided for.

Article 6.5

1). If the interests of the safety of others or the general safety of persons or property so require, Our Minister may determine that a forensic patient be temporarily placed for a period not exceeding seven weeks in an institution other than the institution in which the forensic patient has been placed, in order to ascertain whether a transfer is necessary for safety reasons.
2). If the treatment of the forensic patient, in view of the nature of the mental disorder or intellectual disability observed in them, so requires, Our Minister may determine that a forensic patient shall be temporarily placed for a period not exceeding seven weeks in an institution other than the institution where the forensic patient has been placed, in order to consider whether a transfer for the purpose of different treatment is necessary.
3). If the temporary placement referred to in the first or second paragraph does not result in the transfer of the forensic patient to another institution, he shall return to the institution where he was placed after the expiration of the period not exceeding seven weeks.
4). Our Minister may, if this is necessary with a view to preparing the return of the forensic patient to the institution in which he was placed, extend the period referred to in the third paragraph by a maximum of four weeks.

Article 6.9

Our Minister is authorized to transfer a forensic patient to an institution if this is necessary for the purpose of assessment.

ANNEX 7 – RELEVANT ARTICLES OF THE DUTCH COMPULSORY MENTAL HEALTH CARE ACT[2463]

Wet verplichte geestelijke gezondheidszorg ("Wvggz")

Chapter 1. General provisions
Article 1:1

2). For the purposes of this Act and the provisions based thereon, "serious harm" means the existence of or significant risk of:
   a). danger to life, serious physical injury, serious psychological, material, immaterial or financial damage, serious neglect or social breakdown, seriously disturbed development for or of the person concerned or another person,
   b). threat to the safety of the person concerned whether or not due to them becoming under the influence of another;
   c). the situation that the person concerned provokes aggression from others through hindering behaviour;
   d). the situation that the general safety of persons or goods is endangered.

Article 1:3

3). As representative in respect of the exercise of the rights and duties under this Act of an adult person concerned, the following shall act:
   a). the person concerned's authorised representative as such, or
   b). if the person concerned is not capable of a reasonable valuation of their interests with regard to the exercise of these rights and duties:
      – the guardian or mentor, or in their absence,
      – the authorised representative referred to under a, or in the absence of the aforementioned,
      – the spouse, registered partner or other life companion, or if the latter does not wish this or is missing,
      – a parent, child, brother, sister, grandparent or grandchild, unless this person does not wish, or is absent.

7). The representative will exercise the care of a good representative and is bound to involve the person involved as much as possible in the performance of their duties.

Chapter 2. General principles
Article 2:1

1). The care provider and the medical director offer sufficient possibilities for care on a voluntary basis, in order to prevent compulsory care as much as possible.
2). Compulsory care can only be considered as a measure of last resort, in cases where there are no possibilities for voluntary care.

2463 The translations provided in the Annexes made by the author.
The last updates were made on 1 December 2024.

3). When preparing, issuing, implementing, executing, amending, and terminating a crisis measure, authorization to continue the crisis measure or care authorization of the compulsory care, the proportionality, subsidiarity, effectiveness and safety of compulsory care, including compulsory care in outpatient settings, shall be assessed.
4). The preparation, issue, implementation, amendment and termination of a crisis measure, authorisation to continue the crisis measure or care authorisation shall take into account the conditions necessary to promote participation of the person concerned in social life.
5). During the preparation, implementation, modification and termination of a crisis measure, authorisation to continue the crisis measure or care authorisation, the wishes and preferences of the person concerned with regard to care are recorded.
6). 6. The wishes and preferences of the person concerned regarding the compulsory care will be honoured, unless:
   a). the person concerned is not capable of a reasonable appreciation of their interests in this respect, or
   b). the person involved is in imminent danger of death or there is a considerable risk of death for another person, serious physical injury, serious psychological, material, immaterial or financial damage, serious neglect or social breakdown, or to be seriously impaired in their development, or the general safety of persons or property is at risk.
7). In the preparation, execution, modification and termination of a crisis measure, authorisation to continue the crisis measure or care authorisation, the family, immediate relatives of the person concerned and the general practitioner shall be involved as much as possible.
8). When preparing, issuing, implementing, modifying and terminating compulsory care, the possible long-term adverse effects of the compulsory care on the person concerned shall be included in the assessment of subsidiarity, proportionality, effectiveness and safety and, if possible, discussed with relevant experts.
9). When preparing, issuing, carrying out, modifying and terminating compulsory care for children and adolescents, additional due diligence requirements shall be imposed where necessary, and the possible long-term adverse effects of the compulsory care on the person's physical and mental development and participation in social life shall be included in the assessment of subsidiarity, proportionality, effectiveness and safety, and discussed with relevant experts if possible.

Chapter 3. Criteria for and aims of compulsory care
Article 3:2
1). Care includes the care provided by a healthcare provider to the person concerned, which may consist of treatment, care, nursing, treatment, counselling, protection, security, and compulsory care as referred to in the second paragraph.
2). Compulsory care consists of:

a). administering fluids, food and medication, as well as performing medical checks or other medical actions and therapeutic measures, to treat a mental disorder, or because of that disorder, to treat a somatic condition;
b). restricting the freedom of movement;
c). confining;
d). exercising supervision over the individual concerned;
e). examining clothing or body;
f). searching the housing or accommodation area for behaviour-influencing substances and dangerous objects;
g). checking for the presence of behaviour-influencing substances;
h). placing restrictions on the freedom to organise one's own life that result in the person concerned having to do or refrain from doing something, including the use of means of communication;
i). restricting the right to receive visitors;
j). admitting to accommodation;
k). depriving the individual concerned of their freedom by transferring them to a place suitable for temporary residence as referred to in Article 7:3(3).

Article 3:3
If the behaviour of a person as a result of their mental disorder, not being a psychogeriatric condition, mental disability, or an illness or condition equated with it pursuant to Article 1 paragraph 4, or under application of Article 24 paragraph 4, of the Care and Compulsion Act for Psychogeriatric and Mentally Handicapped Patients (*Wet zorg en dwang psychogeriatrische en verstandelijk gehandicapte cliënten*), leads to serious harm, compulsory care as referred to in Article 3:1 may be provided as a last resort, if:
a). there are no possibilities for care on a voluntary basis;
b). there are no less onerous alternatives with the intended effect for the person concerned;
c). the provision of compulsory care, given the intended purpose of compulsory care, is proportionate; and
d). there is a reasonable expectation that the provision of compulsory care will be effective.

Article 3:4
Compulsory care may be provided to:
a). avert a crisis situation,
b). avert serious harm,
c). stabilise the mental health of the individual concerned,
d). restore the mental health of the individual concerned in such a way that they regain their autonomy as far as possible, or
e). stabilise or restore the physical health of the individual concerned in the event that their behaviour as a result of their mental disorder leads to serious harm for it.

Chapter 5. Preparation for care authorisation
Paragraph 3. The medical certificate
Article 5:9

1). The medical director shall ensure that the psychiatrist in the medical certificate shall in any case state their findings concerning:
   a). the symptoms exhibited by the person concerned and a diagnosis or provisional diagnosis of the mental disorder of the person concerned;
   b). the relationship between the mental disorder and the behaviour leading to the serious harm;
   c). the care necessary to eliminate the serious harm.

Paragraph 4. The care card and care plan
Article 5:14

1). The care plan shall in any case include:
   a). a diagnosis made by the care manager of the person's mental disorder and the behaviour that results from the mental disorder and leads to serious harm;
   b). the care necessary to eliminate the serious harm;
   c). the aim of compulsory care;
   d). the manner in which the preferences of the person concerned with regard to the care are taken into account, as recorded on the care map including the attachments;
   e). the views and contact details of persons, referred to in Article 5:13, fourth paragraph;
   f). the maximum duration of the individual forms of compulsory care;
   g). the manner in which the care provider and the medical director monitor the quality of the compulsory care and supervise the implementation of the compulsory care in ambulatory conditions;
   h). the essential conditions for participation in the social life of the person concerned, insofar as these are lacking;
   i). the frequency with which and the circumstances under which the care plan and the subsidiarity, proportionality, effectiveness and safety of the compulsory care are evaluated with the person concerned, the representative, as well as the family member or next of kin and the patient confidential adviser, and the care plan is updated;
   j). the care provider who can be charged with the implementation of the care authorisation, and if necessary the accommodation.

Chapter 6. Care authorisation
Article 6:1

1). The court shall hear the person concerned after receiving the application for a care authorisation, unless the judge determines that the person concerned is unable or unwilling to be heard. The court shall give the representative and the lawyer the opportunity to express their views orally.
2). The court may order an examination by experts and is authorised to summon such or other experts as well as witnesses. The court shall summon the experts and witnesses

specified by the person concerned, unless he considers that it is reasonable to assume that the person concerned will not suffer harm to their interests by not doing so. If the court has not summoned a declared expert or witness, it shall state the reason in the ruling.

3). The court may order to appear:
   a). the public prosecutor;
   b). the medical director;
   c). the representative;
   d). the psychiatrist who drew up the medical certificate;
   e). the care provider or care manager;
   f). a police officer who is familiar with the person concerned;
   g). the family guardianship worker.

4). If the court is informed in the absence of the person concerned, the factual content of the information provided shall be communicated to the person concerned.

Article 6:3

1). There is no appeal against the decision on the granting of a care authorisation.

Chapter 8. Rights and duties in the implementation and execution of the crisis measure, authorisation to continue the crisis measure and care authorisation

Paragraph 1. Implementation and execution of the crisis measure, authorisation to continue crisis measure and care authorisation

Article 8:1

1). The public prosecutor shall proceed with the implementation of the care authorisation without delay, but no later than two weeks after its issue by the court.

ANNEX 8 – RELEVANT ARTICLES OF THE DUTCH PRINCIPLES ACT FOR TBS PATIENTS[2464]

Beginselenwet verpleging ter beschikking gestelden ("BVT")

Article 16

1). The director of the institution shall ensure that a nursing and treatment plan is drawn up in consultation with the patient as soon as possible, and no later than three months after they are admitted to the institution. The director assigns each patient a personal accommodation and ensures that it is properly furnished. Our Minister shall lay down rules regarding the requirements to be met by a residential room.

2). The treatment plan, referred to in the first paragraph, is aimed at removing the danger caused by the mental disorder, psychogeriatric disorder or intellectual disability to the detainee to such an extent that the detention may be terminated or conditionally ended. If possible, this shall be done by treating the disorder. If this is not possible, it shall be done by otherwise reducing the danger.

3). By order in council, rules are laid down regarding the minimum requirements to be met by a nursing and treatment plan and the rules to be observed in case of an amendment thereof.

4). Before the nursing and treatment plan is adopted, consultations shall be held with:
   a). the guardian, if the patient has been placed under guardianship;
   b). the mentor, if a mentorship has been established for the benefit of the patient;
   c). the parents or guardian, if the patient is a minor.

Article 17

1). Treatment shall be provided on behalf of the institution. In cases where a part of the treatment cannot be provided by the institution, the director of the institution shall ensure that it can be provided by a suitably qualified third party.

2). The director of the institution shall ensure that treatment takes place in accordance with the nursing and treatment plan.

2464 The translations provided in the Annexes made by the author.
The last updates were made on 1 December 2024.

ANNEX 9 – OPENING DATES AND BED CAPACITIES OF YGAP HOSPITALS

Email reply to freedom of information application on 06/12/2021 by cimer_bilgi@cimer.gov.tr

CİMER | CUMHURBAŞKANLIĞI İLETİŞİM MERKEZİ

Sayın CANDAN YILMAZ,

T.C. Cumhurbaşkanlığı İletişim Merkezi (CİMER)' ne 10.05.2021 tarihinde yapmış olduğunuz 2102517277 sayılı başvurunuz 06.12.2021 tarihinde ŞEHİR HASTANELERİ KOORDİNASYON DAİRESİ BAŞKANLIĞI tarafından cevaplanmıştır:

Sayın ilgili şu ana kadar 13 tane şehir hastanesi hizmete açılmış olup bunlardan 6 tanesinde YGAP bulunmaktadır bunlar: Bursa Şehir Hastanesi 100 yataklı olup 11.11.2019 da hizmete açılmıştır.

Eskişehir Şehir Hastanesi 100 yataklı 21.02.2019 da hizmete açılmıştır

Ankara Şehir Hastanesi 80 yataklı olup 22.03.2021 de hizmete açılmıştır

Elazığ Fethi Sekin Şehir Hastanesi 100 yataklı olup 18.08.2018 de hizmete açılmıştır

Adana Şehir Hastanesi 100 yataklı olup 23.01.2018 de hizmete açılmıştır

Kayseri Şehir Hastanesi 72 yataklı olup 01.07.2018 de hizmete açılmıştır

This publication offers a unique comparative analysis of the sentencing of mentally disordered offenders in Türkiye, England and Wales, and the Netherlands, exploring the alignment of these systems with the European Convention on Human Rights (ECHR). While the presence of mental disorders impacts criminal responsibility, the legal responses and practices differ significantly across jurisdictions.

The complex sanctioning system in Türkiye faced substantial challenges due to the absence of secure forensic psychiatric facilities until 2018. Despite legal mandates, mentally disordered offenders were often either released or unlawfully detained in prisons, creating a prolonged gap between law and practice. The research highlights how the situation evolved and assesses the lingering issues, which were exacerbated by delays during the COVID-19 pandemic.

In order to contextualize the criminal justice system of Türkiye, comparisons are drawn with the criminal justice systems of the Netherlands and England and Wales, two jurisdictions which have distinct and unique frameworks for mentally disordered offenders. The eminent TBS (*terbeschikkingstelling*) system of the Netherlands and the bifurcated sentencing approach in England and Wales provide valuable points of reference.

This publication is of significance in the field of legal academic literature given the paucity of research on the Turkish criminal justice system, carried out in languages other than Turkish. It evaluates the degree to which these systems adhere to or deviate from ECHR standards, thereby providing insights that facilitate improved compliance with human rights requirements. By bridging comparative legal traditions and identifying best practices, this research holds significant societal and academic relevance.

Candan Yılmaz (Türkiye, 17 February 1992) She obtained her Bachelor's degree in Law from Ankara University in 2014 and a second degree in International Relations from Anadolu University in 2015. Following the completion of her mandatory internship, she obtained her licence to practise as a lawyer from the Ankara Bar Association in 2015. She then pursued postgraduate studies in criminal and criminal procedure law at Ankara University, defending her Master's thesis on the crime of abortion and miscarriage in 2019. She obtained a second Master's degree in Forensics, Criminology, and Law at Maastricht University in 2019, with a thesis on absent and anonymous witnesses, which was subsequently published as an article. In November 2019, she initiated her PhD research at the University of Groningen, where she lectured in Criminal Law and European Human Rights Law and supervised Bachelor's and Master's theses. From 2020 to 2021, she engaged in research at the University of Cambridge as a visiting researcher.

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