

# *The Fair Trial Rights of Accused Persons Found 'Unfit to Plead and Stand Trial' in the Hong Kong Special Administrative Region*

ANDRA LE ROUX-KEMP\*

## ABSTRACT

It is a foundational principle of modern criminal justice systems that accused persons must possess the necessary faculties to effectively and meaningfully participate in criminal proceedings. In the laws of England and Wales, formal statutory recognition of this fair trial right first appeared in 1800 and has since remained an ongoing legislative project keeping abreast with contemporary understandings and awareness of mental health and cognition and reflecting interminable efforts to develop procedures that embolden fairness and justice. In this article, the legislative framework for “fitness to plead and stand trial” in the Hong Kong Special Administrative Region, is critically analysed with reference to the ongoing law reform and development in England and Wales. While the primary aim of this article is to critically evaluate whether and to what extent the relevant legislative framework of Hong Kong fosters or impedes the fair trial rights of accused persons suffering from a mental, intellectual, or other cognitive impairment, the discussion and analysis will also provide an opportunity for meaningful reflection on the evolution of fair trial rights for vulnerable accused in light of the adoption of the United Nations Convention on the Rights of Persons with Disabilities. Thus, in addition to revealing the current shortcomings of the Hong Kong legislative scheme, this article prompts renewed attention on the importance of *fairness* and *equality* in criminal proceedings involving vulnerable accused.

\* Assistant Professor at the School of Law, City University of Hong Kong. BA LLB (Stell) CML (UNISA) LLD (Stell) BMus (UNISA) Hons BMus (UNISA).

## I. INTRODUCTION

The right of an accused person to a fair trial entails, as a basic minimum, that such a person possesses of the necessary faculties to understand the charge against him or her, to plead thereto, and to participate in a meaningful and effective manner in any criminal proceeding that may ensue. To determine whether an accused person is indeed fit to plead and stand trial has, therefore, become an important part of contemporary criminal procedure. This, however, was not always the case. Fair trial rights, as such, were not always of primary concern and impetus in proceedings aimed at establishing whether an accused person is fit to plead and stand trial. At first, the primary concern was rooted in the possibility of the Crown to seize the property of an accused in the event of a conviction, and in the necessity of being able to distinguish “whether an accused was mute by malice or mute by visitation of God”.<sup>1</sup> Both these concerns were aimed at serving the interests of the Crown in terms of execution of punishment; whether it be to punish upon conviction or for contempt of court. It was not until the eighteenth century that the focus shifted to the rights of the accused.

In 1790, Lord Chief Justice Keynon stated as follows: “No man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing.”<sup>2</sup> Shortly after this pronouncement the first statutory provision for determining whether an accused person is fit to plead and stand trial was enacted in the laws of England and Wales under section 2 of the Criminal Lunatics Act 1800:

If any person indicted for any offence shall be insane, and shall upon arraignment, be found so to be by a jury lawfully impanelled for that purpose, so that such a person cannot be tried upon such indictment, or if upon the trial of any such person so indicted such person shall appear to the jury charged with such indictment to be insane, it shall be lawful for the court before whom any such person shall be brought to be arraigned or tried as aforesaid to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until his Majesty’s please shall be known.

De Souza explains that this law was initially applied in several nineteenth-century trials involving “deaf-mutes” and later also in cases involving accused persons suffering from various forms of mental disorder.<sup>3</sup> Revisions to this first legislative

<sup>1</sup> Law Commission, *Unfitness to Plead* (Law Com CP 197, 2010) [2.3].

<sup>2</sup> *ibid* [2.5]; Nigel Walker, *Crime and Insanity in England and Wales: The Historical Perspective Vol. 1* (Edinburgh: Edinburgh University Press 1968) p. 222.

<sup>3</sup> Dominic S.M. De Souza, ‘The concept of unfitness to plead’ (Sep 2007) 9:3 *The British Journal of Forensic Practice* 7, 8.

enactment followed by way of the Criminal Procedure (Insanity) Act 1964,<sup>4</sup> the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991,<sup>5</sup> and the Domestic Violence, Crime and Victims Act 2004,<sup>6</sup> with each revision the relevant procedures were further streamlined and aligned with the accumulation of knowledge and awareness of mental health and cognition, as well as the continuing expansion of fair trial rights in criminal procedure. This legislative project for fitness to plead and stand trial in the laws of England and Wales is still ongoing. In 2016, the Law Commission published an extensive report detailing recommendations for further legislative amendments,<sup>7</sup> together with the draft text of a Criminal Procedure (Lack of Capacity) Bill.<sup>8</sup> In addition to further procedural fine-tuning, this report and the draft bill also address, for the first time, the formulation of a new legal test for determining whether an accused person is fit to plead and stand trial.<sup>9</sup>

Similar legal development can also be noted in other parts of the Commonwealth. For example, in 2014, the Australian Law Reform Commission published a comprehensive inquiry into the laws and legal frameworks that directly or indirectly impact on the recognition of people with disabilities, including mental disabilities, and specifically how such persons can exercise their legal capacity on an equal basis with others. It was recommended in this report that the concept of fitness to stand trial be reformulated, “to focus on whether, and to what extent, a person can be supported to play their role in the justice system, rather than on whether they have the capacity to play such a role at all”.<sup>10</sup> In South Africa, in turn, the Constitutional Court declared unconstitutional the default position provided for under the Criminal Procedure Act 51 of 1977, whereby an accused person having been declared unfit to plead and stand trial faced detention in a prison

<sup>4</sup> For example, section 4 of this Act introduced a new procedure for determining whether an accused person is fit to plead and stand trial and also provided for a right of appeal against such a finding. The amendments in this Act was prompted by the 1963 report by the Criminal Law Revision Committee.

<sup>5</sup> The amendments in this Act was prompted by the Report of the Committee on Mentally Abnormal Offenders (Cmnd 6244, 1975) (generally referred to as The Butler Report) and included, inter alia, for a mandatory hearing of the facts of the case once an accused has been found to be unfit to plead (section 4A).

<sup>6</sup> Section 22(1) to (3) of this Act amended section 4(5) of the 1964 Act so as to require that the determination whether an accused is fit to plead and stand trial be made by the court and not a jury as section 4(4) of the 1964 Act had previously required.

<sup>7</sup> Law Commission, *Unfitness to Plead Volume 1* (Law Com No 364, 2016).

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid* [3.1-3.104]; Law Commission, *Unfitness to Plead Volume 2* (Law Com No 364, 2016) sections 3, 6, 32 and 34.

<sup>10</sup> Law Commission, *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124, 2014) [7.4].

or institution.<sup>11</sup> A subsequent legislative amendment enacted in 2017, addressed the limited nature of the erstwhile orders available to South African courts and now bolster the rights to freedom and security of accused persons declared unfit to plead and stand trial.<sup>12</sup> And in India, following the ratification of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in 2007, and which has at aim “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”,<sup>13</sup> a new Indian Persons with Disability Act and Mental Health Act were respectively promulgated in 2016 and 2017 to better reflect the paradigm shift of mental disability from being a social welfare concern, to a human rights issue which underscores a “presumption of legal capacity, equality, and dignity”.<sup>14</sup>

In stark contrast to this active and ongoing legislative agenda, is the comparable legislative framework for determining “fitness to plead and stand trial” in the Hong Kong Special Administrative Region. The laws of Hong Kong with regard to the determination of fitness to plead and stand trial, as well as the legal consequences following upon such a determination, have largely preserved the erstwhile position of the laws in England and Wales as it was established in the English Criminal Procedure (Insanity) Act 1964. Despite the provisions of the United Nations Convention on the Rights of Persons with Disabilities also finding application in Hong Kong,<sup>15</sup> the Hong Kong Law Reform Commission and the Legislative Council have yet to undertake a comprehensive legislative review and overhaul of this legislative framework. And arguably the most important and a necessary baseline for such legal reform, sufficient concern for and critical debate on the fair trial rights of accused persons unfit to plead and stand trial in the Hong

<sup>11</sup> De Vos *NO v Minister of Justice and Constitutional Development* 2015 (2) SACR 217 (CC).

<sup>12</sup> Criminal Procedure Amendment Act 4 of 2017.

<sup>13</sup> Convention on the Rights of Persons with Disabilities (A/RES/61/106, adopted on 13 December 2006, entered into force 3 May 2008) (CRPD) Preamble.

<sup>14</sup> Choudhary Laxmi Narayan and Deep Shikha ‘Indian Legal System and Mental Health’ (2013) 55:2 *Indian Journal of Psychiatry* 177; Richard M. Duffy and Brendan D. Kelly ‘India’s Mental Healthcare Act, 2017: Content, context, controversy’ (2019) 62 *International Journal of Law and Psychiatry* 169.

<sup>15</sup> The United Nations Convention on the Rights of Person with Disabilities entered into force on 3 May 2008 and the People’s Republic of China became a signatory to the Convention on 30 March 2007 and ratified the Convention on 1 August 2008. On the date of ratification, the People’s Republic of China also indicated that the Convention shall apply to both the Special Administrative Regions of Hong Kong and Macau.

Kong Special Administrative Region must first amass in local (Hong Kong) legal discourse.

The primary aim of this article is to provide a comprehensive overview of Hong Kong laws and procedures relating to an accused person's competency to plead and stand trial. The legal test and related procedures for determining whether an accused person is possibly unfit to plead and stand trial will be considered, as well as the legal consequences that may ensue following such a determination. For every shortcoming identified in the article, possible solutions are recommended with reference to either the United Nations Convention on the Rights of Persons with Disabilities or to comparable legal development in the laws of England and Wales. Due to the historical and ongoing reliance of Hong Kong law reform and legal development on the laws of England and Wales, the discussion and analysis here are informed by the ongoing English legislative project for fitness to plead and stand trial, specifically the most recent 2016 Law Commission Report. This juxtaposition offers a particularly insightful analysis as the laws of Hong Kong with regard to fitness to plead and stand trial are still reflective of a rather archaic, legal paternalistic stance towards accused persons suffering from a mental, intellectual or cognitive disability, while the English legal development place increasing emphasis on a more supportive framework, which ensures the effective and equal participation of vulnerable accused in criminal proceedings.

## II. THE LEGAL TEST FOR DETERMINING WHETHER AN ACCUSED PERSON IS 'UNFIT TO PLEAD AND STAND TRIAL'

The first case in which criteria for determining fitness to plead were mentioned is *R v Dyson*,<sup>16</sup> a case involving a so-called “deaf-mute” who was determined to be “insane due to her inability to understand her right to challenge jurors”.<sup>17</sup> This was followed in 1836, with the first formulation of a legal test to determine fitness to plead by Baron Alderson in *R v Pritchard*.<sup>18</sup> Of the inquiry into an accused assumed to be unfit to plead and/or stand trial, Baron Alderson stated that the following must be considered:

[W]hether 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 proceedings on 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

<sup>16</sup> *R v Dyson* 173 ER 135; (1831) 7 Car & P 305.

<sup>17</sup> *De Souza* (n 3) 8.

<sup>18</sup> *R v Pritchard* (1836) 173 ER 135.

the details of the evidence, which in a case of this nature must constitute a minute investigation. Upon this issue, therefore, if you think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge; you ought to find that he is not of sane mind. It is not enough, that he may have a general capacity of communicating on ordinary matters.<sup>19</sup>

It is important to remember that this test was formulated at a time when it was still impossible for an accused to give evidence in his own defence.<sup>20</sup>

Shortly after the decision in *Pritchard*, in the case of *R v Davies*,<sup>21</sup> the additional requirement that an accused must also be able to instruct his or her legal adviser was included. The test was subsequently interpreted to make it more consistent with the modern trial process. In England and Wales, for example, the present authoritative formulation of the test was articulated in *R v M (John)*<sup>22</sup> where the judge directed the jury that they should find the accused unfit to plead if any one or more of the following was beyond the capacity of the accused: understanding the charge(s), deciding whether to plead guilty or not, exercising the right to challenge jurors, instructing solicitors and/or barristers, following the course of the proceedings and giving evidence in his or her own defence.<sup>23</sup> And more recently in *R v Orr*,<sup>24</sup> Judge Macur for the English Court of Appeal held that “fitness to plead” is more aptly identified as “fitness to participate in the trial process”, since ‘the supposed disability’ can be determined at any stage” of the trial proceedings.<sup>25</sup> For example, the appellant, in this case, suffered from depression and while he was fit to enter a plea and to participate in some of the criminal proceedings relating to money laundering charges against him, his mental health deteriorated, and he was unable to finish his evidence-in-chief and unable to undergo cross-examination.<sup>26</sup> Yet, the trial judge allowed for the proceedings to conclude but directed that the appellant should not undergo cross-examination and gave strict instructions to the prosecution not to refer in closing argument to any subject which the appellant had

<sup>19</sup> *ibid*, 135; *R v Sharp* [1960] 1 QB 357.

<sup>20</sup> *R v Orr* [2016] 4 WLR 132 6.

<sup>21</sup> *R v Davies* (1853) 3 Car & Kir 328, 175 ER 575.

<sup>22</sup> *R v M (John)* [2003] EWCA Crim 3452 [2003] All ER (D) 199.

<sup>23</sup> Note that in 2004, with the enactment of the Domestic Violence, Crime and Victims Act 2004 in England and Wales, the law changed to a judge-only determination of an accused’s fitness to plead and stand trial. De Souza (n 3) 8. Also see *R v Walls* [2011] EWCA Crim 443; [2011] 2 Cr App R 6.

<sup>24</sup> *R v Orr* [2016] 4 WLR 132.

<sup>25</sup> *ibid* 135-6.

<sup>26</sup> *ibid* 134-5.

not been cross-examined on. At the heart of the appeal was whether the appellant became unfit to be tried during the trial or whether he merely became unable to give evidence and be cross-examined.<sup>27</sup> Judge Macur held that once the issue of “fitness to plead” had been raised, it must be determined. In this case, the trial judge, in finding that the appellant had been fit to participate in his trial up to the point of cross-examination, implicitly also found that the appellant subsequently became unfit to fully participate fully in his trial according to the *Pritchard* criteria.<sup>28</sup>

This legal test, as formulated in *R v Pritchard*,<sup>29</sup> was also adopted in Hong Kong law in *R v Leung Tak-Choi*,<sup>30</sup> where it was held that disability in this context “refers to the lack of ability to understand the charge against him, to give instructions to his lawyers, to challenge the jurors, to understand the evidence against him, and to give evidence in defence.”<sup>31</sup> The mere fact, therefore, that an accused suffers from a mental illness or an intellectual or cognitive impairment or some other disability will not be sufficient for a finding that the accused is unfit to plead and stand trial. It must be shown that this disability or impairment affects the ability of the accused to meaningfully and effectively participate in the criminal proceeding against him or her.<sup>32</sup> Of this test, the English Law Commission noted the following:<sup>33</sup>

- Uncertainty exists about the formulation of the text, its scope and proper application and is, as a result, not widely and consistently applied.
- The test focuses too heavily on the intellectual ability of an accused and fails to consider other aspects of mental illness and other

<sup>27</sup> *ibid* 136.

<sup>28</sup> *ibid* 136-7. Note that in terms of section 35(1)(b) of the Criminal Justice and Public Order Act 1994 a court under the laws of England and Wales may not draw an adverse inference from an accused person’s silence where it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence.

<sup>29</sup> *R v Pritchard* (1836) 173 ER 135.

<sup>30</sup> *R v Leung Tak-Choi* [1995] HKCFI 202; HCCC 457/1994 (26 June 1995).

<sup>31</sup> *ibid* [31].

<sup>32</sup> Julio Arboleda-Florez ‘Fitness to Stand Trial – Is it Necessary’ (1982) 26:1 *International Journal of Offender Therapy and Comparative Criminology* 43, 43-44, quoting from Norwood W. East, *An introduction to forensic psychiatry in criminal courts* (London: J.A. Churchill 1927).

<sup>33</sup> Law Commission, *Unfitness to Plead Summary* (Law Com No 364, 2016) paras 1.42-1.47; Law Commission, *Unfitness to Plead Volume 1* (Law Com No 364, 2016) [3.11]. Also see Amar Shah ‘Making Fitness to Plead Fit for Purpose’ (2012) 1 *International Journal of Criminology and Sociology* 176.

conditions which may interfere with an accused's ability to engage effectively in the trial process.

- No explicit consideration is given to an accused's ability to make decisions required of him or her during the criminal proceeding.
- There is a general lack of clarity over the correlation between an accused being unfit to plead, and the fair trial guarantee that an accused must participate effectively in the proceedings against him or her.
- Finally, the Law Commission also noted that “[t]he current test and procedures do not allow a defendant who would otherwise be unfit for trial, but who clinicians consider has the capacity to plead guilty, to do so. This may unnecessarily deny the defendant his or her legal agency. It is also liable to undermine victim confidence in the system and deny the court the opportunity to impose sentence where appropriate.”<sup>34</sup>

These comments by the English Law Commission are of equal importance to the Hong Kong statutory scheme given its shared origin in the 1836 decision in *R v Pritchard*.<sup>35</sup>

The English Law Commission emphasised two important aspects with regard to a modern legal test for determining unfitness to plea and stand trial: First, it was held that the current terminology in terms of “a finding of ‘disability’ such that the defendant is deemed ‘unfit to plead’, is outdated... [a]nd risks labelling a defendant in a way that may be objectionable to him or her and to others affected by the proceedings.”<sup>36</sup> Second, that a reformulated test should rather focus on assessing an accused person's ability to participate effectively in his or her trial.<sup>37</sup> Requiring “effective participation” of an accused person in a criminal trial was described by the European Court of Human Rights as “implicit in the very notion of an adversarial procedure”,<sup>38</sup> and inclusive of the following: the accused must have “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 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

<sup>34</sup> Law Commission, *Unfitness to Plead Summary* (Law Com No 364, 2016) [1.15].

<sup>35</sup> *R v Pritchard* (1836) 7 C & P 303, 173 ER 135.

<sup>36</sup> Law Commission, *Unfitness to Plead Volume 1* (Law Com No 364, 2016) [3.34].

<sup>37</sup> *ibid.*

<sup>38</sup> *Stanford v United Kingdom* App No 16757/90 (23 February 1994) [26].

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.”<sup>39</sup> An accused must therefore be able to maintain an active level of involvement throughout the trial, and must also be able to make relevant decisions during the course of the trial itself.<sup>40</sup>

Thus, in steering away from the concepts of “disability” and “unfit to plead”, the English Law Commission proposed a legal test of capacity, based on a list of relevant abilities which taken together must be sufficient to enable effective participation of the accused in the legal proceedings against him or her. These relevant abilities include, *inter alia*, the ability to understand the nature of the charge, the nature and purpose of the evidence adduced, as well as the nature of the trial process and the legal consequences following a conviction, and the ability to give instructions to a legal representative.<sup>41</sup> This new legal test also incorporates explicitly the need for an accused person to be able to make key decisions, like whether to plead guilty or not guilty and whether to testify at trial. It is prescribed that this ability to make key critical decisions is dependent on the accused person’s ability to understand information relevant to the making of the decision, the ability to retain that information, and to use and weigh this information in making an informed decision, and to, ultimately, communicate this decision in court.<sup>42</sup>

In addition, the English Law Commission also emphasised the importance of protecting an accused person’s fundamental right to legal autonomy and recognised the significant impact that a finding of unfit to plead and stand trial has:

“[s]uch a curtailment of an individual’s access to justice should only occur where absolutely necessary in the circumstances, and where it is essential to protect other fundamental rights of the defendant, in this situation the right to a fair trial...[i]t is in the interests not only of the accused but of all those affected by an alleged offence that all those who can fairly be tried for an offence in the usual way should be”.<sup>43</sup>

The Commission consequently recommended that a separate legal test of capacity to plead guilty be included in statute and that this test only be applied in

<sup>39</sup> *SC v United Kingdom* (2005) 40 EHRR 10 (App No 60958/00) [29].

<sup>40</sup> Law Commission, *Unfitness to Plead Volume 1* (Law Com No 364, 2016) [3.21].

<sup>41</sup> Law Commission, *Unfitness to Plead Volume 2* (Law Com No 364, 2016) section 3(4)(a)-(d) of the Criminal Procedure (Lack of Capacity) Bill.

<sup>42</sup> Law Commission, *Unfitness to Plead Volume 2* (Law Com No 364, 2016) section 3(4)(e)-(g) and 3(5)(a)-(d) of the Criminal Procedure (Lack of Capacity) Bill. Also see Law Commission, *Unfitness to Plead Volume 1* (Law Com No 364, 2016) para 3.2.

<sup>43</sup> Law Commission, *Unfitness to Plead Volume 1* (Law Com No 364, 2016) para 3.40.

cases where an accused has been found unfit to plead and stand trial and where there is expert opinion considering whether the accused nonetheless has the capacity to plead guilty. It is also required that an accused specifically applies to the court to invoke this provision and determine the issue.<sup>44</sup>

These two proposed new legal tests<sup>45</sup> certainly provide for greater legal certainty, and ultimately also greater consistency in the determination of whether an accused person is fit to plead and to stand trial. The two tests are, furthermore, consonant with the provisions of the UN Convention of the Rights of Persons with Disabilities (which also applies in Hong Kong) in ensuring that all accused persons are treated equally before the law and that those persons who suffer from a disability receive the necessary assistance and opportunity to also exercise their legal autonomy also.<sup>46</sup> Finally, it can be noted that the two tests proposed by the English Law Commission for determining capacity to plead and stand trial give full consideration to the notion of “effective participation” throughout the various stages of a criminal proceeding and ultimately also provide for the possibility to enter a guilty plea.

The rationale and design of the ongoing English law reform with regard to the legal test for determining fitness to plead and stand trial, and as set out above, certainly lay bare the shortcomings of the old common law test originally formulated in *R v Pritchard*,<sup>47</sup> and adopted in Hong Kong law in *R v Leung Tak-Choi*.<sup>48</sup> This common law test not only falls short in adequately assessing the ability of an accused person to participate effectively and meaningfully in his or her trial, but it is also not conducive of promoting equal protection before the law. Legal reform and development in this regard is therefore certainly necessary; a Hong Kong statutory test for determining fitness to plead and stand trial will not only guarantee the fair trial rights of accused persons suffering from a mental, intellectual or a cognitive disability, it will also allow for greater legal certainty and consistency in the determination of fitness to plead and stand trial.

To this end, shortcomings in ancillary legislation in Hong Kong also need to be addressed. For example, while the Mental Capacity Act 2005 of England and Wales provides for a legal definition of the concept “capacity”, no comparable

<sup>44</sup> Law Commission, *Unfitness to Plead Volume 1* (Law Com No 364, 2016) para 3.2. Law Commission, *Unfitness to Plead Volume 2* (Law Com No 364, 2016) section 6 of the Criminal Procedure (Lack of Capacity) Bill.

<sup>45</sup> Law Commission, *Unfitness to Plead Volume 2* (Law Com No 364, 2016); Criminal Procedure (Lack of Capacity) Bill s 33, 35.

<sup>46</sup> United Nations Convention on the Rights of Persons with Disabilities (CRPD) (n 13) articles 12–13.

<sup>47</sup> *R v Pritchard* (1836) 7 C & P 303, 173 ER 135.

<sup>48</sup> *R v Leung Tak-Choi* [1995] HKCFI 202; HCCC 457/1994 (26 June 1995).

definition exists in Hong Kong law. In Hong Kong law, “mental incapacity” is defined in the Mental Health Ordinance as “mental disorder or mental handicap” and these two concepts are respectively described as follows: “Mental disorder means (a) mental illness; (b) a state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned; (c) psychopathic disorder; or (d) any other disorder or disability of mind which does not amount to mental handicap.” And “mental handicap” refers to a “sub-average general intellectual functioning with deficiencies in adaptive behaviour, and ‘mentally handicapped’ shall be construed accordingly.” These definitions for “mental incapacity” and “mental handicap” under Hong Kong law are clearly inadequate in terms of our contemporary understanding of the full extent of a person’s mental, intellectual and cognitive abilities. The existing Hong Kong definitions in this regard rather pathologise and medicalise human/personal capacity by confining the definitions to illness, disorders, impairments, and handicaps. Such excessive pathologising of a basic human capability, i.e. the capacity to make decisions, not only contributes to the stigma surrounding mental illness, but also results in a distorted view of the vast continuum on which a person’s capacity and incapacity, or ability and inability to make decisions, can exist, and the fact that any determination in this regard may fluctuate with time, or with regard to particular decisions at material times.

For example, in the preamble of the United Nations Convention on the Rights of Persons with Disabilities it is recognised explicitly that “[d]isability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.<sup>49</sup> It is, furthermore, recognised that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person and that a wide diversity of persons with disabilities exist.<sup>50</sup> A non-medicalised articulation of capacity in the legal sense can be found in the English Mental Capacity Act 2005 Cap 9, where a person who lacks capacity is described in terms of that person lacking “capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.”<sup>51</sup> For the purpose of this definition it does not matter whether the impairment or disturbance is permanent or temporary, nor can this lack of capacity be established

<sup>49</sup> *ibid* Preamble (e).

<sup>50</sup> *ibid* Preamble (h)-(i).

<sup>51</sup> Mental Capacity Act, s 2(1).

merely by reference to age, appearance, a condition, or any aspect of behaviour.<sup>52</sup> Likewise, the inability to make decisions is defined specifically in the English Mental Capacity Act 2005 Cap 9 in terms of a person being unable “(a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means).”<sup>53</sup>

While there has been no indication of legal reform in Hong Kong for a new legal test for determining fitness to plead and stand trial, the shortcomings of the Hong Kong legal definition of “capacity” were remarked upon by the Hong Kong Law Reform Commission in August 2006 with its report titled *Substitute Decision-making and Advance Directives in Relation to Medical Treatment*.<sup>54</sup> No meaningful legal reform has taken place to date. The updating and alignment of a legal test and ancillary legislation dealing with accused persons suffering from a cognitive, mental, or intellectual disability in the criminal justice process are, however, imperative and should be considered in conjunction with the procedural aspects relating to this far-reaching pronouncement on an accused person’s abilities at trial.

### III. THE PROCEDURE FOR ACCURATE AND EFFICIENT IDENTIFICATION OF ACCUSED PERSONS UNABLE TO MEANINGFULLY AND EFFECTIVELY PARTICIPATE IN THEIR TRIAL

Section 75 and 75A of the Criminal Procedure Ordinance of Hong Kong provide for the procedure to determine whether an accused person at trial suffers from an incapacity or disability that affects their fitness to plead and be tried. These provisions are derived from the English Criminal Procedure (Insanity) Act 1964 and save for minor amendments, still reflect the law of England and Wales in this regard before the legislative revisions brought about in the Criminal Procedure

<sup>52</sup> Mental Capacity Act, s 2(2)-(3).

<sup>53</sup> Mental Capacity Act, s 3(1).

<sup>54</sup> Law Commission, *Substitute Decision-making and Advance Directives in Relation to Medical Treatment* (HKLRC, August 2006).

(Insanity and Unfitness to Plead) Act 1991,<sup>55</sup> and the Domestic Violence, Crime and Victims Act 2004.<sup>56</sup>

According to section 75(1) of the Criminal Procedure Ordinance, the question of whether an accused is “under a disability...[that] would constitute a bar to his being tried”, arises “at the instigation of the defence or otherwise”. There is no duty on a presiding officer to raise the issue of an accused’s competence *mero motu* or where there is merely a possibility of some disability or lack of ability, and it is generally accepted that a presiding officer will only intervene if a substantial question as to the defendant’s trial competency is raised; “a heavy burden and responsibility [therefore] rests on legal representatives—especially those for the defence—to make known the suspicious behaviours of defendants and that might suggest incompetency.”<sup>57</sup> The defence must ultimately provide clear and convincing evidence that the accused is unfit to plead and stand trial, and section 75A details the procedure for such a finding to be made.<sup>58</sup>

Yet, effectively and accurately identifying instances where the accused may be unfit to plead and stand trial is not always an easy feat. The appellant in *HKSAR v Choi Yiu Wai David*<sup>59</sup> appealed against his conviction on a charge of theft contrary to section 9 of the Theft Ordinance on the basis that his guilty plea was a nullity.<sup>60</sup> The appellant explained that his legal representation under the Duty Lawyer Scheme at trial was ineffective as he suffered from a delusional and obsessive-compulsive disorder and was not taking his psychotropic drugs at the time of trial. This, he submitted, resulted in him being overly anxious and nervous during the conference with his duty lawyer.<sup>61</sup> It was also during this pre-trial conference that the appellant experienced some of the recurrent thoughts that often consumed his mind; he felt as if his head was shrinking and that he had to check the circumferences of his head to confirm that his head was not shrinking.<sup>62</sup> On appeal before the Hong Kong Court of First Instance this case was described

<sup>55</sup> The amendments in this Act was prompted by the Report of the Committee on Mentally Abnormal Offenders (Cmnd 6244, 1975), generally referred to as The Butler Report, and included, inter alia, for a mandatory hearing of the facts of the case once an accused has been found to be unfit to plead (section 4A).

<sup>56</sup> Section 22(1) to (3) of this Act amended section 4(5) of the 1964 Act so as to require that the determination whether an accused is fit to plead and stand trial be made by the court and not a jury as section 4(4) of the 1964 Act had previously required.

<sup>57</sup> *R v Keung Sai-chung* (1986) HKLR 838 (CA); Samuel Adjorlolo, Heng Choon and Oliver Chan “Determination of Competency to Stand Trial (Fitness to Plead): An Exploratory Study in Hong Kong” (2017) 24:2 Psychiatry, Psychology and Law 205, 208.

<sup>58</sup> *R v Podola* [1960] 1 QB 235.

<sup>59</sup> *HKSAR v Choi Yiu Wai David* [2011] HKCFI 1847; HCMA 459/2011 (16 December 2011).

<sup>60</sup> *ibid* [1]-[2].

<sup>61</sup> *ibid* [17].

<sup>62</sup> *ibid* [12].

as one where the appellant's mental illness was such that a layman would not notice it unless the appellant mentioned it. Judge Barnes found that the appellant did not have a fair trial as his outward appearance and behaviour would not have alerted the magistrate or the duty lawyer of his mental condition, "it is a fact that he was not a man free of any mental illness at the time. As such, there is a real likelihood that the appellant's mental process was affected to such an extent that his mind did not truly go with his act, making his act of pleading guilty not a true act."<sup>63</sup>

While the trial court, prosecution, and legal counsel in *HKSAR v Choi Yiu Wai David* had failed to accurately identify the appellant as possibly unfit to plead, the opposite happened in *HKSAR v Chan Shu Hung*,<sup>64</sup> where the magistrate, in assuming that the accused was not fit to stand trial, invoked section 51 of the Mental Health Ordinance and remanded the accused to a mental hospital for observation. The accused had no legal representation at trial, he elected not to give evidence in his defence, and he also did not call any witness(es) in support of his case. In denying that he was responsible for criminal damage contrary to section 60(1) of the Crimes Ordinance, the accused presented the magistrate with a letter in which he wrote out his defence. On numerous occasions during the trial the accused requested that the magistrate read this letter but the magistrate ignored these requests and took the view, shortly before the prosecution closed its case, that the accused was "speaking in a somewhat incoherent and confused manner".<sup>65</sup> It was based on this observation that the magistrate decided to remand the accused for observation in a mental hospital.<sup>66</sup> Having read the transcript and having listened to the recording of the trial, Judge Barnes for the Hong Kong Court of First Instance was unable to detect any instance of the appellant speaking "in an incoherent and confused manner" or hear anything which sounds like the appellant having any mental problem.<sup>67</sup> Judge Barnes also agreed with the defence that the trial magistrate did not have a good understanding of the defence case and that he may, for this reason, have held the opinion that the appellant spoke in an incoherent and confused manner.<sup>68</sup>

In terms of the applicable procedure, it can be noted that whether an accused person is fit to plead and stand trial usually falls to be determined upon arraignment and this can, of course, occur at the level of the Magistrate's Court, the District Court, or the Court of First Instance. While the procedure for making

<sup>63</sup> *ibid* [27].

<sup>64</sup> *HKSAR v Chan Shu Hung* [2011] HKCFI 1853; [2012] 2 HKLRD 424; HCMA 425/2011 (20 December 2011).

<sup>65</sup> *ibid* [11].

<sup>66</sup> *ibid* [11].

<sup>67</sup> *ibid* [32].

<sup>68</sup> *ibid* [32].

the determination in the Court of First Instance are detailed in the Criminal Procedure Ordinance, very little statutory guidance exists at the Magistrate's Court and District Court level. The discussion here focuses on the procedural aspects at the level of the Court of First Instance. With regard to the procedure at Magistrate's Court and District Court level it can be noted that many of the provisions in the Mental Health Ordinance refer to both a "court or magistrate"<sup>69</sup> or to "the District Judge or magistrate",<sup>70</sup> and it can therefore be inferred that many of the orders in terms of the Mental Health Ordinance can also be made by a Magistrate or District Court Judge.<sup>71</sup>

### JURY DETERMINATION

At the Court of First Instance, a jury is tasked to decide, as a question of fact, whether an accused person is fit to plead and stand trial. A jury so tasked will make its decision based on the written or oral evidence of two or more registered medical practitioners of whom no less than two shall be psychiatrists on the Specialist Register established under section 6(3) of the Medical Registration Ordinance Cap 161.<sup>72</sup> If the jury decides that the accused person is indeed mentally fit and able, the trial will proceed but before another jury. Likewise, where the question as to the fitness of an accused person to stand trial falls to be determined at any later time after arraignment it is usually also decided by a jury other than the jury tasked with deciding on the guilt or innocence of an accused.<sup>73</sup> In all other instances the question as to the fitness of the accused to stand trial will be determined by the same jury tasked with deciding on the guilt or innocence of the accused.<sup>74</sup>

Where it is determined by a jury that an accused person is not fit to stand trial, the trial shall not proceed or further proceed and the jury shall determine whether the accused did the act or omission with which he or she is charged, based on such evidence as may be adduced or further adduced by the prosecution or by a person appointed by the court to put the case for the defence. A factual finding can subsequently follow as to whether the accused person did or did not do the act or omission so charged. Where the finding is negative, the jury shall return a verdict

<sup>69</sup> See, for example, sections 44A, 44D, 44E, 44F, 44I, 45, 46, 47 etc.

<sup>70</sup> See, for example, sections 31, 32, 36, 62, 68, 71 etc.

<sup>71</sup> In section 2 of the Mental Health Ordinance, 'court' is defined as the Court of First Instance and any judge of the Court of First Instance.

<sup>72</sup> The Criminal Procedure Ordinance Cap 221, Section 75(5).

<sup>73</sup> The Criminal Procedure Ordinance Cap 221, Section 75(4)(a)(i) and 75(4)(b)(i). Note that it is possible for the court to also direct otherwise, i.e. that the same jury decides on both the fitness of the accused to plead and stand trial as well as the guilt or innocence of the accused.

<sup>74</sup> The Criminal Procedure Ordinance Cap 221, Section 75(4)(a)(ii) and 75(4)(b)(ii).

of acquittal as if the trial had proceeded to a conclusion on that particular count.<sup>75</sup> A positive finding, on the other hand, remains a mere factual determination and does not constitute a guilty verdict in the conventional sense. It therefore, remains possible for such an accused person, at a later stage once his or her mental capabilities have improved, to contest the factual finding in the same manner as it is possible for an accused to be tried at a later stage in respect of the act or omission so charged.<sup>76</sup> Previously, the question of an accused's guilt or innocence in the event that the accused was found to be unfit to plead and stand trial, was postponed until such time as the accused had regained the requisite faculties to meaningfully participate in his or her own defence.<sup>77</sup> It was explained in *R v Leung Tak-Choi* that the mandatory hospital order in terms of the erstwhile version of section 76 of the Criminal Procedure Ordinance Cap 221 was warranted for this very reason, as the accused had to be detained and had to receive compulsory medical treatment and care for his or her guilt or innocence to be decided at a later stage, when he or she was fit to be tried again.<sup>78</sup> The advantage of the factual determination as now contemplated in section 75A of the Ordinance is that it provides for closure in the criminal proceeding and even a full verdict of acquittal where the jury finds that the accused person did not commit the act or omission as alleged. However, it must also be noted that while a positive finding for whether the accused had committed the act(s) or omission(s) so charged, will only amount to a factual finding and not a *true* guilty verdict, it nonetheless is a pronouncement (with consequences) on the acts or omissions of an accused person who is at that moment unable to participate meaningfully and effectively in his own defence. For example, in *R v Orr*<sup>79</sup> it was argued on behalf of the appellant that a positive factual finding, although not a conviction, remains something that is particularly hard to bear "because it is a form of stigma, whatever the law says about it".<sup>80</sup> To make a positive factual finding may furthermore be difficult where failure to give a satisfactory explanation is an essential ingredient to the offence.<sup>81</sup>

The correct interpretation of these provisions on the empanelling of a jury for the purpose of deciding whether an accused is fit to plead and stand trial was considered in *HKSAR v Ng Mei Lan*. The applicant, in this case, was charged with

<sup>75</sup> The Criminal Procedure Ordinance Cap 221, Section 75A(1).

<sup>76</sup> The Criminal Procedure Ordinance Cap 221, Section 76(4).

<sup>77</sup> See generally *R v Leung Tak-Choi* [1995] HKCFI 202; HCCC 457/1994 (26 June 1995).

<sup>78</sup> *R v Leung Tak-Choi* [1995] HKCFI 202; HCCC 457/1994 (26 June 1995) [31]. The amended section 76 of the Criminal Procedure Ordinance Cap 221 now provides for a number of orders available to a court once it has been determined that an accused person is unfit to plead and stand trial. Section 76 and the various orders available to courts will be considered in the second article.

<sup>79</sup> *R v Orr* [2016] 4 WLR 132.

<sup>80</sup> *ibid* [3].

<sup>81</sup> For example, failure to give a reasonable explanation on suspicion of possession of stolen goods.

manslaughter contrary to common law and punishable under section 7 of the Offences Against the Person Ordinance Cap 212, and arson with intent contrary to sections 60(2) and (3) and 63(1) of the Crimes Ordinance Cap 200.<sup>82</sup> A jury was empanelled pursuant to section 75 of the Criminal Procedure Ordinance Cap 221 to determine whether the applicant was fit to be tried.<sup>83</sup> This jury unanimously determined that the applicant was not fit to be tried and the same jury then proceeded to find that the acts alleged had been proved pursuant to section 75A of the Ordinance.<sup>84</sup> The applicant was subsequently ordered to be detained in Siu Lam Psychiatric Centre under section 76(2)(a)(i) and Schedule 4 of the Criminal Procedure Ordinance Cap 221.<sup>85</sup> At issue on appeal was whether section 75A of the Criminal Procedure Ordinance Cap 221 required another jury to be empanelled to determine whether the applicant did the acts charged or whether the same jury having decided that the applicant was unfit to plead and stand trial could also make the factual determination as to whether the applicant did or did not do the act or omission so charged.<sup>86</sup> Judges Stuart-Moore, Wright, and Saw for the Hong Kong Court of Appeal held that where a jury empanelled in the Court of First Instance is tasked with deciding whether an accused is fit to stand trial, another jury must be empanelled for the trial.<sup>87</sup> The obvious reason for this requirement is that the first jury may have heard evidence from experts and possibly also the accused him- or herself, and also evidence about the nature and the circumstances of the alleged offence that may cloud their judgment at trial.<sup>88</sup> While the issue of an accused's fitness to stand trial arise after arraignment, the situation is different; “[u]p to that point the trial will have proceeded in the normal way. Evidence more prejudicial than probative will have been excluded. Evidence irrelevant to the matters in issue will not have been placed before the jury”.<sup>89</sup> Thus, where the issue of an accused's fitness to stand trial arise only after arraignment, the wording of section 75A of the Criminal Procedure Ordinance Cap 221 is clear that it is the same jury that makes a positive determination on the question of fitness to stand trial, that will then also consider the subsequent issue whether that accused had committed the act or

<sup>82</sup> *HKSAR v Ng Mei Lan* [2009] HKCA 44; [2009] 3 HKLRD 193; [2009] 3 HKC 277; CACC 149/2008 (12 February 2009) [1].

<sup>83</sup> *ibid* [2].

<sup>84</sup> *ibid* [3], [6].

<sup>85</sup> *ibid* [8].

<sup>86</sup> *ibid* [4].

<sup>87</sup> The Criminal Procedure Ordinance Cap 221, Section 75(4)(a); *HKSAR v Ng Mei Lan* (n 38) para [18].

<sup>88</sup> *HKSAR v Ng Mei Lan* (n 38) [19].

<sup>89</sup> *ibid* [19].

omission in question.<sup>90</sup> Another (new) jury will only be empanelled if the defendant is determined not to be under any disability.<sup>91</sup>

A Hong Kong court faced with the question of an accused's fitness to be tried may also postpone the matter until a time up to the opening of the case for the defence. However, where the question does not arise until after the jury has returned a verdict of acquittal on the count(s) for which the accused person is tried, the question of that accused person's fitness to stand trial shall not be determined.<sup>92</sup> The question can furthermore arise on appeal against a conviction, as per section 83J of the Criminal Procedure Ordinance Cap 221. Section 83L of the Ordinance will then apply and the provisions of this section are, in essence, similar to the provisions relating to the question of fitness to stand trial in a court a quo and which will be set out below.

The most significant difference in the procedure whereby it is to be determined whether an accused person is fit to plead and stand trial under Hong Kong law and the laws of England and Wales relates to the role of the jury. In 2005, by way of section 22(2)-(3) of the Domestic Violence, Crime and Victims Act 2004 (c. 28), section 4(5)-(6) of the English Criminal Procedure (Insanity) Act 1964 was amended to exclude the jury from the determination whether an accused person is fit to plead and stand trial. Lord Auld in his 2001 Review of the Criminal Courts of England and Wales explained that:

In the majority of cases the jury's role on the issue of unfitness to plead is little more than a formality because there is usually no dispute between the prosecution and the defence that the defendant is unfit to plead. However, the procedure is still cumbersome, especially when the issue is raised, as it mostly is, on the arraignment, because it can then require the empanelling of two juries. More importantly it is difficult to see what a jury can bring to the determination of the issue that a judge cannot. He decides similar questions determinative of whether there should be a trial, for example, whether a defendant is physically or mentally fit to stand or continue trial in applications to stay the prosecution or for

<sup>90</sup> *ibid* [22].

<sup>91</sup> *ibid* [24], [26]-[28]; It is interesting to note that the Hong Kong provisions in this regard depart from the original English legislation on which the Hong Kong provisions were modelled: In terms of sections 2 and 4A of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, where a jury found an accused to be unfit to stand trial, a separate jury had to be empanelled to determine whether that accused did the acts or omissions so alleged.

<sup>92</sup> The Criminal Procedure Ordinance Cap 221, Section 75(2).

discharge of the defendant.<sup>93</sup>

Moreover, even where the determination is made by a presiding judicial officer alone, the English Law Commission described the process as time-consuming, leading to substantial delays, and causing uncertainty and anxiety to complainants, witnesses, and the defendant.<sup>94</sup> This is all the more so where a jury is tasked with determining whether an accused is fit to plead and stand trial. In Hong Kong, however, and as was indicated above, differing procedures currently exist with regard to the determination in Magistrate's Courts and the District Court, versus the procedure in the Court of First Instance. While the determination stands to be made by the presiding judicial officer in a Magistrate's Court and the District Court, a jury is tasked with making the determination in the Court of First Instance.

It is submitted that the differing procedures currently in place under Hong Kong law for determining whether an accused person is fit to plead and stand trial are unnecessary, breed inconsistency, and are particularly time-consuming in the Court of First Instance where a jury is tasked to make this determination. Most important, is that the accumulation of knowledge and awareness of mental health and cognition, as well as the interminable efforts to develop procedures that guarantee and safeguard the fair trial rights of accused persons, have rendered the determination whether an accused person is fit to plead and stand trial a legal-technical matter that depends on the correct application of the law to a particular factual set, and it can no longer be left for a jury to decide only as a matter of fact. It is for this reason also that it is a requirement in both the laws of England and Wales as well as in Hong Kong that the consequences that follow from such a determination be informed by the written or oral evidence of two or more registered medical practitioners that meet the requirements of the respective statutes.<sup>95</sup> Moreover, in England and Wales, the Law Commission recommended that all members of the judiciary and all legal practitioners engaged in criminal proceedings receive training in understanding and identifying participation and communication difficulties on the part of accused persons. This, it was said, "would improve accurate and timely identification of participation difficulties, reducing delays to proceedings and the uncertainty and anxiety caused to complainants and witnesses where the defendant's participation difficulties are raised at the last

<sup>93</sup> Law Commission, *Unfitness to Plead* (Law Com CP 197, 2010) [2.33].

<sup>94</sup> Law Commission, *Unfitness to Plead Summary* (Law Com No 364, 2016) para 1.47; Law Commission, *Unfitness to Plead Volume 1* (Law Com No 364, 2016) Chapter Four.

<sup>95</sup> See the English Criminal Procedure (Insanity) Act 1964, section 4(6); and the Hong Kong Criminal Procedure Ordinance Cap 221, section 75(5).

minute”.<sup>96</sup> This acknowledgement that appropriate training for legal professionals is imperative for the just administration and determination of whether an accused person is fit to plead and stand trial further supports the submission that this determination can no longer be for a lay jury to decide based on evidence, argument, and inferences alone.

#### IV. THE CONSEQUENCES FOLLOWING A DETERMINATION THAT AN ACCUSED PERSON IS UNFIT TO PLEAD AND STAND TRIAL

Section 76 of the Criminal Procedure Ordinance Cap 221 applies whenever a special verdict was returned under section 74 of the Criminal Procedure Ordinance Cap 221 finding the accused not guilty by reason of insanity, or where it was found under sections 75 and 75A of the Ordinance that the accused is unfit to stand trial, but that the accused person did in fact commit the offence(s) with which he or she is being charged.<sup>97</sup> Then, in terms of section 76(2)(a), a court may admit the accused person to a mental hospital or a Correctional Psychiatric Centre if it is satisfied on the written or oral evidence of two or more registered medical practitioners (of whom not less than two are registered under the Medical Registration Ordinance Cap 161 as psychiatrists) that it is necessary in the interests or the welfare of the accused person, or for the protection of other persons to have the accused so admitted. In addition to an order admitting the accused to a mental hospital or a Correctional Psychiatric Centre,<sup>98</sup> provision is also made for a guardianship order under Part IIIA of the Mental Health Ordinance Cap 136,<sup>99</sup> a supervision and treatment order under Part IIIB of that Ordinance, or an order for the absolute discharge of the accused.<sup>100</sup> These alternative orders are not available to a court where the special verdict returned in terms of section 74 of the Ordinance or the finding in terms of sections 75 and 75A of the Ordinance relate to an offence for which the sentence is fixed by law.<sup>101</sup> For such cases, a hospital order must be imposed. Where a jury has decided that an accused is unfit to stand trial and that the accused person has also not committed the act or omission so charged, a verdict of not guilty will be returned and the presiding judicial officer may also make an appropriate order which is in the best interests and welfare of the acquitted person as well as for the protection of society in terms of the

<sup>96</sup> Law Commission, *Unfitness to Plead Summary* (Law Com No 364, 2016) [1.35]; Law Commission, *Unfitness to Plead Volume 1* (Law Com No 364, 2016) [2.21-2.30].

<sup>97</sup> The Criminal Procedure Ordinance Cap 221, Section 76(1)(a)-(b).

<sup>98</sup> *ibid* Section 76(2)(a).

<sup>99</sup> *HKSAR v Cheung Kam Yau* [2017] HKCFI 507; HCCC 413/2016 (22 March 2017).

<sup>100</sup> The Criminal Procedure Ordinance Cap 221, Section 76(2)(b)(i)-(iii).

<sup>101</sup> *ibid* Section 76(3).

provisions of the Mental Health Ordinance Cap 136. In the least serious of cases a court may order for the absolute discharge of such an accused.<sup>102</sup>

Any order made in terms of section 76 of the Criminal Procedure Ordinance Cap 221 or the provisions of the Mental Health Ordinance Cap 136 is appealable either in terms of sections 83M and 83N of the Criminal Procedure Ordinance Cap 221 or before the Mental Health Tribunal<sup>103</sup> or the Guardianship Board,<sup>104</sup> as the case may be. Interesting aspects with regard to the appeal procedure include the following: In terms of section 83N of the Criminal Procedure Ordinance Cap 221, it is provided that where the question of fitness to stand trial was determined later than on arraignment, and the Court of Appeal is of the opinion that the case was one in which the accused person should have been acquitted before the question of fitness to be tried was considered, the Court of Appeal shall not only quash the conviction and finding of unfitness to stand trial, but the Court of Appeal shall also direct that a verdict of acquittal be recorded but not a verdict of not guilty by reason of insanity.<sup>105</sup> It is also possible for the Chief Executive to refer a case where the accused was found not guilty by reason of insanity or unfit to stand trial because of a disability to the Court of Appeal. Such referrals are then also regarded and dealt with as if it was an appeal against the findings.<sup>106</sup>

It is evident from the above, that courts, upon finding that an accused person is unfit to plead and stand trial, have a relatively wide range of options available in terms of section 76 of the Criminal Procedure Ordinance Cap 221. Moreover, any determination and order so made are appealable and subject to the scrutiny and interjection of other executive organs like the Mental Health Tribunal, the Guardianship Board, or the Chief Executive. These legislative protections have not always been in place in Hong Kong law to the extent that they are today.<sup>107</sup> In terms of the previous version of section 76 of the Criminal Procedure Ordinance Cap 221, once a determination had been made that an accused person is unfit to plead and stand trial, the court was obliged to impose a mandatory hospital order, without this order being conditioned upon medical evidence, and to postpone the proceedings until such time as the accused had regained the requisite faculties

<sup>102</sup> *ibid* Section 72(2)(b)(iii); *HKSAR v Cheung Kam Yau* [2017] HKCFI 507; HCCC 413/2016 (22 March 2017).

<sup>103</sup> The Mental Health Ordinance Cap 136, Section 59A.

<sup>104</sup> *ibid* Section 59J and 59K.

<sup>105</sup> The Criminal Procedure Ordinance Cap 221, Section 83N(2).

<sup>106</sup> *ibid* Section 83P.

<sup>107</sup> See *R v Leung Tak-Choi* [1995] HKCFI 202; HCCC 457/1994 (26 June 1995). This case was decided under the previous version of section 76 of the Criminal Procedure Ordinance Cap 211 when the imposition of a hospital order was still mandatory once it has been found that an accused is unfit to plead and stand trial.

to meaningfully participate in his or her own defence.<sup>108</sup> Under this regime, an accused person found to be unfit to plead and stand trial was, in a sense, worse off than “a person setting up the defence of insanity because that kind of person would at least have gone through a trial whereas a person under disability would not have such an opportunity.”<sup>109</sup> This position changed with the enactment of section 75A which now provides for a factual determination to be made as to whether an accused did or did not commit the act(s) or omission(s) so charged once it has been found that the accused is unfit to plead and stand trial. This factual determination has rendered the previous mandatory hospital order nugatory and justifies the wider range of options now available to courts.

Yet, although some safeguards therefore exist in the statutory scheme for fitness to plead and stand trial in Hong Kong, and a wider range of options are now available to courts upon a finding that an accused is unfit to plead and stand trial, the question can also be asked here, with regard to the legal consequences following a determination of unfit to plead and stand trial, whether such accused persons are afforded *equal* participation before and *protection* of the law. Equal participation before the law requires disability neutral rules and procedures, as well as the necessary support for vulnerable accused persons, to ensure that such accused have an equal opportunity to participate in the legal consequences that may follow upon them being declared unfit to plead and stand trial. Protection of the law furthermore requires tailored support for accused persons having been found unfit to plead and stand trial; support that ultimately ensures access to justice by focussing on the ability-specific needs of the individual involved.

At present, and as was succinctly illustrated in the above exposition, the provisions related to an accused person presumed unfit to plead and stand trial in Hong Kong, are scattered over various Ordinances: the Criminal Procedure Ordinance Cap 221, Magistrates Ordinance Cap 227, Mental Health Ordinance Cap 136, Juvenile Offenders Ordinance Cap 226 and Prisons Ordinance Cap 234.<sup>110</sup> Particularly onerous is the interface between the provisions of these Ordinances and especially with regard to the various orders a court can make and how and by whom these orders ought to be effected, renewed, discharged, or appealed/reviewed.<sup>111</sup> Moreover, and as was evident from the discussion in the preceding part, while comprehensive provision is made for the relevant procedures in the Court of First Instance, sparse guidance exist for instances where an accused suffering from a mental disability or intellectual impairment is unfit to plead

<sup>108</sup> *ibid.*

<sup>109</sup> *ibid* [10], [14].

<sup>110</sup> Only the most important provisions were considered in this article.

<sup>111</sup> See, for example, section 76 of the Criminal Procedure Ordinance Cap 221, read together with Parts IIIA, IIIB and IVA of the Mental Health Ordinance Cap 136.

and stand trial in a Magistrate's Court, District Court, and Juvenile Court. It is therefore submitted that the current legislative framework for determining whether an accused person is unfit to plead and stand trial, do not promote accessibility and transparency to the end of empowering such an accused person to participate in the legal proceedings and subsequent decisions. In noting a similar shortcoming in the comparable laws and provisions currently enacted in England and Wales, the Law Commission stated that for all those affected by a finding that an accused is unfit to plead and stand trial, including the complainants, witnesses and family members:

The complexity and inaccessibility of the current law is a significant barrier to their engagement and undermines their confidence in the criminal justice system. Complainants and those who support them, who are themselves often volunteers with no legal expertise, would welcome an easy to locate, readily understandable test, set out in statute. Leaving the test to be hunted out in case law is inconsistent with efforts to make the criminal law accessible to those affected by it.<sup>112</sup>

However, the best and most appropriate way in which to support and provide for accused persons suffering from a mental, intellectual, or cognitive disability or impairment at trial, and specifically in ensuring their equal participation before and protection of the law, remain vexed. A fine balance must ultimately be achieved between the interests of society and the rights and welfare of an accused person rendered vulnerable by mental disability or intellectual impairment. This problem was described as follows by an unknown author in a 1967 note published in the *Harvard Law Review*:

The problems of incompetency law reflect a basic ambivalence in society's attitude toward mentally ill criminal offenders. On the one hand, there is a feeling that persons who are mentally disabled ought to be sheltered from the severity of the criminal process while, on the other, there is a desire to protect society by confining and punishing persons thought guilty of criminal conduct.<sup>113</sup>

<sup>112</sup> Law Commission, *Unfitness to Plead Volume 1* (Law Com No 364, 2016) [3.27].

<sup>113</sup> Note, 'Incompetency To Stand Trial' (1967) 81:2 *Harvard Law Review* 454, 472.

### A. INTERMEDIARIES

One way in which to address the obstacles created by the current Hong Kong legislative patchwork of ordinances and provisions governing the proceedings, determinations, and legal consequences involving accused persons unfit to plead and stand trial, is to make provision for the appointment of intermediaries. An intermediary can be defined as “a communication expert whose role is to facilitate a witness’s or defendant’s understanding of, and communication with, the court”.<sup>114</sup> To date, Hong Kong law does not make provision for the appointment of intermediaries in any of its legal proceedings involving vulnerable categories of persons. This is regrettable as a statutory entitlement to the assistance from an intermediary can be particularly helpful to those accused suffering from a mental, intellectual and/or cognitive disability, and who is otherwise not necessarily also unfit to plead and stand trial. For these accused, a statutory entitlement to receive assistance from an intermediary may facilitate a more accessible proceeding in which such accused persons can exercise their autonomy and effectively participate and vindicate their fair trial rights.<sup>115</sup> In fact, the appointment of intermediaries for accused persons suffering from a mental, cognitive or intellectual disability was one of the recommendations made by the English Law Commission in its 2016 report,<sup>116</sup> and it is also consonant with the spirit of the United Nations Convention on the Rights of Persons with Disabilities.

For example, article 12(2) of the Convention requires State Parties to “recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of their life”.<sup>117</sup> Legal capacity is a distinct concept from mental capacity and “involves the capacity to be a holder of legal rights, and the full protection of those legal rights in the eyes of the law”.<sup>118</sup> Given this broadening perspective on the effective and meaningful exercise of human capacities and abilities before the law, the focus can no longer be on the threshold determination of whether an accused person is fit to plead and stand trial, but should rather focus on “identifying and implementing the supports necessary to help an individual [to]

<sup>114</sup> Law Commission, *Unfitness to Plead Summary* (Law Com No 364, 2016) [1.27].

<sup>115</sup> *ibid*; Law Commission, *Unfitness to Plead Volume 1* (Law Com No 364, 2016) [2.31]-[2.94].

<sup>116</sup> Law Commission, *Unfitness to Plead Summary* (Law Com No 364, 2016) [1.28], [2.31]-[2.94].

<sup>117</sup> Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS (CRPD) art 12(2).

<sup>118</sup> Anna Arstein-Kerslake, Piers Gooding, Louis Andrews, and Bernadette McSherry ‘Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities’ (2017) 17 *Human Rights Law Review* 399, 405.

exercise that absolute right to legal capacity”.<sup>119</sup> Intermediaries can certainly play an important supportive role to accused persons suffering from a mental, cognitive or intellectual disability, and who find themselves entangled in the labyrinth of Hong Kong’s current legislative framework for fitness to plead and stand trial.

## B. DIVERSION FROM THE CRIMINAL PROCESS

Where an accused person has been declared unfit to plead and stand trial, however, the support of an intermediary may not be sufficient. Moreover, the continuation of the legal process for the purpose of making a factual finding on whether that accused person had committed the act alleged, may in itself be unjust as it amounts to a differential process, stripped from some of the procedural safeguards that underpin the adversarial criminal trial.<sup>120</sup> For example, in the exposition of the Hong Kong legal framework above, and with reference to the recent English case of *R v Orr*,<sup>121</sup> it was highlighted that although a factual finding on whether an accused person did the illegal act alleged, may hold the advantage of providing closure to the criminal proceeding, it remains problematic as it constitutes a legal pronouncement against which the accused person is not able to properly defend him or herself, and upon which legal consequences may nonetheless follow.

Moreover, in the context of Hong Kong, an agenda for the active prosecution of ‘mentally ill’ persons is seemingly at the order of the day. For example, article 5.10 of the Hong Kong Prosecution Code (2013) provides as follows:

The criminal justice system operates to protect both the community and individual members of it. From time to time the prosecution may consider it appropriate to charge mentally ill persons with applicable offences principally in order to invoke the court’s jurisdiction to make beneficial orders for the management of the mentally ill, their protection and the protection of the community.

<sup>122</sup>

Thus, at stake here is the potential benefit of the court’s jurisdiction to make determinations and impose appropriate orders in terms of the provisions of the Criminal Procedure Ordinance Cap 221 to ensure that the interests of society are

<sup>119</sup> Arstein-Kerslake, Gooding, Andrews, and McSherry (ibid) 406; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS (CRPD) art 13(1).

<sup>120</sup> Arstein-Kerslake, Gooding, Andrews, and McSherry (ibid) 404.

<sup>121</sup> *R v Orr* [2016] 4 WLR 132.

<sup>122</sup> Hong Kong Prosecution Division, Hong Kong Prosecution Code (2013) article 5.10.

protected from possible harm or violence, and that accused persons suffering from a mental disability receive the necessary treatment.

A case in point is *R v Chan Ming Kwok* in which the applicant had a long history of mental illness and was charged with one count of attempted murder and two of wounding with intent. The trial judge, in making a hospital order under section 45 of the Mental Health Ordinance Cap 136 stated:

I find it impossible to forecast today that it would be safe to release the defendant on any particular date. His condition can be controlled by regular medication. Whilst he is detained the administration of the appropriate drugs can be ensured. Once he is released, if he ceases to take the necessary drugs he may be expected to relapse, in which case as his previous conduct shows he can be highly dangerous. I know of no order I can make which will ensure that he takes the drugs once he is released. In the circumstances I refrain from specifying the period during which the defendant is to be detained. I leave it to the medical authorities, once they are satisfied that it will be safe to release the defendant, to take the necessary steps under the Mental Health Ordinance for his discharge.<sup>123</sup>

The majority of the Hong Kong Court of Appeal agreed with this finding and emphasised that the applicant was a danger to the community if he was not under medication and proper treatment.<sup>124</sup>

Yet, the potentially dire consequences such a prosecution policy may have for a vulnerable accused should also be noted. The appellant in *HKSAR v Meijne, Camilo Arturo* had a long history of bipolar affective disorder and experienced difficulty in coping with stressful situations. In the lead-up to the incident resulting in a charge of indecent assault, which was later amended to a charge of common assault to which the appellant pleaded guilty, the appellant displayed erratic behaviour and obvious signs of an escalation of his mania.<sup>125</sup> In fact, the appellant's treating psychiatrist recommended that he be admitted to a psychiatric hospital but the appellant went missing for three days and was not seen until the day of the incident. The incident was captured on CCTV footage and involved the appellant, standing inside a lift, allegedly 'pushing' the victim's right breast once

<sup>123</sup> *R v Chan Ming Kwok* [1987] HKCA 194; [1987] 3 HKC 222; CACC 82/1987 (11 August 1987) [2].

<sup>124</sup> *ibid* [3].

<sup>125</sup> *HKSAR v Meijne, Camilo Arturo* [2015] HKCFI 131; HCMA 274/2012 (30 January 2015) [1]-[2].

with his left hand before pressing the button to close the lift door.<sup>126</sup> At trial, the appellant was found fit to plead and stand trial but an order was made, in virtue of the ongoing concern for his mental health, that he be remanded in custody for observation in a mental health hospital and that the findings of two psychiatrists be brought before the court. The psychiatric reports confirmed the appellant's mental health condition, which had by that time deteriorated, and it was suggested "in the event of a conviction, [that] a hospital order for a period of three months should be imposed".<sup>127</sup> The two psychiatrists nonetheless declared the appellant mentally fit to plead.<sup>128</sup> The appellant was subsequently convicted and sentenced to twenty-one days' imprisonment reduced to fourteen days for the plea of guilty. A suspended sentence of one-month imprisonment for an assault occasioning actual bodily harm was also triggered. The appellant served his entire sentence at the Siu Lam Psychiatric Centre, after which he was referred to the Pamela Youde Nethersol Eastern Hospital where he was detained for a further sixty-two days as an involuntary patient.<sup>129</sup>

On appeal, Judge Zervos for the Hong Kong Court of First Instance held that the appellant's psychiatric history was relevant to the question whether the appellant should have been prosecuted, the alleged incident of the assault, and also the determination of an appropriate and just sentence.<sup>130</sup> On the first ground, Judge Zervos emphasised that the magistrate who hears a fitness to plead application should also be the magistrate who ultimately presides over the trial. This was not so in this case, as the Principal Magistrate had called for the psychiatric reports to determine whether the appellant was fit to stand trial and another magistrate was thereafter assigned to preside over the trial. This was described as 'regrettable', as the two psychiatric reports made it clear that while the appellant was fit to stand trial at that moment, his mental health condition fluctuated and he was subject to manic episodes and relapses.<sup>131</sup> This information was therefore relevant not only on the question whether the appellant was fit to stand trial at arraignment, but more generally in terms of his mental condition during the course of the trial. With regard to the second ground it was found, upon a close scrutiny and analysis of the CCTV footage, that the appellant did not in fact push the complainant as alleged, but that he rather held out his left-hand gesturing to the complainant not to enter the lift, and that his outstretched arm and hand made contact with the

<sup>126</sup> *ibid* [2].

<sup>127</sup> *ibid* [6].

<sup>128</sup> *ibid* [6].

<sup>129</sup> *ibid* [3].

<sup>130</sup> *ibid* [8].

<sup>131</sup> *ibid* [13].

complainant above her right breast for a mere second.<sup>132</sup> Of this Judge Zervos stated:

As far as I am concerned it was not a push and there was no aggressive action by the appellant with his left hand. It was simply a gesture not to come in with his left hand reached out. It was also clear that it was the slightest of contacts which occurred in less than a split-second. Whilst I can understand the woman being offended by not being let in the lift, there was no physical action by the appellant who probably, because of his mental state, wanted to be left alone in the lift.<sup>133</sup>

Thus, given the appellant's mental condition and that the alleged incident involved minimal contact, Judge Zervos concluded that the facts of the matter did not support a criminal conviction and the conviction was quashed and the sentence and order to activate the suspended sentence was set aside.<sup>134</sup>

These two cases illustrate the practical difficulty of having a prosecution policy that seemingly encourages the prosecution of those who may suffer from mental, intellectual or other cognitive disabilities. While it may sometimes be effective to use a criminal prosecution to bring somebody under the protection of the court, it must also be remembered that the positive factual finding for the alleged act or omission performed by an accused subsequent to a finding that the accused is not fit to plead and stand trial, has consequences. These consequences may be dire for those who are not a danger to society and who would not benefit from becoming entangled in a labyrinth of Ordinances and role-players who make life-decisions on their behalf. It is for this reason that the English Law Commission recommended that a court should, subsequent the finding that an accused person is not fit to plead and stand trial, have the option *not* to embark on the deliberation as to whether the accused committed the act or omission as charged.<sup>135</sup>

In other words, to divert from the matter from the criminal justice system. This would not only be consonant the fundamental principle that an accused be present at his or her own trial and that the accused effectively and meaningfully participate in his or her own defence, but it would also be respectful and accommodating of those who are not able to fully and meaningfully participate in a criminal proceeding because of mental, intellectual, or cognitive incapacities, and irrespective of whether the incapacity is of a temporary or a permanent nature.

<sup>132</sup> *ibid* [22].

<sup>133</sup> *ibid* [22].

<sup>134</sup> *ibid* [22]-[23].

<sup>135</sup> Law Commission, *Unfitness to Plead Summary* (Law Com No 364, 2016) [1.18]-[1.19].

Where a criminal process for the determination of factual guilt or innocence nonetheless continue after the accused person was found to be unfit to plead and stand trial, it was already emphasised above that every effort must then be made “to afford a defendant whose capacity may be in doubt such adjustments to the proceedings as he or she reasonably requires to be able to participate in the full criminal process, and to maintain that capacity for the whole of the process”.<sup>136</sup>

The English Law Commission further recommended that courts exercise a judicial discretion not to proceed with a hearing to consider the allegation following a finding that the accused is unfit to plead and stand trial, and explained that such a discretion:

[S]hould be subject to an interests of justice test, to be applied by the judge taking into account various factors, including: (1) the seriousness of the offence; (2) the effect of such an order on those affected by the offence; (3) the arrangements made (if any) to reduce any risk that the individual might commit an offence in future, and to support the individual in the community; and (4) the views of the defence and the prosecution in relation to the making of such an order.<sup>137</sup>

Yet, it was also submitted that the exercise of such a judicial discretion should not prevent the prosecution from applying for leave to resume prosecution, in appropriate cases and where the accused subsequently regains capacity for trial.<sup>138</sup>

Moreover, and as was indicated before, it is particularly problematic for a factual finding to be made as to whether an accused had committed the act or omission charged, if only the *actus reus* of that act or omission is considered. The English Law Commission stated in this regard that “the unfit individual is substantially disadvantaged in comparison to a defendant facing the same allegation in full trial”, as the ability of that unfit individual to rely on common defences such as self-defence, accident or mistake will be significantly restricted.<sup>139</sup> The Commission subsequently recommended that where the factual determination

<sup>136</sup> *ibid* [1.15].

<sup>137</sup> *ibid* [1.71].

<sup>138</sup> *ibid* [1.72].

<sup>139</sup> *ibid* [1.20].

is pursued, that the prosecution be required to prove all elements of the offence beyond a reasonable doubt. This, it was submitted,

[W]ould afford individuals who lack capacity the same opportunity to be acquitted as is enjoyed by defendants who have capacity, enabling them to engage all available full defences...The resulting finding at the hearing would not be a conviction, since the individual who lacks capacity is unable to participate effectively in trial, but an alternative finding that the allegation is proved against him or her.<sup>140</sup>

## V. CONCLUSION

It is clear from the critical and legal-historical analysis in this article that the Hong Kong legal framework for ‘fitness to plead and stand trial’ has not been the subject of critical revision and reform to bring the relevant substantive and procedural law in line with contemporary understandings and awareness of mental health and cognition. This, it was noted, affects the fair trial rights of vulnerable accused persons suffering from a mental, intellectual, or cognitive disability.

The shortcomings identified in this article with regard to the current Hong Kong legislative framework for fitness to plead and stand trial, included substantive matters like the legal test for determining whether accused persons are able to effectively and meaningfully participate in the legal proceedings against them, procedural matters relating to the process for this determination and the legal consequences that may ensue, as well as the elaborate structure of ordinances and policy on which this Hong Kong legislative framework is based. It was noted, for example, that Hong Kong law excessively pathologises human (in) capabilities, which not only contributes to the stigma surrounding mental illness but may also result in a distorted view of the vast continuum on which a person’s capacity and incapacity, or ability and inability to make decisions, can exist. It was also shown that the determination of whether an accused person can effectively and meaningfully participate in the criminal proceedings against him or her, has become a sufficiently complex matter that can no longer be left to the jury. Particularly problematic in Hong Kong is that differing procedures exist in this regard for trials at Magistrate’s Court and District Court level, and for proceedings before the Court of First Instance. Such differing procedures are unnecessary, breed inconsistency, and are particularly time-consuming in the Court of First Instance where a jury is tasked to make the determination. And finally, with regard to the consequences that may follow upon a determination of unfit to plead and

<sup>140</sup> *ibid* [1.73]; Law Commission, *Unfitness to Plead Volume 1* (Law Com No 364, 2016) Chapter Five.

stand trial, it was evident that much more can be done to ensure the effective and equal participation of vulnerable accused before the law.

This evaluation of the Hong Kong legislative framework was informed by the comparable legal developments in the laws of England and Wales, as well as the provisions of the United Nations Convention on the Rights of Persons with Disabilities. The recommendations subsequently made essentially require of the Hong Kong legislative framework to better reflect contemporary comparative and international understandings and awareness of mental health and cognition, and to ensure equal recognition before the law of all persons, including persons suffering from mental disabilities or intellectual impairments. Such legal reform and development will not only align Hong Kong law with the laws of England and Wales—which are important for historical reasons and for the coherent and systematic development of the laws of Hong Kong—but will also ensure that Hong Kong meets its obligations under the United Nations Convention on the Rights of Persons with Disabilities.

It is submitted that the fair trial rights of vulnerable accused persons suffering from a mental, intellectual, or cognitive disability, should be a critical priority on the agenda of Hong Kong legislators. Yet, the plight of such accused persons should not be made exceptional; that is a differentiated jurisprudence that stands distinct from mainstream fair trial rights. This is because *fairness*, in adversarial systems like that of Hong Kong, also requires *equality* before the law, as well as equal protection of the law.<sup>141</sup> Our longstanding commitment to fair trial rights, must therefore evolve with contemporary understandings of mental health and cognition to ensure equal recognition before and equal participation in the law, for all persons, including those suffering from mental disabilities or intellectual impairments.

<sup>141</sup> Michaël van der Wolf, Hjalmar van Marle, Paul Mevis and Ronald Roesch, 'Understanding and Evaluating Contrasting Unfitness to Stand Trial Practices: A Comparison between Canada and the Netherlands' (2010) 9:3 *International Journal of Forensic Mental Health* 245, 249.