

Student Paper

Fitness to Stand Trial: A General Principle of European Criminal Law?

Liselotte van den Anker
Lydia Dalhuisen
Marije Stokkel*

1. Introduction

‘Fitness to stand trial’ is a fundamental concept in many legal systems. Especially within the common law tradition, but also in civil law countries like the Netherlands, the capacity of an accused to stand trial is taken into account. The reason for this principle is that it is generally recognised that in order for a trial to be fair, the accused must be able to participate in the legal proceedings. Article 6 of the European Convention on Human Rights (ECHR) entitles every person to ‘a fair and public hearing by an independent and impartial tribunal’. If a person lacks the required mental capacity to understand what is going on, the trial can hardly be seen as fair.

While the notion of fitness to stand trial is generally recognised and plays an important role in ensuring the fairness of a trial, this article poses the question whether fitness to stand trial should be incorporated as a general principle in European criminal law. This would generate a more common standard throughout the Union in the way this notion is protected; furthermore, citizens can then derive rights from this European criminal law.

In this article the position is defended that fitness to stand trial must become a general principle of European criminal law. First, the concept of fitness to stand trial and its practice are elaborated to give a general overview. Second, an outline of the relevant case law of the European Court of Human Rights (ECtHR) is given. Thirdly, the competency of the European Union to introduce and approximate the law is discussed. Finally, it is argued why fitness to stand trial should become a general principle of Union Law.

* Liselotte van den Anker, LL.M (e-mail: lmvdanker@gmail.com), Lydia Dalhuisen, MSc, LL.M (email: L.Dalhuisen@uu.nl) and Marije Stokkel, LL.M (e-mail: stokkel.ajm@gmail.com) have recently completed their Master's degree in Dutch Law (specialisation: Criminal Law) at Utrecht University School of Law, Utrecht (the Netherlands). Furthermore, they participated in the Excellent Master's track in Criminal Law, which is an extracurricular programme for selected excellent, highly motivated and enthusiastic students. This paper was written under the supervision of Prof.Dr. F.G.H. Kristen.

2. Fitness to stand trial

2.1. Introduction

The underlying rationale for the existence of a concept of fitness to stand trial is the notion that everyone is entitled to a fair trial. This right is enshrined in Article 6 ECHR. Besides the obvious notion that it is difficult to guarantee fairness if a person does not (seem to) understand what is going on at the trial, fitness to stand trial is also related to other principles, like the view that persons suffering from a mental disorder should receive treatment instead of punishment and the right to represent oneself in court.¹ It is a misuse of the law and does not reflect well on a civilised legal system if a person who does not understand the trial is nevertheless forced to endure it. Furthermore, this poses a threat of convicting an innocent person because that person is not able to disprove his guilt.² Besides this legal view of fitness to stand trial, it can also be placed in a cultural context. From the existence of the concept it can be derived that the legal system is seen as reasonably fair, that it is believed that accused persons are treated fairly and have an opportunity to defend themselves, and that this fairness is compromised when the accused is not capable of standing trial.³

From the foregoing it is clear that fitness to stand trial is an important notion of a fair trial. This section deals with the question of how different countries have implemented this notion into their trial system. With respect to the importance of a concept of fitness in practice, a distinction is made between adversarial and inquisitorial legal systems. Because of their common law tradition and similarities the situation in England and Wales and the United States is discussed. Following that, the Dutch practice is presented as an example of the application of the concept of fitness to stand trial in an inquisitorial system.

2.2. Anglo-American practice

2.2.1. Introduction

In the common law tradition, the active participation of the accused in the criminal procedure is seen as a necessity for a truly adversarial trial. This emphasis on the role of the accused and his ability to actively participate is in line with the notion of fitness to stand trial. Therefore fitness to plead or competency to stand trial plays a significant role in criminal trials in both the United Kingdom and the United States of America.⁴ In this following section the criteria for fitness to stand trial which developed throughout this case law are discussed in the case of England and Wales as well as the United States. This concept is called ‘fitness to plead’ in England and Wales, in the United States it is called ‘competency to stand trial’. Aside from many similarities, differences can also be discerned.

1 T.P. Rogers et al., ‘Fitness to plead and competence to stand trial: a systematic review of the constructs and their application’, 2008 *Journal of Forensic Psychiatry and Psychology* 19, no. 4, p. 576.

2 Law Commission, ‘Unfitness to plead: a consultation paper’, 2010, Law Com CP No 197, pp. 3-4. At the time of writing the period of consultation had closed and a final recommendation is expected in the summer of 2012.

3 D. Mossman et al., ‘AAPL Practice guideline for the forensic psychiatric evaluation of competence to stand trial’, 2007 *Journal of the American Academy of Psychiatry and the Law* 35, no. 4, p. S29.

4 P. Bal & F. Koenraadt, *Het psychisch onvermogen terecht te staan. Waarborg of belemmering van het recht op een eerlijk proces*, 2004, p. 7; T.P. Rogers et al., ‘Fitness to plead and competence to stand trial: a systematic review of the constructs and their application’, 2008 *Journal of Forensic Psychiatry and Psychology* 19, no. 4, p. 576-596.

2.2.2. *Fitness to plead in England and Wales*

In England and Wales fitness to plead is an important concept. As early as the 7th century it was recognized that mentally disordered perpetrators required special consideration under the law. In the 14th century this acknowledgment resulted in a formal notion of fitness to plead.⁵ However, it was not until the 19th century that criteria were developed to determine whether or not an accused was fit to plead. These criteria have not changed since. This subject is governed by the Criminal Procedure (Insanity) Act 1964, as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and the Domestic Violence, Crime and Victims Act 2004. This Act states that ‘the accused is unfit to plead if he is under a disability which would constitute a bar to his being tried’. This means that ‘no man may be brought to trial upon any criminal charge unless and until he is mentally capable of fairly standing his trial’.⁶

Although fitness to plead is now governed by an Act, the criteria for determining fitness to plead are still those of the common law, as set out in *Regina v Pritchard* by Alderson B.⁷ He relied upon *Dyson* and directed the jury that in order to be sane the accused must be: ‘Of sufficient intellect to comprehend the course of proceedings in the trial so as to make a proper defence, to know that he may challenge any of you to whom he may object and to comprehend the details of the evidence’.⁸ From this quote criteria for fitness to stand trial were derived, commonly known as the *Pritchard* criteria. In *Davies* the ability to instruct legal advisors arose later and has been subsequently added to those criteria.⁹

The *Pritchard* criteria are:¹⁰

- the ability to plead to the indictment;
- the ability to understand the evidence;
- the ability to understand the course of the proceedings;
- knowing that a juror can be challenged;
- the ability to instruct a lawyer.

The meaning of the use of this legal test for fitness to plead is that expert witnesses now have to give evidence based on whether or not the accused meets these criteria. The fact that an accused is incapable of making decisions which are in his or her best interest is not enough to be deemed unfit to plead.¹¹ A person can be deemed unfit on the ground of several disorders: deficient mental and intellectual capacities but also physical problems. Mr. Pritchard, for instance, did not have a mental illness; he suffered from hearing and speech impairments.

Although this legal test of fitness to plead has not been changed since the early 19th century and is still used today, this practice is not as generally accepted as it may seem. Over the years criticism arose, stating that these criteria failed to provide an adequate legal test and that the threshold to be considered unfit was set too high. It was found in a qualitative study that ‘formal

5 T.P. Rogers et al., ‘Fitness to plead and competence to stand trial: a systematic review of the constructs and their application’, 2008 *Journal of Forensic Psychiatry and Psychology* 19, no. 4, p. 577.

6 Lord Edmund-Davies in *Regina v Podola*, [1960] 1 QB 325.

7 *Regina v Pritchard*, [1836] 7 C & P 303.

8 *Regina v Pritchard*, [1836] 7 C & P 303, 304.

9 *Regina v Davies*, [1853] CLC 326.

10 P. Bal & F. Koenraadt, *Het psychisch onvermogen terecht te staan. Waarborg of belemmering van het recht op een eerlijk proces*, 2004, p. 8; T.P. Rogers et al., ‘Fitness to plead and competence to stand trial: a systematic review of the constructs and their application’, 2008 *Journal of Forensic Psychiatry and Psychology* 19, no. 4, p. 578.

11 *Regina v Robertson*, [1968] 3 All ER 557.

findings of unfitness under the (...) test are extremely rare'.¹² This may result in the potential unfairness of the trial, because a significant number of persons who are mentally ill continue to undergo trial.¹³ Both conceptual and procedural changes are considered necessary.¹⁴ Given the problems with the *Pritchard* criteria and the developing concept of effective participation in relation to article 6 of the European Convention on Human Rights, the Law Commission proposes a new legal test in a consultation paper on unfitness to plead. This new legal test should take into account the decision-making capacities of the accused.¹⁵ In the Mental Capacity Act (2005) a framework and guideline for determining mental capacity is given.¹⁶ Mental capacity is defined as follows in Article 2(1): '[A] person lacks 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 (whether permanent or temporary).' This Act uses a functional approach to capacity by looking at the decision-making ability at a particular moment in time and not the more general decision capacity of a person.¹⁷ Although this Act does not specifically mention fitness to stand trial, it has influenced decision-making in this respect. For the development of a new legal test, the Law Commission uses this Act and gives some specific criteria for decision-making capacity. Someone is deemed incapable if that person is unable to:¹⁸

- understand the information relevant to the decisions that (s)he will have to make in the course of the trial;
- retain that information;
- use or weigh that information as part of the decision-making process; or
- communicate his/her decisions.

This incapacity can be the result of both physical shortcomings like brain damage as well as mental problems like paranoid schizophrenia.¹⁹ Despite this interest in decision-making capacity and the proposal for a new legal test, the *Pritchard* criteria are still being used.

2.2.3. Competency to stand trial in the United States

While in England and Wales the formal finding of unfitness to plead is rare,²⁰ this is almost the opposite in the United States. It is estimated that about 60,000 competence evaluations are carried out annually and that in about 20% of those cases the persons under evaluation are deemed unfit.²¹ Presuming that this estimate is still valid, this means that around 12,000 accused are found incompetent to stand trial every year.

12 T.P. Rogers et al., 'Reformulating fitness to plead: a qualitative study', 2009 *Journal of Forensic Psychiatry and Psychology* 20, no. 6, p. 816. In England and Wales, there were on average only 66 findings per year between 1997 and 2001.

13 *Ibid.*, p. 817.

14 T.P. Rogers et al., 'Fitness to plead and competence to stand trial: a systematic review of the constructs and their application', 2008 *Journal of Forensic Psychiatry and Psychology* 19, no. 4, p. 576.

15 Law Commission, 'Unfitness to plead: a consultation paper', 2010, Law Com CP No 197, p. 51 and further.

16 T.P. Rogers et al., 'Fitness to plead and competence to stand trial: a systematic review of the constructs and their application', 2008 *Journal of Forensic Psychiatry and Psychology* 19, no. 4, p. 583.

17 Law Commission, 'Unfitness to plead: a consultation paper', 2010, Law Com CP No 197, p. 52; T.P. Rogers et al., 'Fitness to plead and competence to stand trial: a systematic review of the constructs and their application', 2008 *Journal of Forensic Psychiatry and Psychology* 19, no. 4, p. 584.

18 Law Commission, 'Unfitness to plead: a consultation paper', 2010, Law Com CP No 197, p. 54.

19 *Ibid.*, pp.55-56.

20 T.P. Rogers et al., 'Reformulating fitness to plead: a qualitative study', 2009 *Journal of Forensic Psychiatry and Psychology* 20, no. 6, p. 816.

21 D. Mossman et al., 'AAPL Practice guideline for the forensic psychiatric evaluation of competence to stand trial', 2007 *Journal of the American Academy of Psychiatry and the Law*, no. 35 (4), p. S55.

Although in the absolute number of findings there is a big difference between the United States and the United Kingdom, the criteria used in the United States to test whether a person is competent to stand trial have a great deal of similarity with the *Pritchard* criteria.²² These criteria were provided in the landmark case of *Dusky v United States*²³ where the minimal constitutional standard for adjudicative fitness was established.²⁴ The US Supreme Court ruled on appeal that the test for competency to stand trial was ‘whether he [had] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he [had] a rational as well as factual understanding of the proceedings against him’.²⁵

This *Dusky* standard reveals three separate factors:²⁶

- the ability to consult with defence counsel;
- the ability to ‘otherwise assist with [their] defence’;
- having both a rational and factual understanding of the proceedings.

As with the *Pritchard* criteria, the *Dusky* test has received a great deal of criticism.²⁷ In accordance with the ‘decision-making capacity’ test proposed by the Law Commission in the UK, the *Godinez* case is relevant.²⁸ This case seems to interpret *Dusky* as requiring that a defendant must possess certain decision-making capacities in order to be judged competent to stand trial. In *Godinez* it was stated that ‘all criminal defendants (...) may be required to make important decisions once criminal proceedings have been initiated’.²⁹ So it seems that the courts may have to evaluate at least some of the decision-making abilities of the accused when judging competency to stand trial.³⁰

2.3. Dutch practice

2.3.1. Introduction

In the civil law tradition, the role of the accused is very different from that in the common law practice. Because of the strong belief in the objective quest of finding the truth by both the prosecution and the judge, the participation rights of the accused are seen as being of much lesser importance. Despite this weaker position of the accused, fitness to stand trial does play a role. The practice in the Netherlands will now be discussed.

2.3.2. Suspension of the prosecution in the Netherlands

The Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*) provided for the possibility to suspend a prosecution as early as 1838. At present, this is governed by Article 16 of the Code of Criminal Procedure. This article states that a prosecution will be suspended when a person is not capable of understanding the scope of the prosecution due to a lack of development or a

22 P. Bal & F. Koenraadt, *Het psychisch onvermogen terecht te staan. Waarborg of belemmering van het recht op een eerlijk proces*, 2004, p. 8.

23 *Dusky v United States*, 362 US 402 (1960).

24 D. Mossman et al., ‘AAPL Practice guideline for the forensic psychiatric evaluation of competence to stand trial’, 2007 *Journal of the American Academy of Psychiatry and the Law*, no. 35 (4), p. S5.

25 *Dusky v United States*, 362 US 402 (1960) Ref. 16, p. 402.

26 T.P. Rogers et al., ‘Fitness to plead and competence to stand trial: a systematic review of the constructs and their application’, 2008 *Journal of Forensic Psychiatry and Psychology*, no. 19 (4), p. 580.

27 *Ibid.*, p. 581.

28 *Godinez v Moran*, 509 US 389 (1993).

29 *Ibid.*, Ref. 20, p. 398.

30 D. Mossman et al., ‘AAPL Practice guideline for the forensic psychiatric evaluation of competence to stand trial’, 2007 *Journal of the American Academy of Psychiatry and the Law* 35, no. 4, p. S6.

pathological disturbance of his mental faculties. Originally it was held that this article was only applicable in cases where the disorder arose after the commission of the offence.³¹ More recently there is a discussion as to whether or not this should change, allowing for a suspension also in cases where the disorder existed prior to or arose during the offence.³² A recent verdict by the Dutch Court of Appeal suggests that as a basic principle Article 16 Code of Criminal Procedure only applies to disorders which originate after the offence. However, this verdict explicitly leaves room for exceptions.³³ In the Netherlands a suspension based on that article is very rare. It is one of the least common verdicts.³⁴

As in the Anglo-American tradition, the concept of fitness to stand trial is further elaborated in the somewhat scarce case law. An important case is that of *Menten*.³⁵ Here criteria for the suspension of a prosecution were given. An accused must still be able to defend himself. If this ability is compromised due to a mental problem, the suspension of the prosecution must follow.

Under the ability to defend oneself in court, the following is understood:

- the ability to respond to the charges and to the matters raised during the course of the proceedings;
- the ability to instruct counsel;
- the ability to give comments and explanations to counsel.

These criteria show a resemblance with the current legal test for fitness in both the United Kingdom and the United States.³⁶ It is unclear how the interest in the decision-making capacity of the accused and the proposed new legal test in the United Kingdom will affect this in the future.

However, in practice there are large differences between the Netherlands and the Anglo-American countries. Unlike the United Kingdom and the United States, where unfitness to stand trial could entail various forms of mental disorder, developmental deficiencies, and physical problems, in the Dutch practice a person is only deemed unfit in the case of a severe mental disorder.³⁷ The reason why developmental deficiencies and physical disorders like deafness are not seen as a ground for unfitness is that these problems arise long before the commission of the crime. However, more recently the debate on whether or not the Dutch provision of unfitness should also be admissible in cases where the unfitness arose before or during the commission of the crime could lead to the disappearance of this difference with the Anglo-American system.

2.4. Conclusion

From the case law of both common law and civil law countries it follows that fitness to stand trial can be compromised by a multitude of factors. Although the different legal traditions have a different view of the role of the accused, a notion of fitness to stand trial seems to be generally

31 P. Bal & F. Koenraadt, *Het psychisch onvermogen terecht te staan. Waarborg of belemmering van het recht op een eerlijk proces*, 2004, pp. 31-32.

32 M.D.C. Moncada Castillo et al., 'Psychisch gestoorde verdachten. Artikel 6 EVRM vraagt om herijking van de Nederlandse antwoorden op procesonbekwaamheid', 2010 *Strafblad*, pp. 320-337. M. van der Wolf et al., 'Understanding and Evaluating Contrasting Unfitness to Stand Trial Practices: A Comparison between Canada and the Netherlands', 2010 *International Journal of Forensic Mental Health* 9, pp. 245-258.

33 Gerechtshof Amsterdam 27 August 2010, *LJN* BN5666.

34 P. Bal & F. Koenraadt, *Het psychisch onvermogen terecht te staan. Waarborg of belemmering van het recht op een eerlijk proces*, 2004, p. 39.

35 Hoge Raad 5 februari 1980, *NJ* 1980, 104.

36 P. Bal & F. Koenraadt, *Het psychisch onvermogen terecht te staan. Waarborg of belemmering van het recht op een eerlijk proces*, 2004, p. 29.

37 *Ibid.*, pp. 29-30.

accepted. There is a great deal of overlapping between the different countries and their legal criteria to test for the ability to stand trial.

3. Fitness to stand trial as effective participation

3.1. Introduction

From Section 2 it can be derived that the principle of ‘fitness to stand trial’ is generally recognised within the criminal legal systems of different countries irrespective of whether they are inquisitorial or adversarial. Without this principle, a trial would not be fair. Article 6 ECHR guarantees the right to a fair trial and provides that ‘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’. Following the case law of the ECtHR the concept of effective participation is enshrined within the right to a fair trial. This concept ensures the right of an accused to participate effectively in a criminal trial. Fitness to stand trial can be seen as a derivative of effective participation. In this section, a general overview of the relevant case law of the ECtHR on effective participation is given. From this case law some state obligations can be derived.

3.2. Effective participation and the ECtHR

3.2.1. *Stanford v UK*

In the case of *Stanford v UK* the Court expressed the concept of effective participation for the first time. Bryan Stanford had been committed for trial by jury at Norwich Crown Court on seven counts arising out of his relationship with a young girl: indecent assault, two counts of rape, unlawful sexual intercourse, kidnapping and two counts of making a threat to kill. During the trial, Stanford was seated in a glass-fronted dock. He complained under Article 6(1) ECHR that he did not receive a fair trial because he was unable to hear the proceedings, including the witness statements made by the alleged victim, which resulted in his conviction.³⁸ The Court found no violation of Article 6, because apart from a minimal loss of sound due to the glass screen, the acoustic levels in the courtroom were satisfactory. Furthermore, counsel for Stanford, who could hear everything that was said and was able to take his client's instructions at all times, chose for tactical reasons not to bring the accused's hearing difficulties to the attention of the trial judge at any stage throughout the six-day hearing.³⁹

The Court stated in this judgment that the right of effective participation includes, amongst other things, the right to be present and the right to hear and follow the proceedings. Effective participation is also seen as the general principle behind the specific rights of the accused listed in Article 6(3) ECHR – ‘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’.⁴⁰ According to this judgment these rights are ‘implicit in the very notion of an adversarial procedure’.⁴¹

The Court referred back to the notion of an adversarial procedure and thus to the common law tradition. As already mentioned in Section 2, the active participation of the accused in the

38 *Stanford v UK*, [2002] ECtHR, Paras. 7-11.

39 *Stanford v UK*, [2002] ECtHR, Paras. 30-32.

40 *Stanford v UK*, [2002] ECtHR, Para. 26.

41 *Stanford v UK*, [2002] ECtHR, Paras. 29-30.

criminal procedure is seen as a necessity in England and Wales. According to their common law tradition the emphasis on the active role of the accused is seen as lying at the heart of a truly adversarial procedure. The Court upheld this view by stating that the right of effective participation includes *not only* the right to be present. This means that Article 6 ECHR includes a right for the defendant to play an active role.

The following question remains: what does effective participation actually presuppose in the context of the principle of fitness to stand trial? The Court explicitly stated that Article 6 ECHR guarantees a right of effective participation which goes further than the right to be present, but failed to give a broader definition of what this principle entails. Furthermore, the Court gave no details as to how this right should be ensured in practice.

3.2.2. *T v UK and V v UK*

The principle of effective participation as stated in the *Stanford* case was further developed in the joint cases of *T v United Kingdom* and *V v United Kingdom*.⁴² Two boys, aged eleven, were tried and convicted of the murder and abduction of a two-year-old boy. The case was so brutal that it led to a feeling of uproar within the United Kingdom and the trial was preceded and accompanied by massive national and international publicity.

The trial took place over three weeks and was conducted with the formality of an adult criminal trial, which means that both the judge as well as counsel wore wigs and gowns. The procedure was, however, modified to a certain extent in view of the defendants' age, for example they were seated next to social workers in a specially raised dock. Besides this, the applicants were introduced to the trial procedures and personnel by way of a 'child witness pack' which contained books and games.⁴³

Part of the applicants' claim was that they had been denied a fair trial in breach of Article 6 ECHR, because in the light of their youth, immaturity and state of emotional disturbance, they had not been able to participate effectively in the trial against them.⁴⁴ In the case against T, evidence showed that he suffered from a post-traumatic stress disorder involving a constant preoccupation with the events of the offence, a generalised high level of anxiety and poor eating and sleeping patterns. This disorder, combined with the lack of any therapeutic treatment since the offence, limited his ability to instruct his lawyers and to adequately testify in his own defence. In the case against V there was psychiatric evidence that he 'functioned emotionally at far younger than his chronological age' and that he suffered from post-traumatic stress disorder. Furthermore, he did not understand the situation and was not able to give informed instruction to his lawyers.⁴⁵

The Court concluded in both cases that the applicants had been deprived of a fair trial, because they were not able to participate effectively in the criminal proceedings against them. The Court began its reasoning concerning Article 6 ECHR by stating that this article guarantees the right of an accused to participate effectively in his criminal trial, with reference to the *Stanford* judgment.⁴⁶ It was, however, the first time that the Court had to consider how this principle should apply to criminal proceedings against children who both suffered from a disorder. Moreover, the Court had to decide, in particular, whether procedural elements of a trial,

42 *T v United Kingdom and V v United Kingdom*, reported as a joint decision in [2000] 30 EHRR 121.

43 *T v United Kingdom*, [1999] ECHR, Par. 9.

44 *T v United Kingdom*, [1999] ECHR, Par. 79.

45 *V v United Kingdom*, [1999] ECHR, Paras. 65 & 11.

46 *T v United Kingdom*, [1999] ECHR, Par. 85.

which are considered to safeguard the rights of adults on trial, should be abrogated in respect of children in order to promote their understanding and participation during trial.

The Court provided in these cases a general rule for the application of the principle of effective participation in criminal proceedings against children,⁴⁷ stating that ‘it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceeding’.⁴⁸

These joint cases differ from the *Stanford* judgment,⁴⁹ where the Court found no violation of Article 6(1) ECHR although the accused could not hear some of the evidence given at trial. In that case the hearing difficulties experienced by Stanford were not mentioned to the Court due to tactical reasons. Moreover, the fact that Stanford was represented by skilled and advanced lawyers was seen as a sufficient safeguard against unfairness. In these cases the mere fact that the two boys were represented by skilled lawyers was not enough, because it was ‘highly unlikely that the applicants would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial’ and ‘that given their immaturity and disturbed emotional state, the applicant would not have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence’.⁵⁰

As already mentioned previously, the Court ruled in these joint cases⁵¹ that there had been a violation of Article 6 ECHR. However, this was contrary to the ruling in the *Stanford* case. This difference lies particularly in the fact that for minors this factual representation was not enough to satisfy the criteria of effective participation. The conclusion can hereby be drawn that good and effective legal assistance can compensate for ineffective participation, but only to a certain degree (precaution must be used). In this respect, reasons like the defendant’s youth or a disorder, which determine why an applicant can be considered ‘unfit to stand trial’, also determine in which degree active participation is required. The level of the required (active) participation was in these joint cases much higher, *because* of their youth and the fact that they suffered from a disorder.

3.2.3. SC v United Kingdom

In this case an eleven-year-old boy had attempted to rob an 87-year-old woman together with another boy. This led to the woman falling, thereby fracturing her arm. The boy was tried in an adult court and sentenced to detention for two-and-a-half years. The applicant alleged that, because of his youth and low intellectual ability, he was unable to participate effectively contrary to Article 6(1) ECHR.⁵² The Court provided, for the first time, a definition of effective participation: ‘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 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

47 H. Davis, *Human rights law: directions*, 2007, p. 252.

48 *T v United Kingdom*, [1999] ECtHR, Par. 86.

49 *Stanford v UK*, [2002] ECHR.

50 *T v United Kingdom*, [1999] ECtHR, Paras. 88-89.

51 *T v United Kingdom* and *V v United Kingdom*, reported as a joint decision in [2000] 30 EHRR 121.

52 *SC v the United Kingdom*, [2004] ECtHR, Paras. 9-18.

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' (emphasis added).⁵³

In this definition several cumulative conditions are given for the right of effective participation. According to the already discussed *Stanford* case, the right of effective participation includes (i) the right to be present and (ii) the right to hear and follow the proceedings.⁵⁴ Furthermore, the Court had already explained the second criteria in *Stanford*. The right to hear and follow the proceedings include that the accused should fully understand the nature of this trial and what is at stake for him. In the *SC* case, the Court elaborated on this, stating that effective participation should also include (iii) the right of an accused to be assisted by, for example, an interpreter, lawyer, social worker or friend. However, a reservation must be made: the Court stated that this right is only of relevance when it is regarded as 'necessary'. The next question which can be posed is what does this limitation entail? The Court does not give us a detailed answer, but it referred back to the reasons of the principle of 'unfitness to stand trial', like the defendant's youth and a mental disorder. In these cases, when the applicant can be considered unfit to stand trial, he or she is in more need of assistance. The next criterion which is mentioned by the Court is that (iv) the accused should be able to follow what is said in court and (v) the accused should be able to explain his own version of the events and challenge the arguments and statements of the opposing party.

In *SC* it was not clear to the defendant what was at stake for him. According to the Court, the defendant did not totally understand that he risked a custodial sentence. Even once the sentence had been imposed and he had been taken down to the holding cells, he appeared confused and expected to be able to go home with his foster father.⁵⁵

In this case the Court provided some general rules on the effective participation of minors in court. The ECtHR had already concluded earlier in the *T v UK* and *V v UK* cases that it is essential that a child, who is charged with a criminal offence, should be dealt with in a way which takes full account of his age, level of maturity and intellectual and emotional capacities.⁵⁶ This in order to make sure that a minor has the ability to understand and participate in the proceedings against him. In *SC* the Court specified this general rule by stating that it 'is essential that the child should be tried in a specialist tribunal which is able to give full consideration to, and make proper allowance for, the handicaps under which he labours, and adapt its procedure accordingly'.⁵⁷

3.2.4. *Liebreich v Germany*

In the case of *Liebreich v Germany*⁵⁸ the Tiergarten District Court opened the trial against the applicant on charges of insurance fraud. The accused complained under Article 6, Paragraphs 1 and 3(c) that he had been unable to participate effectively due to the effects of antidepressant medication. The Court declared this complaint inadmissible as the accused had been represented by a lawyer with whom he could consult. Besides this, the domestic German court had received information from a doctor who was treating the accused that he was fit enough to plead. Moreover, the Court found that there was nothing to indicate that the applicant, due to his depression and the effects of his medication, was unable to have a broad understanding of the trial process

53 *Ibid.*, Para. 29.

54 *Stanford v UK*, [2002] ECtHR, Paras. 29-30.

55 *SC v the United Kingdom*, [2004] ECtHR, Para. 33.

56 *T v United Kingdom*, [1999] ECtHR, Par. 84.

57 *SC v the United Kingdom*, [2004] ECtHR, Para. 35.

58 *Liebreich v Germany*, [2009] ECtHR.

and unable to understand what was at stake for him. Therefore it could be concluded that the applicant was fit to plead.

This judgment by the European Court is of relevance for the confirmation of the several cumulative conditions, given in the *SC case* and the *Stanford case*, for the right of effective participation. Furthermore, the ECtHR reconfirmed that good professional legal assistance can compensate for ineffective participation. Also, the Court explicitly stated in what way it should be determined that there are reasons for the conclusion that a defendant is unfit to plead, namely by consulting a doctor. Besides this substantive relevance, this is also an example of a case within the domain of a civil law country.

3.2.5. Active duty / responsibility

After discussing what the principle of effective participation entails according to the ECtHR, we can raise the question of in what way the Contracting States need to ensure that this principle is upheld. Is there a responsibility or an active duty for the Government to ensure that the right of effective participation is upheld? In the *Stanford case*, the accused stated that the Government bore responsibility for the poor acoustics in the courtroom. In response, the ECtHR only mentioned that such a complaint is ‘undoubtedly a matter which *could* give rise to an issue under Article 6 ECHR’ (emphasis added).⁵⁹ Indirectly, we could derive from this statement that effective participation should be guaranteed by the Government. However, in the *Stanford case*, no explicit positive obligation is mentioned.

However, in the already mentioned *Liebreich case* the Court ruled with reference to *V v UK*⁶⁰ and *Vaudelle v France*⁶¹ that the circumstances of a case may require the Contracting States to take positive measures in order to enable the applicant to participate effectively in the proceedings.⁶² In the case of *Vaudelle v France*,⁶³ which dealt with a possible violation of the defence rights of the applicant rather than the principle of effective participation, the Court stated that the Convention system requires that, in certain cases, the Contracting States take positive measures to guarantee effective compliance with the rights set out in Article 6 ECHR. They must exercise diligence to ensure the effective enjoyment of the rights guaranteed by Article 6 ECHR.⁶⁴ In the case of *Liebreich* the Court reaffirmed this. However, the Court stated that this is only the case when the circumstances of a case so require. The Court thus found it necessary to limit this general principle to certain cases, but it did not explicitly state in which cases it is necessary for the Contracting States to ensure that this principle is upheld.

3.2.6. Conclusion on the general view of the ECtHR

The case law of the Court clarifies that effective participation is the general principle which lies behind the specific rights of the accused as listed in Article 6(3) ECHR. Article 6 ECHR therefore includes the right of an accused to effective participation. The right of effective participation includes, according to the case law discussed, (i) the right to be present and (ii) the right to hear and follow the proceeding, (iii) the right of an accused to be assisted, (iv) the accused should be able to follow what is said in court and (v) the accused should be able to

59 *Stanford v UK*, [2002] ECtHR, Para. 29.

60 ECHR 2001-I; *V v the United Kingdom*, [1999] ECtHR, Para. 86.

61 *Vaudelle v France*, [2001] ECtHR, Paras. 48-49.

62 *Liebreich v Germany*, [2009] ECtHR.

63 *Vaudelle v France*, [2001] ECtHR.

64 *Ibid.*, Para. 52.

explain his own version of the events and challenge the arguments and statements of the opposing party.

The underlying reasoning in all these cases gives rise to a broad principle, namely that for effective participation active involvement on the part of the accused is required instead of merely a passive presence.⁶⁵ However, a reservation must be made because many of the cases before the ECtHR were against the United Kingdom, and therefore subjected to the common law system. The question raised in this respect is to which extent can this reasoning of the Court be explained so as to form a general standard concerning effective participation? The conclusion can still be drawn, however, although it is limited to common law countries, that in order to participate effectively, active involvement is required. For example, in order to give meaningful instructions, an accused will have to be able to make certain decisions. However, it is also clear from the case law that limited abilities on the part of the accused do not automatically render the trial unfair; he or she may still be able to participate effectively in the trial as long as some safeguarding steps have been taken.⁶⁶ In this respect it must be stated that, according to the Court, good and effective legal assistance can compensate for ineffective participation, but only to a certain degree.

So for effective participation active involvement by the accused is required in order for a trial to be fair. If this is impeded, then safeguarding steps must be taken.

This line of cases by the ECtHR gave rise to extensive discussions in England and Wales about the question whether their legal test was sufficient to fulfil the criteria of effective participation as set out by the ECtHR. If the legal test is not broad enough to ensure that the accused who stands trial is capable of effective participation, then there is a clear risk that such trials are incompatible with Article 6 ECHR.⁶⁷ The conclusion reached in England and Wales is that the *Pritchard* test, discussed in the previous section, is outdated in the light of the case law of the Court on effective participation.

In order to make sure that effective participation, and thereby fitness to stand trial, is guaranteed, the ECtHR demands that Contracting States take positive measures to guarantee effective compliance with the rights set out in Article 6 ECHR in certain cases.

This active duty forms, together with the notion of effective participation, the reason for posing the question whether the principle of fitness to stand trial should be a general principle of European Union law.

4. Human rights protection in the European Union

4.1. Introduction

In order to answer the question whether fitness to stand trial should be a general principle of European criminal law, we need to take a closer look at the Union's competence in the field of human rights. In this section we have to ascertain, on the one hand, whether the European Union, its institutions and thereby the European Court of Justice (ECJ) consider themselves competent to protect human rights and to review the initiatives of the Member States taken in this field. Closely linked to this is the question whether the Union finds itself to be the most competent organisation to deal with the protection of human rights. On the other hand, this section deals with the question of when the European Union is competent in the field of human rights and how certain principles can become general principles of European criminal law.

65 Law Commission, 'Unfitness to plead: a consultation paper', 2010, Law Com CP No 197, p. 5.

66 Law Commission, 'Unfitness to plead: a consultation paper', 2010, Law Com CP No 197, p. 48.

67 Law Commission, 'Unfitness to plead: a consultation paper', 2010, Law Com CP No 197, p. 5.

4.2. The Union's competence in the field of human rights

For many years the European Community, or the European Union, had no explicit competence in the field of human rights in criminal law. The ECJ was occasionally asked to examine the relationship between the Community legal order and human rights and it made some constructive rulings,⁶⁸ but it never developed a specific point of view concerning the right to a fair trial. Despite its lack of competence, the Court always stated that it is very important that human rights are respected.⁶⁹ Because of the absence of treaty provisions, the case law of the Court was until then the most important source of EU policy in the field of protecting the right to a fair trial. In 1996 the Court ruled that, looking at the treaty provisions, the European Union could not accede to the ECHR,⁷⁰ but 'by then fair trial provisions had started to apply at Community level'.⁷¹

In the Treaty of Maastricht the importance of human rights was already stressed, but the Treaty of Amsterdam specifically altered the Treaty on the European Union in order to strengthen the EU's competence in police and judicial cooperation in criminal matters. With the Treaty of Amsterdam an area of freedom, security and justice was created which was codified in Article 6 TEU (old). The ambition of the European Commission in creating this area, dating from 1998, has always been to give citizens a common notion of justice throughout the Union.⁷² Article 6 TEU (old) states that the Union should respect the fundamental rights set out in the ECHR. Article 7 of the TEU (old) provides for stringent penalties for non-compliance. In December 2000, the Commission, the Council and the European Parliament jointly signed the Charter of Fundamental Rights of the European Union. In this Charter the relevant articles in this respect are 47 to 50. According to the ECJ, the right to a fair trial, the presumption of innocence, the *ne bis in idem* principle and the legality principle are enshrined in these articles. With the Treaty of Lisbon the possible human rights protection in the Union is elaborated with the possibility for the Union to accede to the ECHR. Until now, this has not yet been executed and it is not possible to oversee the implications of the Union's membership of the ECHR. However, the pertinent point is that potential membership will bring changes to human rights protection within the European Union.

In addition to the historical overview of the protection of human rights in the European Union, the European Green Paper on the Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union is also of importance.⁷³ The Commission considers in this Green Paper that, in the area of the protection of human rights, action at only the EU level, and not at the level of the ECHR, can be effective in ensuring common standards.⁷⁴ Next to this general statement, this Green Paper deals with several safeguards for defendants or suspects which are closely linked to the underlying principle of effective participation, as set out in the case law which is discussed in Section 3. However, this Green Paper never led to an actual Framework Decision. From the foregoing it can be concluded that the Commission finds the protection of human rights at the Union level to be of great importance. The question is whether

68 See, for instance, Case C-29/69, *Stauder v City of Ulm*, [1969] ECR 419 where the Court held that Community law should uphold human rights that are protected at the national level. See also Case C-4/73, *Nold v The Commission of the European Community*, [1974] ECR 491 where the Court declared that human rights provide guidelines which should be followed in European law. No measure could have force unless it was compatible with the recognized fundamental rights protected by the Member States.

69 Case C-46/87, *Hoechst AG v the Commission of the European Communities*, [1989] ECR 2859.

70 Case C-2/94, *Denkavit International BV e.a. v the Chamber of Trade and Industry*, [1996] ECR I-1759.

71 COM(2003) 75, p. 3

72 COM(1998) 459 final, pp. 1, 2.

73 COM(2003) 75.

74 COM(2003) 75, p. 11.

this should lead to a common criminal law standard of fitness to stand trial to ensure effective participation and thus a fair trial.

4.3. Formulating general principles of Union law

The common standards of European criminal law have developed over the years through the case law of the ECJ. Examples are the *nulla poena sine culpa* rule,⁷⁵ the principle of legal certainty,⁷⁶ the principle of guilt⁷⁷ and, most importantly in this matter, the rights of the defence.⁷⁸ ‘These are principles either common to substantive or procedural criminal law in all Member States, or principles derived from human rights conventions’.⁷⁹ Moreover, fundamental rights, as respected in the ECHR, by definition fall under the general principles of Union law. The fact that the rights of the defence are being recognized as a general principle of Union law gives an indication that also fitness to stand trial can be enshrined in this. As already stated above, nowadays the importance of these general principles are also in essence laid down in article 6(1)(3) TEU and has taken the ECHR as a starting point:

‘1. The Union recognised the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

(...) 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.’

This article gives the European Union the necessary competence to recognize fitness to stand trial as a general principle of Union law, because this right is included in the fundamental rights which follow from the ECHR. Moreover, the wording of the Treaty, namely that the fundamental rights *shall* constitute general principles of the Union’s law, gives an indication that it is possible that this article constitutes an obligation for the European Union. The rationale as to why this competence has not yet been executed concerning all the human rights of the ECHR has to do with the necessary European dimension within the rights themselves. This dimension can be found, for instance, in the fundamental freedoms, the establishment of the internal market or the prohibition of discrimination. The European dimension is also connected with the common constitutional traditions of the Member States. The ECJ is the Union’s appointed institution to decide whether or not there is a European dimension in order to create the general principles of the Union’s law. Therefore, it is for the ECJ to decide whether fitness to stand trial has a European dimension and whether a common constitutional tradition of the Member States can be found.

4.4. Conclusion

From the foregoing it follows that the European Union, according to the reasoning of the Commission and the case law of the ECJ, is not only competent to safeguard human rights, but,

75 Case C-326/88, *Hansen and Søn I/S*, [1990] ECR I-2911.

76 Case C-265/78, *H. Ferwerda BV v Produktschap voor Vee en Vlees*, [1980] ECR 617.

77 Case C-157/80, *Criminal proceedings v Siegfried Ewald Rinkau*, [1981] ECR 1395.

78 Case C-46/87, *Hoechst AG v the Commission of the European Communities*, [1989] ECR 2859.

79 A. Klip, *European Criminal Law – An Integrative Approach*, 2009, p. 143.

moreover, it is stated that *only* action at the EU level can be effective in ensuring common standards. Next to that, the ECJ and article 6 TEU provide for the competence of and the obligation for the European Union to consider certain principles, like fitness to stand trial, as general principles of European criminal law.

5. Fitness to stand trial as a general principle of European criminal law

5.1. Introduction

The competence to consider fundamental rights as general principles of European law has been laid down in article 6 TEU. Nevertheless, as already mentioned, it must also be considered that it should be necessary to regard fitness to stand trial as a principle that must be protected throughout the Union, because of a European dimension. Whether this is so can be argued, for instance, through the arguments set out in the Green Paper and through the ECJ's case law in connection with the Treaty provisions. Section 2 is also of relevance when deciding whether the principle of fitness to stand trial has a common constitutional tradition within the Member States of the European Union.

5.2. The Commission's Green Paper

In the Green Paper of 2003 the notion of fitness to stand trial was not referred to as being part of the right to a fair trial. However, some rights which are closely linked to effective participation are mentioned and the list put forward by the Commission has also never been regarded as an exhaustive list. Moreover, the Commission mentioned that the main reason to regulate the rights for suspects and defendants in criminal proceedings is not to ensure that states comply with the ECHR, but rather that the rights for suspects and defendants in criminal proceedings are 'applied in a more consistent and uniform manner throughout the European Union'.⁸⁰ The following question must therefore be answered: does the essence of the case law of the ECtHR require that the European Union has to step in and does it require Member States to comply with the ECtHR's case law in a consistent and uniform manner? Following the reasoning of the Commission in its Green Paper, fitness to stand trial can still become a general principle of Union law.

Regarding the conclusions in Section 3, the case law of the ECtHR states that fitness to stand trial requires the possibility of the active participation of the accused. Furthermore, the ECtHR states that this principle should be upheld by the Contracting States. Therefore the notion of fitness to stand trial sets an active duty for states to guarantee effective compliance. However, the problem is that active participation is a very broad and vague principle. Furthermore, the interpretation of this principle remains undefined, because of the margin of appreciation for the Contracting States to the ECHR and the assessment of the ECtHR which focuses on the fairness of the procedure as a whole. In the light of the Union's principle of free movement of persons and creating an area of freedom, security and justice with a common notion of justice it is of importance that this vague principle will be given a more consistent interpretation. Linked to the principle of the free movement of persons throughout the Union, defendants with other nationalities can be brought to trial in other countries. When considering this, in our view suspects must be able to rely on consistent safeguards throughout the Union. Leaving this to the discretion of the different Member States gives rise to the possibility of inconsistent practices. Effective participation and the right to a fair trial is, in our view, the most important human right during

80 COM(2003) 75, p. 16.

criminal proceedings. The Union has already embodied the right to a fair trial as a general principle of Union law. This will have to lead, in our opinion, to the European Union stepping in and embracing all the rights enshrined in article 6 ECHR in order to guarantee the provisions on fitness to stand trial.

5.3. ECJ case law and Treaty provisions

The other way of reasoning that there is a general principle of fitness to stand trial in the European Union is through the ECJ's case law and the Treaty provisions. First of all, the notion of fitness to stand trial has not yet been dealt with in the case law of the ECJ or explicitly mentioned in the Charter of the Fundamental Rights of the European Union (the Charter). However, this absence does not lead to the fact that fitness to stand trial could never become a general principle of Union law. The Charter will be and has to be explained in the light of the ECHR and, accordingly, in the light of the ECJ's case law. As was demonstrated in Section 3, fitness to stand trial is enshrined in the right to fair trial. This human right *is* upheld in the Charter. Finally, '(...) it is conceivable that other rights recognised in the ECtHR case law will find their way into being applied as specific rights under the chapeau of a fair trial for the accused or under the rights of the defence'.⁸¹ As seen in Section 1, fitness to stand trial is a notion which is more relevant in the common law tradition, although it is guaranteed in Member States with common law as well as civil law traditions.

5.4. Conclusion

From the ECtHR's case law it is clear that fitness to stand trial forms part of the right to a fair trial. The notion can be enshrined in Union law through the competence of Article 6 TEU. As already discussed in Section 4, Article 6 TEU provides for the competence of the European Union to recognize general principles of European criminal law. However, as to the wording of the article and the rationale behind the Union's competence, a European dimension and common practice within the Member States have to be present in order to regard fitness to stand trial as a general principle of European criminal law.

In Section 2 the common practice of countries with a common law tradition, as well as those with a civil law background, has become clear. Although it has more relevance in the adversarial procedure, fitness to stand trial is also a notion to be safeguarded in inquisitorial systems. Furthermore, it can be said that there is a common practice in the way that countries founded on different legal traditions have to ensure that defendants can effectively participate during their trial. Moreover, because the interest of the free movement of persons is closely linked to the right to a fair trial, there is also a Community interest within the notion of fitness to stand trial. Defendants must be able to rely on consistent safeguards throughout the Union. Therefore it can be argued that fitness to stand trial can become a general principle of Union law. In our view, the standard set out by the ECtHR gives too much discretion to the Member States and therefore there is an inherent risk that it will result in divergent practices. The advantage of fitness to stand trial being a general principle of European criminal law is that citizens can derive rights from this principle by means of the effects and mechanisms of the Union's legal order. Like the Commission in its Green Paper, we are of the opinion that the rights for suspects and defendants in criminal proceedings must be 'applied in a more consistent and uniform manner throughout the European Union'. Therefore, it must be concluded that the European Union is not

81 A. Klip, *European Criminal Law – An Integrative Approach*, 2009, p. 216.

only competent to frame fitness to stand trial as a general principle of European criminal law, but this is also of importance.

From the case law of both common law and civil law countries, as discussed in Section 2, it follows that fitness to stand trial can be compromised by a multitude of factors. The criteria which are deemed necessary in order for a trial to be fair show much resemblance with the criteria given by the ECtHR. Based on the criteria from the ECtHR, we believe that the general principle of European criminal law should consist of (i) the right to be present and (ii) the right to hear and follow the proceeding, (iii) the right of an accused to be assisted by, for instance, an interpreter, lawyer, social worker or friend, (iv) the ability of the accused to follow what is said in court and (v) the ability of the accused to explain his own version of the events and to challenge the arguments and statements of the opposing party.