

The Insanity Defence and Disposals in Thailand: from Past to Present*

Yada Dejchai Tianprasit

Faculty of Law, Thammasat University

Corresponding author e-mail: yada.dej@tu.ac.th

Abstract

The insanity defence is one of the defences under the criminal law, which if successfully raised, would exempt mentally disordered offenders from criminal responsibility and/or punishment. The disposals are measures, which usually attached to the insanity defence, that allow criminal law to handle mentally disordered offenders who are not subjected to punishment. The development of the insanity defence and disposals under criminal law of Thailand could be divided into 3 eras; the insanity defence and disposal under the 'Three Great Seals' Law, the Criminal Code R.E.127, and the Criminal Code B.E.2499, which is the current law. This article aims to critically examine the development and analyse the insanity defence and disposals under the criminal law of Thailand.

Keywords: Insanity defence, Disposals, Criminal law, Mentally disordered offenders

Introduction

The insanity defence is one of the defences under the criminal law, which allows a person to raise a defence that during the time of the commission of the alleged offence, he was suffering from mental disorder(s) that affected his capacity to be held criminally responsible and/or punishable (Loughnan, 2012; Mackay, 1995). Meanwhile, the disposal(s) is a part of criminal justice system, which concerns the handling of mentally disordered offenders, who are not criminally responsible and/or punishable. Thus, if such offender still poses danger to the society, criminal law still retains power to detain such persons to undertake an involuntary treatment. Contrary, if such offender poses no threat, he could be released from the criminal justice system (Loughnan, 2012; Mackay, 1995).

The concept of the insanity defence and disposal are not new, as it could be traced back to the Roman time.¹ As for Thailand, insanity defence had long-established roots under Thai law as it would be examined below. Addition to the law, the old Thai proverb: 'Do not mind the insane; do not blame the drunk.' also reflected perceptions of the responsibility, whether civil or criminal, of the mentally disordered.

The 'Three Great Seals' Law (1805-1908)

The insanity defence in Thailand can be traced as far back as the 'Three Great Seals' codification, in the chapter called: 'Phra-Aya-Karn-Laksana-Vivat-Da-Tee-Kan' (the law on violent quarrelling) where Section 15 of the law stated:

If the crazy person enters your house and he attacks and kills others, you cannot hold the crazy person punishable because he is crazy and unable to communicate. Instead, the family of the crazy person has to pay for the funeral of the deceased and the family has to take care of that crazy person. If the crazy person attacks and injures others, the crazy person cannot be held punishable. If someone enters the area where the crazy or elderly people reside or meet them on the street and do not get out of their way and get attacked by them, whether the attack leads to injury or death, the crazy person cannot be held punishable. Hence, the police should take the crazy person into custody and confine him until his death²

It is noteworthy that older Thai laws held that all were responsible for their actions. There was no distinction between criminal or civil (tort) liability, nor was there between those who could be held liable and those who could not. Subsequently it was considered that imposing punishment on a person who evinced no wicked intention and could not distinguish between right or wrong would not be justified. Thus, not everyone was punishable since there is an exemption from punishment for children younger than seven years old and elderly people who are more than 70 years old.³ Moreover, certain types³ of people were exempted from liability and/or punishment but their guardians would be held liable and/or punishable instead (Lingat, 1983, pp. 91, 111-112).

Section 15, quoted above, had already adopted the concept by not punishing mentally disordered offenders. Instead, it transferred punishment and/or liability to their family. Interestingly, this reflects Thai culture in that the head of the family assumed responsibility for the actions of those residing within the house. This principle is based on the legacy of the administration system of the Ayutthaya period when everyone had to belong to a group and the leader

¹ The Emperor Justinian's Digest (circa 533 A.D.)

² The Three Great Seals Law: Book 2 (first published 1938, Sukkaphabjai 2005) 247.

³ Section 10, Phra-Aya-Karn-Laksana-Vivat-Da-Tee-Kan' in The Three Great Seals Law.

of the group was liable for the actions of people within that group (Wales, 1965, p. 25; Boonchalermwipas, 2011, pp. 82-83). Evidently, the law on violent quarrelling was still based on Ayutthaya's old law⁴ and King Rama I decided to adopt it as part of the 'Three Great Seals Law' in the subsequent Rattanakosin dynasty. Interestingly, a burden of liability, similar to the burden traditionally placed on the leader or caretaker, is still present in cases concerning minor offences in the current Criminal Code, where whoever is the carer of a mentally disordered person has a duty to take care of such person as a form of 'vicarious liability'. Careless failure to do so, resulting in damage or disturbance caused by the mentally disordered person, would leave the carer liable to receive punishment.⁵

According to the old law, in some severe cases, it was possible to confine mentally disordered offenders who injured or killed others, in order to ensure public safety. This shows that, even under the old law, the modern essence of punishment, incapacitation, is present and, in a way, it could be said that this is also a form of disposal for mentally disordered offenders. Although it could not be considered proper disposal, and it is indeed harsh to confine the mentally disordered for life, it was probably held to be expedient and to make sure that they would not cause any more trouble within society. At the time of the enactment of this law, in 1805, western psychiatric practice had yet to be introduced in Siam and it was not until 1889 that the first asylum was constructed. Hence, there were no suitable establishments for treating the mentally disordered at that time.

There are two recorded cases involving the insanity defence under this law. In the first recorded case, a mentally disordered offender assaulted another person. Since the court held that the defendant was mentally disordered, it ordered that the defendant receive treatment in an asylum so that, once the defendant's sanity had been re-established, he could be put on trial.⁶ Unfortunately, there is no further detail in the records but this can perhaps be considered the first recorded case of fitness for trial.⁷ In the second case, a defendant was charged with murder but, as a witness testified that the accused was mentally disordered, the court did not impose punishment but ordered him to receive treatment in an asylum.⁸

⁴ Section 10, Phra-Aya-Karn-Laksana-Vivat-Da-Tee-Kan' in The Three Great Seals Law, 117.

⁵ Section 373 Criminal Code of Thailand B.E. 2499 [THA 1956]

Any person who is in charge of an insane person and carelessly allows such insane person to ramble alone shall be liable to a fine not exceeding five thousand baht.

⁶ Judgment No. 40 (28 June 1893).

⁷ Since there is no earlier record of cases like this.

⁸ Criminal Court of Justice, 30 December 1902.

It was clear that the old law did not hold mentally disordered offenders punishable. Nonetheless, it was less clear whether the law held them to be criminally responsible or not. The latter judgment mentioned only that the mentally disordered offender would not be subjected to punishment. The reason for this lack of clarity may have been because there was no distinction between the concepts of responsibility, blame and punishment. This is reflected in the Thai term which was integral to the law, 'tode', since this word has dual meanings - the first is 'punishment' and the second is 'blame' or 'responsibility'.⁹

Criminal Code R.E.127 (1908-1956)

The insanity defence may be found under Sections 46 and 47 of this Code. It is noteworthy that Criminal Code R.E. 127 was the first modern legal codification in Siam and several codifications from other civil law countries had been used as 'models' in its collation (Kraiwichian, 1968, p. 15). Section 46 paragraph 1, the insanity defence, stated:

*Whoever commits an offence while being insane because of the distortion of perception or pathology, if he is unable to appreciate his action or cannot control himself at the time of the commission of the offence because of his insanity, do not hold him punishable.*¹⁰

Cases of insanity, according to this section, were categorised either as 'mental sickness' (the distortion of perception or 'Sanya-vi-pa-las' in Thai) or 'physical illness' (pathology) and this insanity must have caused the defendant either to be unable to appreciate his action, being unaware that his action was something that he should not have done or it was a wrong thing to do, or that he could not control himself adequately to avoid committing the offence (Sang-u-thai, 2005, p. 157). Interestingly, neither legal provision, Supreme Court judgments nor academic works had ever clarified the level of insanity required for the insanity defence. The law only required that insanity must be present at the time of committing the offence. Nonetheless, it could be inferred that the insanity must be total for the offender to be exempted from punishment according to Section 46 since, if the insanity was partial, it usually meant that the offender might still have been able to appreciate his action or control himself. Thus, he would receive some punishment, but the court would consider reducing it in line with Section 47, which stated:

*Whoever commits an offence while being insane because of the distortion of perception or pathology, if he is still able to appreciate his action, or still able to control himself at the time of the commission of the offence, he shall be held punishable but the court could reduce the punishment as it deems to be appropriate.*¹¹

⁹ The Royal Institute Dictionary <<https://dictionary.sanook.com/search/dict-th-th-royal-institute/โทษ>> accessed 23 April 2022.

¹⁰ Section 46 paragraph 1 Criminal Code R.E. 127 [THA 1908]

¹¹ Section 47 Criminal Code R.E. 127 [THA 1908]

Section 47 could be applied to all criminal offences. Notwithstanding, insanity here might not be restricted to permanent insanity. If the insanity is temporary but total, rendering the defendant unable to appreciate his action or control himself when committing the offence, he might still be able to qualify for the insanity defence and be exempt from punishment according to Section 46. Although the law did not state what it meant to be 'unable to appreciate his action', there was a textbook definition which explained that the offender must not have known that his action was 'wrong' (Sang-u-thai, 2005, p. 16). It did not specify whether it meant morally or legally wrong but, if one carefully considers the intention of the defence, one might conclude that it meant morally wrong.

Interestingly, Section 48 of the Code stated that if intoxication was involuntary, the offender would be allowed to raise the insanity defence. Nonetheless, whether the offender would be exempted from punishment or subjected to reduced punishment would depend on the extent to which he might have appreciated his action or been able to control himself. In this context, the old Criminal Code also allowed lack of appreciation or control, whether temporary, permanent, partial or total, if caused by (involuntary) intoxication, as grounds for the insanity defence. Nonetheless, all cases of voluntary intoxication would not consider an eligible ground to reduce the punishment nor raising the insanity defence.

Section 46 paragraph 2 provided the disposal for a successful insanity defence. It stated that:

*If the court fears that releasing the insane offender would be dangerous to the others, the court could order the officer to confine him in the asylum or somewhere else, in order to protect the public from harm.*¹²

Noticeably, despite the Code providing a clear disposal attached to the insanity defence, it still relied on the court's discretion to evaluate risks arising from the release of the offender and to impose the relevant disposal. Furthermore, if that mentally disordered offender was confined in an asylum, it was not clear who had the authority to discharge him since there was no administrative procedure regarding this.

There was no special disposal attached to the partial insanity defence under Section 47 as the order for confinement in an asylum for treatment was only available under Section 46. Nevertheless, most offences were punishable by imprisonment so, if a mentally disordered offender, having successfully raised a defence of partial insanity, was imprisoned and subsequently suffered from severe mental disorders while in prison, the prison could request permission to transfer the prisoner for temporary treatment in an asylum.¹³ However, time spent undergoing

¹² Section 46 Criminal Code R.E. 127 [THA 1908].

¹³ Section 30 Correction Act B.E. 2479 [THA 1936]

Regulation of Correction Department (No.6) regarding the permission for the sick inmate to receive treatment outside prison B.E. 2480 [THA 1937]

Regulation of Ministry of Internal Affairs regarding the handling of the sick inmate who received permission to receive treatment outside prison B.E. 2521 [THA 1978].

treatment in an asylum would not be counted towards time served in prison. In this sense, a mentally disordered offender might have been confined longer than necessary. According to the court, the conditions which were accepted as insanity were: 'abnormality of mind',¹⁴ 'personal disease which affects his consciousness from time to time, when it is affected, it makes his mind abnormal',¹⁵ insanity,¹⁶ delusional disorder (jealous type)¹⁷ and epilepsy.¹⁸

In practice, a key problem regarding the insanity defence was the distinction between levels of appreciation (or whether the case fit Section 46 or 47). However, since there was no precise test nor guideline determining whether cases fit Section 46 or 47, it was entirely at the court's discretion to decide whether the defendant was '*still able partially to appreciate...*'. For example, in a case where the defendant had been charged with murder, a lower court held that he was still able partially to appreciate his action; hence, he should receive punishment according to Section 47. The defendant appealed and, later, an appeal court and the Supreme Court overturned the lower court's judgment and held that the defendant should not receive punishment according to Section 46.¹⁹ In another case, a defendant was charged with attempted murder. Both the lower court and the appeal court held that the defendant was guilty and imposed the maximum sentence available. The Supreme Court, however, overturned the verdict of the lower courts and held that, since the defendant was suffering from epilepsy while committing the offence, he was mentally disordered according to Section 46.²⁰ It may be seen that, in practice, the court mainly relied on the circumstantial facts to determine the defendant's level of 'appreciation' and, since the law did not require expert witness testimony regarding the defendant's mental disorder when raising the insanity defence, although such testimony was admissible, the court could exercise sole discretion to determine it.

To conclude, the old Criminal Code recognised the insanity defence and provided disposals attached to it. Notwithstanding this recognition, the determination of insanity was made mainly at the court's discretion due to the absence of a precise test for legal insanity.

¹⁴ Supreme Court Judgment No. 515/2469 [THA 1926]; 160/2471 [THA 1928].

¹⁵ Supreme Court Judgment No. 196/2470 [THA 1927].

¹⁶ Supreme Court Judgment No. 1039-1040/2472 [THA 1929].

¹⁷ Supreme Court Judgment No. 160/2471 [THA 1928]. The court held that the defendant was insane but, with careful consideration of the facts, he might have been suffering from delusion disorder, specifically jealous type.

¹⁸ Supreme Court Judgment No. 928/2499 [THA 1956].

¹⁹ Supreme Court Judgment No. 1039-1040/2472 [THA 1929].

²⁰ Supreme Court Judgment No. 928/2499 [THA 1956].

Criminal Code of Thailand B.E. 2499 (1956-present)

The current insanity defence may be found under Section 65 of the Criminal Code, which states:

Whenever any person commits an offence at the time of not being able to appreciate the nature, or illegality of his act or not being able to control himself on account of defective mind, mental disease or mental infirmity, such person shall not be punished for such offence.

*But, if the offender is still partially able to appreciate the nature or illegality of his act, or is still partially able to control himself, such person shall be punished for such offence, but the Court may inflict less punishment to any extent than that provided by the law for such offence.*²¹

Section 65 paragraph 1 is the 'full insanity' defence which, if successfully pleaded, results in an exemption from punishment. Paragraph 2 is the 'partial insanity' defence which, if successfully pleaded or granted, results in sentence reduction. To plead insanity successfully, the defendant bears the burden of proof regarding his insanity and must satisfy either limb: the cognitive (inability to appreciate the nature or illegality of his conduct) or the volitional (inability to control himself). The insanity defence may only be raised by the defendant in the court of first instance²² and it is possible to appeal the verdict in the Court of Appeal.²³

The defence is composed of the following elements:

An act, which is a criminal offence

The term 'act' in Thai law is defined as a conscious, bodily movement, or non-movement, and the actor must appreciate the nature or illegality of this action.²⁴ Additionally, the alleged act must constitute a criminal offence. Theoretically, the term 'appreciate' means know the nature and understand the essence of his action and understand the consequence of his action (Thing-sa-phat, 2012, p. 849). Hence, even if there is bodily movement but the actor did not appreciate the nature or illegality of the action, it will be considered as 'non-action' under Thai law (Menakanist, 2014, pp. 38-40). To illustrate, if a person is constricting another person's neck in the belief that he is squeezing a lemon, or if a person is sleepwalking and commits a criminal offence under such state, in these situations there have been no actions under Thai law. Thus, in some rare cases, a mentally disordered defendant's action might not have been a criminal act at all, e.g., in a case where the defendant was suffering from severe intellectual disabilities and

²¹ Section 65 Criminal Code of Thailand B.E. 2499 [THA 1956].

²² Supreme Court Judgement No.5073/2562 [THA 2019]; 6642/2558 [THA 2015]; 2537/2548 [THA 2005].

²³ Section 193 Criminal Procedure Code of Thailand B.E. 2477 [THA 1934].

²⁴ Supreme Court Judgement No. 845/2507 [THA 1964].

was unable to appreciate that cutting down protected trees would be illegal, the court held that the defendant committed no criminal act according to Section 59²⁵ rather than ruling under the insanity defence under Section 65.²⁶

Inability to appreciate the nature or illegality of his conduct, or inability to control himself

As for the cognitive limb, it is noteworthy that the original Thai version of the Code may be literally translated as '[unable to] appreciate the rights and wrongs of his conduct' rather than the English version of 'unable to appreciate the nature or illegality of his conduct'.²⁷ As noted, although the term 'appreciate' has a wider sense than simply knowing what one is doing, in practice the court judgements tend to focus on the simple meaning of the term. It is held that the defendant is 'appreciating' as long as he is aware of his physical action. Thus, 'appreciate' is being interpreted narrowly as 'know'. As for the term 'rights and wrongs', theoretically, it should mean 'morally wrong', as the defendant realises that he ought not commit such conduct (Menakanist, 2014, pp. 33). However, in practice, court judgments reflect that the court only focuses on whether the defendant knows he is committing the alleged criminal act. Therefore this wrongfulness is interpreted as 'illegality'.

As for the volitional limb, theoretically, the term 'control' is held to mean that the defendant might still be able to distinguish between rights and wrongs but that his mental disorder renders him unable control himself (Menakanist, 2014). In this regard, a Supreme Court judgement held that there is a difference between not trying to control oneself and uncontrollability of oneself: a hot-tempered person acting in rage or anger would not qualify under the volitional limb of the insanity defence.²⁸

Defective mind, mental disease or mental infirmity

To establish an insanity defence, the defendant must prove that these conditions rendered him unable to appreciate the nature or illegality of his conduct or unable to control himself. A full analysis of the terms 'defective mind', 'mental disease' and 'mental infirmity' has been conducted in Chapter 6. To recap, only the term 'defective mind' has a precise meaning: intellectual disability. Nevertheless, in practice, all of these terms are generally understood to mean 'mental disorders'. It is noteworthy that acute intoxication²⁹ may not be raised as an equivalent to

²⁵ Section 59 Paragraph 2 Criminal Code of Thailand B.E. 2499 [THA 1956]

...To commit an act intentionally is to do an act consciously and at the same time the doer desired or could have foreseen the effect of such doing...

²⁶ Supreme Court Judgement No. 8743/2544 [THA 2001].

²⁷ Currently, there is no official translation of the Code, but most English versions use such a phrase: see for example: Siam Legal, 'Criminal Liability' (Thailand Law Library, Siam Legal 2019) <<http://library.siam-legal.com/thai-law/criminal-code-criminal-liability-sections-59-65/>> accessed 24 April 2022 or the English version of the Criminal Code of Thailand as founded in the UNDOC website <https://www.unodc.org/res/cld/document/tha/criminal-code-as-of-2008_html/Thailand_Criminal_Code.pdf> accessed 24 April 2022.

²⁸ Supreme Court Judgement No. 2402/2522 [THA 1979].

²⁹ Supreme Court Judgement No.1627/2545 [THA 2008]; Supreme Court Judgement No.1323/2545 [THA 2008].

defective mind, mental disease or mental infirmity under the insanity defence.³⁰

Interestingly, although the insanity defence in Thailand comprises two limbs; the 'cognitive' and 'volitional', in practice, the court never distinguishes between the two as it always delivers judgments 'as a whole'; that the defendant is not able to appreciate the nature or illegality of his conduct or he cannot control himself according to Section 65 paragraph 1, or that he is partially able to appreciate the nature or illegality of his conduct or he retained control of himself according to paragraph 2. Hence, eventually, it is a question of the defendant being 'totally insane' or 'partially insane'.

So far, cases which have fallen under Section 65 paragraph 1 or 'total insanity' include the following: a defendant killed and attacked victims with a knife. He had no personal history with the victims and randomly attacked them. The defendant's brother testified that the defendant would occasionally shout that someone was trying to kill him and run away. Interestingly, in this case, the defendant had never been sent for psychiatric examination and the court held that he was insane from the above facts and imposed a hospital order.³¹ In another case, the defendant was charged with attempted rape. He was suffering from intellectual disabilities and a psychiatrist testified that he did not have the capacity to make a rational judgement; moreover, his condition was incurable and needed life-long treatment. Although the court of first instance held that he was punishable under paragraph 2, the Supreme Court overturned that decision, based on medical evidence. Unfortunately, there is no further record as to whether a hospital order was imposed on the offender, as recommended by a psychiatrist, or not.³² Another two cases shared similar facts as the defendants had a medical history of psychosis. In one case, the defendant killed his wife but there was no evidence to suggest that they had fought previously. A witness found him sitting, confused, near the body.³³ In the second case, the defendant attacked four people with a knife. The facts suggest that he did not know the victims and he had formerly been committed to a mental hospital.³⁴ Interestingly, in both cases, the court of first instance held that both defendants were punishable under paragraph 2 as they still had a partial appreciation of their actions, nonetheless, the Supreme Court overturned these decisions and held that the defendants were not punishable under paragraph 1.

³⁰ Section 66 Criminal Code of Thailand B.E. 2499 [THA 1956]

Intoxication on account of taking liquor or any other intoxicant may not be raised as an excuse under Section 65, except where such intoxication is caused without the knowledge or against the will of the offender...

³¹ Supreme Court Judgement No. 288/2530 [THA 1987].

³² Supreme Court Judgement No. 3106/2535 [THA 1992].

³³ Supreme Court Judgement No. 371/2527 [THA 1984].

³⁴ Supreme Court Judgement No. 530/2542 [THA 1999].

It is noteworthy that most insanity defence cases in Thailand fall under paragraph 2 rather than paragraph 1 (partial insanity rather than full insanity), as illustrated in this example:

A defendant was suffering from psychosis, namely a persecutory delusion. At the time of the offence, he killed his father and absconded. The facts suggest that there had been no previous conflict between them. Nonetheless, the court held that the defendant was still able to appreciate his action from the fact that he ran away after committing the offence.³⁵ Interestingly, the verdict was reached without medical evidence. The Supreme Court clearly did not understand the effect of mental disorders on behaviour since, as the defendant was suffering from a persecutory delusion and was afraid that someone was coming to kill him, his flight was consistent with his psychosis. Unfortunately, without medical evidence, the court held that running away meant the defendant must have known that what he had done was wrong or that he experienced guilt, thus, the cognitive limb was not satisfied.

Despite medical evidence affirming that a defendant was unable to appreciate his action due to mental disorder, the court may still hold that he may partially have appreciated his action as in the following cases:

In the first case, the defendant was charged with motorcycle theft. Medical evidence showed that he was suffering from psychosis and was unable to perceive reality like an ordinary person. Moreover, he might firmly have believed that his action was 'right'. Although the court accepted that the defendant was suffering from psychosis, it held that he was still able to appreciate his action from the fact that he was able to 'hot-wire' the motorcycle to steal it.³⁶ This case demonstrates that the court interpreted the term 'appreciate' very narrowly: as long as the defendant was able to perform a physical act, he appreciated the action. Furthermore, the court did not take the illegality or wrongfulness element of the limb into consideration at all since, if 'wrongfulness' is to be defined as morally wrong, the defendant might have qualified for the full insanity defence according to paragraph 1 as he was not really in a position to appreciate the 'wrongfulness' of his action.

In another case, the offender attacked his mother and a neighbour with a hammer. After the attack, he tried to turn himself in to the police. The defendant was suffering from psychosis and had a history of violence. Medical evidence suggested that he was unable to appreciate his action at the time of the offence. Nevertheless, the court held that he was still able to appreciate his action since he tried to turn himself in.³⁷ In this case, the court deemed that the fact that he was trying to turn himself in meant that he knew what he was doing, thus, he did not satisfy the cognitive test.

³⁵ Supreme Court Judgement No. 809/2548 [THA 2005].

³⁶ Supreme Court Judgement No. 9264/2551 [THA 2008].

³⁷ Supreme Court Judgement No. 9264/2551 [THA 2008].

These two cases exemplify many other cases that fall under paragraph 2, revealing that the effect of mental disorder at the time of committing the offence has not been considered when determining the level of appreciation. The court merely relied on the circumstances during the offence rather than carefully considering medical evidence. In this context, the court seems to prefer using discretion based on 'folk-psychology' rather than medical evidence. Unfortunately, without a formal requirement for medical evidence or a proper legal insanity test which limits the use of the court's discretion, this practice will persist. Consequently, a number of mentally disordered offenders will be sent to prison because the court deems that they were 'still ...able to appreciate...'

After careful consideration of relevant cases, this thesis submits that, in practice, there are now four criteria which the Thai courts apply as the legal insanity test and in order to distinguish between the insanity defence paragraphs 1 (full-insanity) and 2 (partial-insanity). These are as follows:

1. Does the defendant seem insane? (Is he visibly insane?) Is he still able to communicate? (Communication skill is viewed as essential since it is assumed that a truly insane person would not be able to communicate coherently.)³⁸ If the answers are yes, then the defendant might succeed in the full-insanity defence.

2. The defendant's mental health record should be considered.³⁹ If there is a mental health record confirming that the defendant has been suffering from mental disorder(s), he might be able to succeed in the full-insanity defence.⁴⁰

3. Medical evidence must be heard in the trial, provided that there is one.⁴¹

4. The circumstances in which the offence was committed ought to be considered, i.e. was the offence committed in a particularly brutal way?⁴² It is an assumption that a normal person would not commit the offence in an horrific way unless there was something wrong with the offender. If so, the defendant might be able to succeed in the full-insanity defence. Did the defendant have a personal history with the victim? Had they been in a fight earlier?⁴³ If so, then the offence may have been committed through rage rather than insanity. What was the defendant's reaction after he committed the offence? Did he flee from the scene?⁴⁴ If so, this reflects guilt, meaning that the defendant appreciated his action and he would not be able to succeed in the full-insanity defence.

³⁸ See Supreme Court Judgement No. 371/2527 [THA 1984]; 5058/2531 [THA 1988].

³⁹ *ibid*, Supreme Court Judgement No. 530/2542 [THA 1999].

⁴⁰ Although, as noted, despite having a record, the defendant might not be able to succeed as the court could still hold that he is 'partially able to appreciate...'. Thus, he might be able to succeed in the partial-insanity defence instead.

⁴¹ See Supreme Court Judgement No. 9264/2551 [THA 2008]; 4533/2545 [THA 2002].

⁴² See Supreme Court Judgement No. 288/2530 [THA 1987].

⁴³ See Supreme Court Judgement No. 530/2542 [THA 1999]; 1421/2529 [THA 1986].

⁴⁴ See Supreme Court Judgement No. 2024/2525 [THA 1982]; 1226/2547 [THA 2004].

Notwithstanding, these so-called criteria operate solely based on the court's discretion so there may be inconsistencies between different cases.

As for the disposal, the court has two choices for disposal: a hospital order or discharge. The hospital order is part of the measures of safety contained in Section 48 of the Criminal Code of Thailand, which states:

If the Court is of opinion that the liberation of any person having a defective mind, mental disease or mental infirmity, who is not punishable, or whose punishment is reduced according to Section 65, will not be safe for the public, the Court may give order to send such person to be put under restraint in an institution of treatment. This order may, however, be revoked at any time by the Court.⁴⁵

According to Section 48, a mentally disordered offender who, having successfully pleaded insanity in Section 65, under either paragraph 1 or 2, might receive a hospital order if the court deems that he poses a threat to public safety. Notably, imposition of a hospital order relies upon the court's discretion, as it may be imposed only if the court deems that the offender is dangerous and should receive treatment. Moreover, this order may be revoked by the court anytime.⁴⁶ In practice, in order to assess public risk or whether an offender requires treatment in hospital, the court would refer the offender (usually for those cases which fall under the full insanity defence) to the Galaya Institute, the only forensic hospital in Thailand, where 'dangerousness' can be evaluated by forensic psychiatrists (Thomkapanich & Graipaspong, 2009). It should be noted that, although it may be recommended that the defendant should receive a hospital order, the court can choose not to comply with that recommendation.⁴⁷

In practice, imposition of a hospital order is straightforward for those who successfully plead full insanity according to paragraph 1. Conversely, for those who are still held punishable under paragraph 2 (partial insanity), the court has to delay an imprisonment sentence under Section 246 of the Criminal Procedure Code of Thailand⁴⁸ before it can impose a hospital order. It should be noted, however, that this eventuality is rare since, if the defendant was held punishable under paragraph 2, the court would probably deem that the level of insanity is insufficient to merit a hospital order. In practice, a hospital order is usually imposed only on those suffering from psychosis and those who have committed violent offences such as murder, attempted murder and assault (Graipaspong, 2008, p. 108). Generally,

⁴⁵ Section 48 Criminal Code of Thailand B.E. 2499 [THA 1956].

⁴⁶ *ibid.*

⁴⁷ There is no provision in the Criminal Code or Criminal Procedure Code which states that the court is bound to comply with such recommendation.

⁴⁸ Section 246 Criminal Procedure Code of Thailand B.E. 2477 [THA 1934]

When the accused person, the accused person's spouse or relative, the public prosecutor, the penitentiary commander or the authority having the duty of executing the warrant of imprisonment has requested or the court considers it is proper, the court shall have power to give the order of respite for imprisonment until the cause reasonable for respite shall be finished in the following cases; (1) In case the accused person is insane...

those who are 'visibly insane' (suffering from psychosis-type disorders) and deemed to be 'dangerous' (prone to violence) are those who are more likely to receive a hospital order.

Discharging mentally disordered offenders or patients requires a court order. Section 37 of the Mental Health Act provides general regulations governing discharge as follows: the hospital must report the progress of treatment to the court after 180 days and, if the treatment is ongoing, a report has to be made once every 180 days.⁴⁹ If the patient is to be discharged, a report has to be made to the court⁵⁰ so that the court may revoke the hospital order. In practice, the discharge procedure is time-consuming since the discharge report has to find its way back to the court and is queued behind other criminal cases before the revoking order may be served. Discharge is recommended solely by the case psychiatrist without any committee to review the case.⁵¹ This practice is questionable as it does not offer any safeguard.

Conclusion

The law of Thailand has long recognised the concept of the insanity defence and disposal since the 'Three Great Seals' law, even back then when the concept of criminal and civil responsibility had not yet been separated. Interestingly, at this time, the insanity defence is only available in the offences related to murder and causing bodily harm. Nonetheless, the concept has become clearer when Thailand (known as 'Siam' at that time) enforced the Criminal Code R.E.127, where it is held that the insanity defence is available for all criminal offences, and the disposal, which was the detention in mental hospital, is available for mentally disordered offenders who raised it, should it be needed.

⁴⁹ Section 37, the Mental Health Act B.E. 2551 [THA 2008].

⁵⁰ *ibid* Section 38.

⁵¹ Regulation of Mental Health Committee regarding the report of the evaluation of fitness for trial and the treatment of mentally disordered offenders B.E. 2551 [THA 2008].

References

- Boonchalermwipas, S. (2011) *The Thai legal history*, 10th edition, Bangkok: Winyoochon. (in Thai)
- Graipaspong, D. (2008) Hospital order for mentally disordered offenders, *Journal of Mental Health of Thailand*, vol. 16, no. 2, 108-118. (in Thai)
- Kraiwichian, T. (1968) *The reform of laws and the courts of law in the reign of King Rama V*, Bangkok: Thai Government Publishing. (in Thai)
- Lingat, R. (1983) *The Thai legal history volume 2*, Bangkok: Thai Watthanapanit. (in Thai)
- Loughnan, A. (2012) *Manifest madness: Mental incapacity in criminal law*, Oxford: Oxford University Press.
- Mackay, R. D. (1995) *Mental condition defences in the criminal law*, Oxford: Clarendon Press.
- Menakanist, T. (2014) *General Principles of Criminal Law (The Project for the Promotion of Textbooks and Teaching Materials)*, Bangkok: Faculty of Law, Thammasat University. (in Thai)
- Sang-u-thai, Y. (2005) *Criminal Code R.E. 127*, 6th edition, Bangkok: Winyoochon. (in Thai)
- Thing-sa-phat, J. (2012) *Criminal Law 1*, Bangkok: Thai Bar Association. (in Thai)
- Thomkapanich, W., & Graipaspong, D. (2009) Influence of forensic psychiatric reports to criminal procedure, *Journal of Mental Health of Thailand*, vol. 17, no. 2, pp. 118-128. (in Thai)
- Wales, H. G. Q. (1965) *Ancient Siamese government and administration*, New York : Paragon Book Reprint Corp.