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Unfit for Punishment Due to Mental Disorder? The Challenge of Defining Fitness to Serve a Prison Sentence in Estonia

Abstract. Mental disorder poses particular challenges in determining fitness to serve a custodial sentence, yet in Estonian law, the concept remains legally undefined. Although proceedings may be terminated or the execution of a sentence deferred in cases of serious illness, the absence of clear criteria undermines legal certainty and shifts undue responsibility to medical experts. Drawing on legal analysis and neuropsychological insight, this article proposes four conceptual levels of fitness, ranging from physical survival to moral comprehension. Case law and scientific literature reveal that current regulation is structurally and substantively deficient, creating a risk that Estonia will violate constitutional and human rights guarantees by punishing those whose mental condition renders them unfit to serve their sentence.

Keywords: fitness to serve a sentence, Estonian criminal law, custodial sentence, Estonian Penal Code § 79, forensic assessment, human dignity and punishment

1. Introduction to the Topic and the Estonian Legal System

When Estonia regained independence in 1991, it finally had the opportunity to establish a criminal justice system reflective of the nation's own vision. Substantive criminal law is primarily found in the Penal Code (Karistusseadustik),[*1] while criminal investigation, prosecution, and adjudication are governed by the Code of Criminal Procedure (Kriminaalmenetluse seadustik).[*2] Specific matters related to the execution of custodial sentences are mainly dealt with by the Imprisonment Act (Vangistusseadus).[*3] All three are relatively modern legal acts with their original versions dating to the early 2000s. Nevertheless, their implementation continues to raise practical issues, which are gradually addressed through case law and fairly frequent legislative amendments.

One such unresolved issue is the concept of fitness to serve a sentence, which is the focus of this article. The notion of fitness to serve a sentence was introduced into the Code of Criminal Procedure in 2011, with § 199(1)(6) providing that a lack of such fitness constitutes a ground for the termination of criminal proceedings, as well as an impediment to prosecution. According to the explanatory memorandum accompanying the amendment, the provision was intended to address cases where criminal proceedings remained pending and could not be terminated even though experts had concluded during the investigation phase that the suspect was suffering from a physical or mental illness unlikely to improve. In such situations, even if proceedings were suspended, there would be no realistic prospect of resuming them. Keeping such hopeless cases on the docket diverts resources from other criminal matters, the drafters of the amendment argued.[*4] It can be argued that this approach also aligns with the principle of human dignity; it would be inhumane to subject a person to trial and punishment when their irreversible medical condition renders them incapable of participating in proceedings or later serving a sentence.

Criminal proceedings may be terminated on the grounds of lack of fitness to serve a sentence during the pre-trial stage by the investigative authority with the approval of the prosecutor or by the prosecutor directly.[*5] In court proceedings, termination may occur at the preliminary hearing before the commencement of the trial[*6] or during the trial.[*7] Commuting the sentence due to lack of fitness may take place at the sentencing stage or while the sentence is being served in cases where the convicted person develops a severe and irreversible illness.[*8] Furthermore, the court must release a person from serving their sentence if they were mentally competent at the time of the offence but have since developed a severe mental disorder that renders them incapable of understanding the unlawfulness of their actions or controlling their behaviour.[*9] Hence, the issue of fitness to serve a custodial sentence may arise in pre-trial, trial, and post-conviction contexts.

As the lack of fitness to serve a prison sentence is, in simplified terms, generally a result of illness, the concept is inherently interdisciplinary, lying at the intersection of law and medicine. Determining such unfitness is often more complex in cases of mental disorder than in cases of physical illness, as the impact of psychiatric disorders on cognitive capacity, comprehension, and behavioural control is less tangible and difficult to measure. In Estonia, where the lack of fitness to serve a sentence constitutes a ground for terminating criminal proceedings and may also lead to commuting a sentence, the need for conceptual clarity is particularly acute. Judges cannot apply a concept they do not fully understand, nor can they give precise and well-defined instructions to forensic experts if they themselves are unsure what information

1 RT I 2001, 61, 364; RT I, 12.12.2024, 6. English version available at <https://www.riigiteataja.ee/en/eli/529122024005/consolide> accessed on 7 May 2025.

2 RT I 2003, 27, 166; RT I, 17.04.2025, 6. English version available at <https://www.riigiteataja.ee/en/eli/512122024002/consolide> accessed on 7 May 2025.

3 RT I 2000, 58, 376; RT I, 31.12.2024, 35. English version available at <https://www.riigiteataja.ee/en/eli/516012025003/consolide> accessed on 7 May 2025.

4 599 SE, Kriminaalmenetluse seadustiku muutmise ja sellega seonduvalt teiste seaduste muutmise seaduse seletuskiri [Explanatory Memorandum to the Draft Act Amending the Code of Criminal Procedure and Related Acts] 117 <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/ab9521d9-5558-45b8-c93a-b5122208c53b/Kriminaalmenetluse%20seadustiku%20muutmise%20ja%20sellega%20seonduvalt%20teiste%20seaduste%20muutmise%20seadus> accessed on 8 May 2025.

5 Code of Criminal Procedure, § 200.

6 Code of Criminal Procedure, § 262(1)(3).

7 Code of Criminal Procedure, § 274.

8 Penal Code, § 79(1).

9 Penal Code, § 79(2).

they require. This lack of clarity has led courts to rely heavily on medical experts in practice—quite possibly too heavily. While psychiatrists and physicians are often willing to assist, fitness to serve a sentence is a legal concept whose conclusion cannot be delegated entirely to medical professionals. Their role is to provide expert evidence on the person's mental or physical condition, while the judge must make the final legal determination as to whether the individual is fit to serve their sentence.

Assessing mental health conditions for legal purposes in criminal proceedings is a well-established practice in many jurisdictions. However, it appears that Estonia can draw only limited benefit from foreign experience as the specific question of fitness to serve a sentence is seldom addressed directly. In some jurisdictions, the notion of fitness to serve a sentence is absent altogether; as a result, even serious mental health conditions are managed within the execution of the custodial sentence, with individuals receiving psychiatric treatment as needed and being transferred back to prison once clinically stable. Instead of asking about fitness to serve a sentence, the focus is on criminal responsibility or the capacity to participate in trial proceedings. According to the literature, much attention is paid to the latter, since it is crucial that the accused possess sufficient cognitive capacity to express themselves, defend their interests, and comprehend court proceedings.[*10] Fitness to serve a sentence does not appear to be the subject of discussion at the sentencing stage either. In the United Kingdom, for example, prisoners with severe mental disorder who require treatment may be transferred to psychiatric hospitals for up to six months, after which they are returned to prison.[*11] In Finland, a special prison hospital exists for inmates with mental disorders, and those requiring long-term treatment may be transferred to a forensic psychiatric institution.[*12] The European Court of Human Rights (ECtHR) does not directly address the ability to serve a sentence in its case law. However, to some extent, this issue can be linked to the scope of protection under Article 3 of the European Convention on Human Rights and Fundamental Freedoms.[*13] Thus, people with mental disorders may also serve prison sentences if this does not violate Article 3. According to the case law of the ECtHR, it is particularly important that the detainee is guaranteed adequate medical care, which includes a comprehensive medical record of the person's state of health and treatment,[*14] prompt and accurate diagnosis and care,[*15] and, if necessary, regular and systematic supervision and a comprehensive treatment strategy.[*16] According to the ECtHR, the necessary standard of healthcare is determined on a case-by-case basis, although it must be compatible with the human dignity of the detainee and, at the same time, take into account the practical demands of imprisonment.[*17] In the case of persons with specific mental disorders, consideration must also be given to their vulnerability and, in some cases, their inability to complain about how they are being treated.[*18] These examples demonstrate how other jurisdictions handle severe mental disorder in the penal context; they do not, however, address the definitional challenge that this article seeks to resolve.

While the ultimate decision on fitness to serve a sentence rests with legal professionals, said decision must be informed by robust scientific knowledge about human physiology, cognition, and behaviour. Punishment is an inherently complex social phenomenon, pursued for objectives such as retribution and deterrence.[*19] Determining whether a convicted person should be exempted from serving their sentence because of a health condition adds a layer of complexity, particularly when the condition is psychiatric rather than physical. For this reason, the present analysis draws on neuropsychological insights to understand

10 John McCarthy, Regi Alexander, and Eddie Chaplin (eds), *Forensic Aspects of Neurodevelopmental Disorders: A Clinician's Guide* (Cambridge University Press 2023). – DOI: https://doi.org/10.1017/9781108955522.

11 Henk Boer, Eilish Brewster, and Rory McHugh, 'The Mental Health Act and Other Relevant Legislation in Relation to Neurodevelopmental Disorders in the UK' in McCarthy and others (n 10) 202–216.

12 Andres Jüriloo, Lauri Pesonen, and Hannu Lauerma, 'Knocking on Prison's Door: A 10-fold Rise in the Number of Psychotic Prisoners in Finland during the Years 2005–2016' (2017) 71(7) Nordic Journal of Psychiatry 543. – DOI: https://doi.org/10.1080/08039488.2017.1351579.

13 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

14 *Khudobin v Russia* App no 59696/00 (ECtHR, 26 October 2006), para 83.

15 *Melnik v Ukraine* App no 72286/01 (ECtHR, 28 March 2006), paras 104□106.

16 *Amirov v Russia* App no 51857/13 (ECtHR, 27 November 2014), para 93.

17 *Blokhin v Russia* App no 47152/06 (ECtHR 23 March 2016), para 138.

18 *Rooman v Belgium* App no 18052/11 (ECtHR, 31 January 2019), para 145.

19 Anthony Bottoms and Andrew von Hirsch, 'The Crime-Preventive Impact of Penal Sanctions' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 97.

how specific mental disorders and cognitive dysfunctions may impair a person's capacity to endure and meaningfully comprehend their punishment. This perspective allows the legal assessment to move beyond a purely medical diagnosis and address the functional implications of mental disorder within the penal context.

This article examines the challenges surrounding the definition and application of fitness to serve a prison sentence in Estonia and explores potential solutions. It analyses Estonian legislation, the case law of the Estonian courts and the European Court of Human Rights, and relevant expertise from outside the legal field. While physical health issues are considered, the focus is primarily on mental disorder, where the assessment of fitness is most complex and legally consequential. We propose a conceptual framework consisting of four levels of fitness, ranging from basic physical survival to moral comprehension, and evaluate the adequacy of the current legal framework against this model. Our aim is to clarify the respective roles of medical experts and legal decision-makers, identify regulatory gaps, and contribute to an internationally relevant discussion on how legal systems can respect human dignity while ensuring fair and proportionate punishment. While the statutory language does not distinguish between the kinds of sentence that may be imposed (actual imprisonment, probation, fines, etc.), we will narrow our focus to the fitness of the accused to serve a prison sentence. Whether a person could also be excused from paying a fine because they are unfit to serve a sentence (perhaps because their health prevents them from earning enough money or because of exorbitant medical bills) is left for future discussion.

2. Legal Framework of Fitness to Serve a Prison Sentence in Estonia

2.1 Statutory Regulation

In Estonian law, the term 'fitness to serve a sentence' is explicitly mentioned only in § 199(1)(6) of the Code of Criminal Procedure, where it is listed as a bar to criminal proceedings, and is not mentioned in any other law. According to this provision, criminal proceedings shall be terminated if "the suspect or accused suffers from an incurable illness and, because of this, is unable to participate in criminal proceedings or serve the sentence". It is logical to infer that if a person's condition prevents participation in the proceedings, their fitness to serve a sentence is not separately assessed. A person cannot be convicted and punished if, due to their health condition, they are unable to participate in court proceedings and defend themselves. An exception to this conclusion arises when the medical condition manifests at the later stages of the proceedings (second or third instance), where the proceedings are conducted in written form and do not require the accused's active participation; in such cases, the inability to participate does not necessarily require termination of the proceedings.[*20]

A person may also become seriously ill after proceedings have been concluded and a sentence has been imposed. In such a case, § 79 of the Penal Code applies.

Article 79(1) of the Penal Code authorises courts to release the convicted person from serving their sentence due to terminal illness, taking into account the circumstances relating to the criminal offence committed, the personality of the offender, and the nature of the illness. It does not mention fitness to serve a sentence explicitly. Instead, § 79(1) mentions, among other things, the "nature of the illness", which has to be "terminal" to warrant the release of a person. The Commentary on the Penal Code, without further clarification, states that the reason for exemption from punishment is a serious illness that "makes it impossible or very difficult for the convicted person to serve their sentence".[*21] Estonian case law has also linked release from punishment on the grounds of terminal illness to fitness to serve a sentence.[*22] This might indicate that the "nature of the illness" is an implicit reference in the text of the Penal Code to fitness to serve the sentence. The Commentary also expresses the view that the terminal illness referred to in §

20 Tartu Circuit Court decision 1-22-312, 14 May 2025, para 103.

21 Jaan Sootak and Priit Pikamäe, *Karistusseadustik. Kommenteeritud väljaanne* [Penal Code: A Commentary] (Juura 2021) § 79/1.

22 For instance, Harju District Court order 1-18-9298/31, 11 June 2019.

79(1) must be a physical or somatic illness,[*23] which means that mental disorders would be excluded from this provision; however, the authors offer no justification or reasoning in support of their conclusion.[*24] Their interpretation is likely based on reading paragraph 2 of the same article that specifically mentions mental disorders.

Paragraph 2 of Article 79 forms the basis for the release of a person who has committed a criminal offence while mentally capable but has since developed a severe mental disorder that renders them unable to understand the unlawfulness of their actions or control their behaviour. This "unable to understand the unlawfulness and control their behaviour" language is also used to define legal insanity (lack of criminal legal capacity) under Article 86 of the Penal Code. Therefore, it appears that paragraph 2 of Article 79 of the Penal Code mandates the commuting of sentences imposed on individuals suffering from "late onset mental incapacity".

Now, if the first two paragraphs of Article 79 are read together and the interpretation offered by the commentators is accepted, a curious picture emerges. While paragraph 1 purports to authorise the commutation of sentence for incurably sick somatic patients, who, due to their ailments, cannot serve their sentence without undue suffering, and paragraph 2 mandates the release of individuals who have become insane since the sentence was handed down, persons suffering from severe mental or cognitive dysfunctions that do not amount to insanity would have to stay in prison even if their mental disorder makes them just as unfit to serve their sentence as a somatic illness would. We see no compelling reason why paragraph 1 should not be interpreted as including certain irreversible and severe mental disorders—even those not amounting to legal insanity under § 79(2). They can certainly make serving a sentence impossible or extremely difficult and should therefore constitute grounds for release.

Moreover, paragraph 2 of Article 79 is worded too vaguely. It does not clarify what kind of understanding the offender must be lacking for it to apply. Is the person expected to comprehend their past actions, or is it their awareness of the current situation that matters? Either interpretation presents problems. Severe mental disorders typically fluctuate in intensity, meaning that the inability of a person to understand the wrongfulness of their actions may vary over time. Limited case law and commentary suggest that § 79(2) requires the court to release the offender if the offender's current mental state no longer allows them to appreciate that they have committed a crime in the past. The Commentary to the Penal Code argues that it is inhumane to punish someone who is incapable of understanding that they have committed a criminal offence.[*25] The same commentary recommends that courts check whether the person is aware they are being punished for a crime,[*26] even though the language of § 79(2) does not require such an assessment. The Supreme Court of Estonia has also stated that, in the context of § 79(2), in addition to the existence of a mental disorder, fitness to serve a sentence should be assessed.[*27] With the Court not offering a more detailed explanation, their reference to the "fitness to serve a sentence" causes more confusion than it offers explanation.

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23 Sootak and Pikamäe (n 21) § 79/1-2.

24 It is worth briefly addressing the notion of "terminal" illness in § 79(1) in light of § 79(3), which refers to the person's "recovery" from the illness mentioned in § 79(1). This juxtaposition raises the question of how "terminal" illness should be understood where recovery is legally envisaged. Is § 79(3) intended to apply only to exceptional or medically unexplained recoveries, or does "terminal" carry a more nuanced meaning in this provision?

It may be argued that § 79(3) serves an important corrective function in cases where the initial assessment of terminal illness proves inaccurate. This includes situations of misdiagnosis, as well as scenarios in which a disease initially considered terminal—such as certain malignancies—later enters remission due to treatment options that were not realistically available during detention but become accessible upon release (for example, through privately funded treatment abroad). In such cases, § 79(3) provides a legal basis for recommitment, further supporting the view that "terminal" illness in § 79(1) should not be understood as excluding all realistic prospects of recovery.

25 Sootak and Pikamäe (n 21) § 79/3.

26 In precise terms in the Commentary: "Essentially, this means that the convicted person is incapable of understanding that they have committed a crime and that they are being punished for it. Punishing such a person is pointless and inhumane." (Sootak and Pikamäe (n 21) § 79/3.1).

27 Criminal Chamber of the Supreme Court of Estonia order 3-1-1-87-16, 7 November 2016, paras 13–14. Here the Supreme Court uses phrases such as "reasonable doubt that the convicted person is unfit to serve their sentence due to their mental state" and "whether they are fit to serve their sentence or not".

The lower courts have followed or preceded this lead, for instance: Tartu Circuit Court of Appeal order 1-21-122/48, 13 September 2021, and Tartu District Court order 1-07-8278/18, 27 October 2008.

2.2. Procedural Issues and the Burden of Proof

In addition to the substantive legal aspects of fitness to serve a sentence, there are procedural concerns, namely how fitness should be assessed and proven.

Under Estonian criminal law, the burden of proof lies with the prosecution, in accordance with the principles of presumption of innocence and adversarial procedure.[*28] In a criminal investigation, the state must gather both inculpatory and exculpatory evidence.[*29] This means that the prosecutor in charge of the criminal investigation has an obligation to order an expert assessment of the suspect's state of health if there is any doubt in this regard. Although the law speaks explicitly of inculpatory and exculpatory evidence, its meaning is broader: the pre-trial investigation must be conducted in a way that reveals all facts relevant to the suspect's criminal liability. Thus, it may be argued that the state should also order an expert assessment if, in the course of pre-trial investigation, doubts arise regarding the suspect's fitness to serve a sentence.

If the prosecution has no such doubt, then it cannot, of course, be blamed for not ordering an expert assessment that is *prima facie* unnecessary. A separate question is whether the state should order an expert assessment to determine fitness to serve a sentence, for example, in a situation where the defence requests it during pre-trial proceedings even though the state has no doubts about the person's fitness. Considering that the state also has the right to determine the course of a criminal investigation[*30] and must take into account, among other things, the efficient use of public resources, it is similarly difficult to find fault in not commissioning an obviously unnecessary and costly expert evaluation. However, § 105(2) of the Code of Criminal Procedure does set a significantly higher threshold for reasoning a decision to refuse an expert assessment requested by the defence.

A refusal to commission an expert assessment during the pre-trial stage does not prevent the defence from raising the issue in court. Although the burden of proving guilt lies with the prosecution, the Supreme Court has acknowledged that the burden of proving active defence arguments, reverts to the defence.[*31] For example, the Court has stated that a probation officer or judge is not required to disprove a mere assertion by the accused that they are medically unfit to perform community service.[*32] Similarly, where the defence argued in a failure to pay child support case that the prosecution should have proven the lack of *bona fide* efforts by the defendant to seek employment and the appellate court agreed, the Supreme Court reversed. The Court explained that where the default burden of proof would require the prosecution to prove negative facts (i.e. the lack of something), the burden shifts to the defence as no party can be required to prove a negative as long as the party with the original burden has met their burden of stating their factual allegations.[*33]

This suggests that in court, the issue of fitness to serve a sentence should generally be raised (and proven) by the defence. As noted earlier, the question of fitness to serve a sentence should not arise if the person is found mentally incapable during trial. However, if serious illness develops after sentencing, the burden of proof lies clearly with the applicant, especially considering the confidential nature of medical records. To avoid collusion between a convict and their physician, objective expert assessments are often required.

The procedural counterpart to § 79 of the Penal Code is § 425 of the Code of Criminal Procedure, which governs early release on medical grounds. It applies to both cases where the prisoner falls seriously ill during imprisonment and cases where they develop a mental disorder after sentencing but before serving the full sentence. In the first case, the prison must initiate proceedings based on the opinion of a medical commission, though the law does not specify how or by whom this commission is formed. In the second case, the prisoner may also submit the application.

If the person becomes seriously ill before imprisonment begins, the court may postpone the enforcement of the sentence for up to six months under § 415(1)(1) of the Code of Criminal Procedure. However, the law does not allow the court to defer the sentence indefinitely. The convicted offender must reapply every six

28 Criminal Chamber of the Supreme Court of Estonia decision 3-1-1-70-11, 17 May 2011; see also 3-1-1-72-13, 20 June 2013.

29 Code of Criminal Procedure, § 211(2).

30 Criminal Chamber of the Supreme Court of Estonia decision 3-1-1-103-13, 12 November 2013.

31 Criminal Chamber of the Supreme Court of Estonia decision 3-1-1-10-16, 3 March 2016, para 37.

32 Criminal Chamber of the Supreme Court of Estonia decision 3-1-1-19-15, 16 March 2015.

33 Criminal Chamber of the Supreme Court of Estonia decision 3-1-1-58-16, 6 October 2016, para 43.

months until the sentence becomes unenforceable due to the expiration period, which ranges from three to five years, depending on the seriousness of the crime (§ 82 of the Penal Code). In a system already overburdened with cases, this periodic review of terminally ill convicts may be inefficient and unnecessary.

2.3. The Role of the Court and the Expert

In Estonian law and case law, there appears to be relatively little controversy over who is responsible for assessing fitness to serve a sentence. The Supreme Court has stated that the question of whether a person, despite suffering from a serious illness, is capable of participating in criminal proceedings and, upon conviction, serving their sentence, is a legal question that must be answered by the court—not by medical experts.[*34] Experts are responsible for evaluating a person's health and explaining how their medical condition might impact their participation in proceedings or the serving of their sentence. Once the court receives the medical expert's opinion, it must assess whether the associated risks justify terminating the proceedings, considering such factors as the reasonable length of proceedings, procedural economy, and humanitarian concerns. Thus, under § 199(1)(6) of the Code of Criminal Procedure, fitness to serve a sentence is to be determined by legal professionals. There is no reason to believe that, if it has to be assessed in a context other than the termination of criminal proceedings, it should be any different.

3. Concept of Fitness to Serve a Prison Sentence: Legal and Neuropsychological Integration

3.1. A Basis for the Concept of Fitness to Serve a Prison Sentence

There is no clarity on when and how fitness to serve a sentence should be assessed. As stated above, the term appears explicitly only in § 199(1)(6) of the Code of Criminal Procedure, where it is overshadowed by the more immediate concern of the person's fitness to participate in proceedings. After all, a sentence may still be commuted or deferred even after the accused is convicted and sentenced. Although the Penal Code does not mention the term 'fitness to serve a sentence' as it was discussed above, Estonian courts still evaluate it (and commission expert assessments) in the context of releasing individuals from serving their sentence under § 79 of the Penal Code. This raises the question of what fitness to serve a (prison) sentence actually means.

According to Coles,[*35] since the law deals with human behaviour, it necessarily engages with psychological concepts. When these concepts are applied within a legal framework, they can be referred to as 'psycholegal'. Academic literature defines competency to be sentenced—or, as we have termed it, fitness to serve a sentence—as a psycholegal competency. In referring to psycholegal competencies, the term denotes the abilities and skills required to function effectively within specific environmental contexts. Psychological abilities are typically understood in terms of psychological and/or neurological functioning.[*36] For this reason, the authors argue that it is important to analyse fitness to serve a sentence on multiple levels—both legal and neuropsychological.

Therefore, fitness to serve a sentence is undeniably a normative legal concept,[*37] which requires a value judgment about which health conditions justify exempting a person from the obligation to endure punishment and for what reasons. Still, although unfitness to serve a sentence is not a medical condition, the root cause of it lies in the person's health. Accordingly, analysing this concept in the context of mental disorders requires an understanding of how specific conditions affect a person's cognitive functions. It is therefore appropriate to turn to neuropsychology as a starting point.

34 Criminal Chamber of the Supreme Court of Estonia decision 1-16-10503, 21 December 2018, paras 39 and 41–42.

35 EM Coles, 'Psychological Support for the Concept of Psycholegal Competencies' (2004) 27 International Journal of Law and Psychiatry 223.

36 Ibid.

37 The term 'normative' refers to a legal concept or characteristic that is either only understandable within a specific legal context or represents a highly abstract value judgment. Jaan Sootak, *Karistusõigus. Üldosa* [Penal Law. General Part] (Juura 2018) 193.

Before examining the neuropsychological foundations of fitness to serve a sentence, we must briefly consider what punishment means in cognitive psychology. Modern psychology, having grown out of earlier behaviourist theories, understands punishment through the paradigm of operant conditioning. This concept, elaborated by E. Thorndike and B. F. Skinner, refers to the shaping of behaviour through reinforcement and punishment, where a given behaviour is either strengthened or weakened depending on its consequences.[*38] Operant conditioning is closely aligned with the concept of specific deterrence in criminal law theory. It distinguishes between positive and negative reinforcement and punishment: positive punishment involves the introduction of a stimulus to reduce unwanted behaviour, e.g. imprisonment as a response to crime, whereas negative punishment refers to the removal of a desirable stimulus, such as reducing privileges. Research in behavioural therapy has confirmed that positive reinforcement is generally more effective than punishment.[*39]

From the theories of punishment, this approach corresponds to specific deterrence, whereby the offender is expected to internalise the unwanted consequences of their unlawful behaviour and avoid future offences. To achieve this, the offender must have sufficient cognitive abilities and emotional insight to understand what punishment is, why it is being imposed, and how they might avoid it in the future. This implies that not everyone is equally capable of 'receiving' punishment in the way the legal system intends.

3.2. Four Conceptual Levels of Fitness to Serve a Prison Sentence

We argue that in the context of neuropsychology, fitness to serve a prison sentence can be approached on four levels that reflect increasing levels of cognitive and normative complexity:

1. Enduring incarceration (passive ability to exist in custody)
2. Functioning within a prison environment (managing daily life and surviving)
3. Understanding the meaning of punishment (grasping moral and legal consequences)
4. Capacity for reintegration and personal change (benefitting from penal objectives)

As will be shown below, most of these levels are also reflected in the case law of Estonian courts and the ECtHR.

3.2.1. Level One: Enduring Incarceration

At the first and most primitive level, anyone with a physical body can be locked up and remain confined there, regardless of their medical condition or cognitive capacity. This is a simple fact of the physical world that requires no further legal or medical analysis. It follows that Estonian case law does not explicitly deal with this level, as it is too basic to warrant discussion.

3.2.2. Level Two: Functioning and Surviving in Detention

The second level examines whether a person can function in a controlled institutional environment and thus encompasses their ability to survive in detention. This includes understanding and complying with prison routines, communicating with staff, exercising legal rights, and preserving basic hygiene. Prisoners' cognitive functions such as memory, attention, visuospatial skills, language proficiency, and executive function must be at a level that enables the performance of the respective activities. The concept of survival should be understood here in a rather broad sense, encompassing mental disorders as a result of which individuals lose contact with reality, are unable to understand instructions given to them, and/or can no longer manage their personal care.

Disorders commonly impairing fitness at this level include:

– Neurodevelopmental disorders (e.g. intellectual disability, autism spectrum disorder, ADHD), which may compromise social understanding and adaptability. Individuals with neurodevelopmental conditions may struggle to understand complex instructions and written materials, react more

38 Burrhus Frederic Skinner, *The Behavior of Organisms: An Experimental Analysis* (Appleton-Century 1938).

39 Hannah K. Scott, Ankit Jain, Mark Cogburn, *Behavior Modification* (StatPearls Publishing 2023) <https://pubmed.ncbi.nlm.nih.gov/29083709/> accessed on 8 May 2025.

slowly, and have difficulty drawing conclusions from the information provided. In the prison environment, they may be unable to assert themselves or express their needs on an equal footing with other inmates, making them more vulnerable to bullying and neglect. Their needs may go unmet unless specifically addressed, and they face a higher risk of suicide[*40] Although individuals with mild intellectual disability are generally deemed criminally responsible in Estonia,[*41] they may still be unable to navigate institutional settings safely. Addressing the needs of individuals with neurodevelopmental disorders within the prison system requires prison staff to take their specific characteristics into account.

- Neurodegenerative diseases, vascular disorders, traumatic brain injuries, and infections can lead to progressive cognitive decline that hinders prison coping.
- Alcohol-related brain damage and chronic substance abuse are associated with executive dysfunction and may increase aggression, impulsivity, and vulnerability.
- Delirium and states of impaired consciousness, while typically transient, render a person unfit for incarceration during the episode.
- Psychotic disorders, such as schizophrenia, frequently present with disorganised thought, hallucinations, and delusions. Approximately 80% of patients with schizophrenia also exhibit substantial cognitive deficits.[*42] The primary treatment for psychotic disorders is pharmacological. If the offender agrees to take medication and cooperate with the treatment team—whether in prison or while on probation—their ability to cope with the conditions of punishment may remain unimpaired.
- Severe mood disorders (e.g. bipolar disorder or major depressive disorder with psychotic features) may compromise motivation, memory, and higher-order reasoning.[*43] Functional impairments usually recede with appropriate treatment.

Neuropsychological assessments must determine whether the person's cognitive profile allows them to navigate the prison environment without undue risk to themselves or others. Experts provide medical findings about the person's state of health, the course of illness, and its effects, while the court makes the final normative judgment. Presumably, a key consideration for the judge is whether the person will be provided with adequate medical care during imprisonment to ensure that their health does not deteriorate and that they do not suffer excessively. Importantly, community-based punishments such as probation or community service are not at all less cognitively demanding; they may require autonomous compliance, such as attending meetings or following behavioural instructions.

In relation to this level, the ECtHR has imposed an obligation on states to take into account, for example, the vulnerability of detainees[*44] with mental disorders or to place the person in an institution where they can receive adequate treatment.[*45] According to the Court, persons deprived of liberty must not be subjected to fear, anxiety, or feelings of inferiority that humiliate or break their physical and moral resistance.[*46]

In Estonian case law, examples of second-level assessments are common, both in cases of physical illnesses and mental disorders. For example, in case 1-18-9298/31, the accused had an immunodeficiency condition. The proceedings were terminated based on the risk that the person could die during imprisonment. Although the expert had been asked an inappropriate question—whether the person was "fit to serve a sentence"—the response was worded more appropriately: the expert found that the accused could serve the

40 Andrew Forrester, Iain McKinnon, and Samir Srivastava, 'Criminal Justice Pathways and Neurodevelopmental Disorders' in McCarthy and others (n 10) 191–201.

41 Sootak and Pikamäe (n 21) § 34/4.3.

42 Amanda McCleery and Keith H. Nuechterlein, 'Cognitive Impairment in Psychotic Illness: Prevalence, Profile of Impairment, Developmental Course, and Treatment Considerations' (2019) 21(3) Dialogues in Clinical Neuroscience 239. – DOI: https://doi.org/10.31887/DCNS.2019.21.3/amccleery.

43 Mădălina Vrabie, Victor Marinescu, Anca Talaşman, and others, 'Cognitive Impairment in Manic Bipolar Patients: Important, Understated, Significant Aspects' (2015) 14 Annals of General Psychiatry Art 41. – DOI: https://doi.org/10.1186/s12991-015-0080-0; Raymond W. Lam and others, 'Cognitive Dysfunction in Major Depressive Disorder: Effects on Psychosocial Functioning and Implications for Treatment' (2014) 59(12) The Canadian Journal of Psychiatry 649. – DOI: https://doi.org/10.1177/070674371405901206.

44 *Rooman v Belgium* App no 18052/11 (ECtHR, 31 January 2019), para 145.

45 *Murray v the Netherlands* App no 10511/10 (ECtHR, 26 April 2016), para 105.

46 *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999), para 99.

sentence only if provided specialised treatment and regular monitoring.*[47] Similarly, in case 1-07-8278/18, the court declined to release a person under § 79(2) of the Penal Code, reasoning that the person did not suffer from a severe mental disorder and that appropriate treatment was available in prison.*[48]

3.2.3. Level Three: Understanding the Meaning of Punishment

The third level builds upon the previous two by adding the ability to understand the meaning of punishment. From a moral perspective, this implies the ability to distinguish right from wrong, recognise socially accepted norms, and comprehend that violating such norms may result in punishment. This, in turn, requires sufficient verbal reasoning and conceptual processing skills.

Such understanding cannot reasonably be expected from individuals with severe cognitive impairments, such as dementia, psychosis, or moderate to severe developmental disorders. However, persons who are cognitively capable of coping with imprisonment or probationary supervision generally also understand that unlawful behaviour may have consequences. What matters is whether the person has a sufficient cognitive capacity to grasp, at a basic level, the causal link between socially unacceptable behaviour and the societal response, namely punishment.

A person with normal cognitive functioning but a poor educational background or upbringing in an antisocial environment may lack familiarity with moral theory or regard legal rules as meaningless. Still, they are capable of recognising that certain actions may lead to sanctions. Similarly, individuals with specific personality traits, such as psychopathic features, may be more likely to make immoral decisions and engage in unlawful conduct.*[49] Yet, as long as their cognitive functions, including verbal reasoning and conceptual understanding, remain within an age-appropriate range, they cannot be considered incapable of understanding the meaning of punishment or acting in accordance with the law. They are able to comprehend the rules and adjust their behaviour; they simply choose not to do so.

At the third level, as with the second level, experts provide input about cognitive functioning, but now the legal system must define what it means to 'understand' punishment. This capacity is typically compromised in persons with mental disorders that impair reasoning. In order for the lawyer to better assess the person's capacity for understanding, the expert must, compared to the second level, explain the person's cognitive abilities to the lawyer in greater detail. ECtHR case law also stresses that in situations involving prisoners with mental disorders, their particular vulnerability and, in some cases, their inability to complain about treatment must be taken into account under Article 3.*[50]

Here are some examples in Estonian case law. In case 1-18-3546/33, an expert stated that the accused would be unable to understand the meaning of the sentence due to their mental state. The proceedings were terminated, although the judgment did not specify what "understanding the meaning of the sentence" entailed or why that question had been posed to the expert.*[51] Similarly, in case 1-19-8180/19, the expert diagnosed the accused with dementia that limited their ability to understand and control their behaviour. The expert concluded that the person was not fit to participate in court proceedings or serve a sentence and could not understand the purpose of the sentence.*[52]

3.2.4. Level Four: Capacity for Reintegration and Penal Goals

The fourth conceptual level of fitness to serve a sentence focuses on the potential for rehabilitation, namely whether the risk of future offending can be reduced and the individual can refrain from undesirable behaviour. Here the question arises as to whether coping in prison also requires sufficient cognitive ability to participate meaningfully in rehabilitative activities, such as social programmes. Behavioural change and

47 Harju District Court order 1-18-9298/31, 11 June 2019.

48 Tartu District Court order 1-07-8278/18, 27 October 2008.

49 Stéphane A. De Brito and Ian J. Mitchell, 'The Neurobiological Underpinnings of Psychopathy' in Anthony R. Beech and others (eds), *The Wiley Blackwell Handbook of Forensic Neuroscience* (John Wiley & Sons 2018). – DOI: https://doi.org/10.1002/9781118650868.ch9.

50 *Rooman v Belgium* App no 18052/11 (ECtHR, 31 January 2019), para 145.

51 Harju District Court order 1-18-3546/33, 26 September 2019.

52 Harju District Court order 1-19-8180/19, 20 May 2020.

risk reduction may occur for many reasons and depend on individual risk factors. For some, the punitive stimulus of imprisonment alone may be effective. For others, key risk factors may include substance use or poor life skills, in which case imprisonment alone is unlikely to help. These individuals may instead require support (e.g. via social programmes) in acquiring new coping strategies to avoid future offending.

Naturally, even evidence-based risk-reduction techniques do not guarantee success, since the drivers behind human behaviour are numerous and complex. However, in order for punishment to have even a hypothetical effect, the individual must have the cognitive capacity to form a basic association between behaviour and consequence and be capable of adjusting their conduct accordingly. Whether they actually choose to change their behaviour is another matter entirely.

Such learning processes may be impaired in individuals with serious neurocognitive disorders, such as severe developmental disorders, brain injury, psychosis, or neurodegenerative conditions. Each case requires individual assessment. The rehabilitative programmes used in the Estonian prison system are based on cognitive behavioural therapy and can be quite complex, meaning that, for example, individuals with mild intellectual disability may struggle to understand them. At the same time, some people with moderate intellectual disability can still distinguish right from wrong and adjust their behaviour accordingly. A separate issue is whether a person with such a condition is able to manage daily life independently in prison.

It is not necessary to delve into the neurobiology of punishment in detail here, but it should be noted that in humans, certain neural circuits are typically activated in response to punishment. These systems create an association between a stimulus and a behaviour, enabling learning and the reduction of undesirable conduct. Such mechanisms are fairly universal across mammals, including humans. However, due to various individual factors, such as psychiatric disorders, some people are more sensitive to punishment than others. For example, individuals with substance use disorders (in the context of seeking the addictive substance), ADHD, antisocial personality disorder, or psychopathic traits tend to be less sensitive to punishment.*[53] This list is not exhaustive. A significant portion of the prison population presents with such traits: according to large-scale studies, approximately 50% of male prisoners meet the criteria for antisocial personality disorder,*[54] and about 8% can be classified as psychopaths.*[55] Research suggests that their brains do not respond to punishment in the same way as the brain of an average human. Their behavioural patterns in social contexts are shaped by the interplay of genetics, personality traits, life experiences, different variables in the surrounding environment, etc. Risk-reduction strategies are often ineffective for this group, and even individuals with no cognitive impairment may continue offending. If the goal of imprisonment is to support reintegration, and this goal proves unattainable for certain individuals, then it might be argued that their continued incarceration is not justified. In such cases, imprisonment fails to serve its intended purpose.

In sum, the fourth level considers the effect of punishment on the individual. Under § 6(1) of the Imprisonment Act, punishment should promote reintegration into society and protect the legal order. At this level, we might ask whether the individual's condition prevents these goals from being achieved. In ECtHR practice, this is linked to the requirement that the detention of persons with mental disorders must pursue a therapeutic purpose, with the maximum aim of treating or alleviating their condition, including reducing or controlling dangerousness.*[56] However, the fourth level is difficult to apply in practice as it requires predicting the impact of punishment. Furthermore, using this level as the grounds for release may conflict with § 56 of the Penal Code, which is based on the principle of retribution – punishment as a response to guilt.

53 Philip Jean-Richard-Dit-Bressel, Simon Killcross, and Gavan P McNally, 'Behavioral and Neurobiological Mechanisms of Punishment: Implications for Psychiatric Disorders' (2018) 43(8) Neuropsychopharmacology 1639. – DOI: https://doi.org/10.1038/s41386-018-0047-3.

54 Seena Fazel and John Danesh, 'Serious Mental Disorder in 23,000 Prisoners: A Systematic Review of 62 Surveys' (2002) 359 The Lancet 545. – DOI: https://doi.org/10.1016/S0140-6736(02)07740-1.

55 Jeremy Coid and others, 'Psychopathy among Prisoners in England and Wales' (2009) 32(3) International Journal of Law and Psychiatry 134. – DOI: https://doi.org/10.1016/j.ijlp.2009.02.008.

56 *Rooman v Belgium* App no 18052/11 (ECtHR, 31 January 2019), para 208.

4. Fitness to Serve a Sentence: Towards Conceptual and Procedural Clarity

Fitness to serve a sentence may significantly affect the fate of the accused in Estonia; during the course of proceedings, its absence may lead to termination of the case, and following conviction, in certain cases, even to full exemption from punishment. Despite its importance in Estonian criminal law, the legislator has left the concept undefined, and case law has also struggled with providing a clear definition. Courts deal with cases involving questions of fitness to serve a sentence in cooperation with experts, yet often in an inconsistent and fragmented manner. The majority of relevant case law comes from district and circuit courts, which do not always follow a consistent approach or adequately compensate for the absence of legislative guidance. The broader legal framework surrounding the concept, as analysed above, also gives rise to fundamental concerns. For these reasons, once the concept of fitness to serve a sentence has acquired clearer contours, developing a comprehensive statutory legal framework should follow.

To move towards such regulation, we must first ask: what is the goal of assessing fitness to serve a sentence? This question inevitably involves deciding who should be exempted from punishment and on what grounds. In considering this, the goals of punishment and the expectations of society cannot be disregarded. In Estonia, punishment is grounded in guilt—in the committed act—which means a strong emphasis on retribution. To maintain the legitimacy of punishment in the eyes of the public, the group of persons released from serving a sentence cannot be too broad. Although discussions about the preventive purposes of punishment, such as reintegration, are essential for the long-term development of the penal system, they are too abstract to serve as grounds for exemption or commutation of sentence in actual cases. Moreover, it is inherently difficult to predict the actual effect of punishment on an individual's future behaviour.

The primary basis for release should instead be found in situations where the individual's interests outweigh society's interest in enforcing the sentence. In this regard, § 79(1) and (2) of the Penal Code provide helpful reference points. Paragraph 1 of article 79 allows for release if continued imprisonment would cause disproportionate suffering to the convicted person. Paragraph 2, in turn, focuses on the person's understanding of their act and the sentence imposed, mandating release if such comprehension is no longer present. Taken together, these provisions reflect different aspects of fitness: § 79(1) addressing survival and suffering, and § 79(2) capturing the moral dimension of punishment where the ability to understand has disappeared. Both provisions require, as a precondition, the presence of a serious mental disorder or other serious illness.

When mental disorders are involved, neuropsychology becomes essential in understanding how punishment affects a person – and, by extension, which effects are normatively unacceptable. Previously, we outlined four conceptual levels of fitness to serve a sentence. Article 79(1) appears to correspond to the second level: the ability to survive and cope. Article 79(2), despite its convoluted language, seems to reflect the third level: the ability to understand the meaning of punishment. In our view, a neuropsychological assessment of fitness should evaluate this third level. If the person is capable of surviving the conditions of imprisonment, coping, and cognitively understanding the relationship between their act and its consequences, there should be no reason to defer the execution of the sentence. This does not mean that expert evaluation should be commissioned indiscriminately for every criminal defendant; however, neuropsychological assessment should be performed where there is suspicion that the person may no longer be capable of understanding the link between their own behaviour and the reaction that follows.

Whether punishment or rehabilitative measures would actually reduce the risk of reoffending should not be decisive here, as such effects often depend on factors beyond cognitive ability (e.g. personality traits, attitudes, lack of factual knowledge, environmental considerations). As regards possible physical health problems, it may suffice to stop at the second level, i.e. whether the person is able to survive and cope. This approach may also be acceptable in cases involving mental disorders, though shifting the threshold to the third level depends primarily on value-based societal choices. So far, Estonia has not made such a deliberate and explicit choice. However, the jurisprudence of the European Court of Human Rights indicates that the assessment should remain within the boundaries of the second and third levels—survival and comprehension—without extending into speculative judgments about rehabilitation as discussed above. This is a fairly clear starting point for Estonian legislators.

Beyond substantive considerations, a functioning procedural framework is equally necessary—one that would allow fitness to serve a sentence to be consistently and meaningfully determined in practice. When discussing expert assessments, we must return to the nature of the concept itself, which determines what kind of information the judge requires and what kind of expert is capable of providing this information. Each mental disorder or cognitive dysfunction must be evaluated individually and in depth, to determine whether the person can cope in a particular environment and/or grasp relevant legal concepts.

Thus, an expert opinion should not simply state whether the person is fit to serve a sentence. Instead, it must describe the nature of any cognitive impairment, how it affects the person's ability to function in prison or while on probation, and/or their capacity to understand the punishment imposed. The overall assessment, especially when it concerns daily functioning in custodial or supervisory settings (and possibly also comprehension of the purpose of punishment), requires the competence of a clinical psychologist, and preferably a neuropsychologist, whose specific task is to assess cognitive functioning. This falls outside the competence of any medical doctor, including psychiatrists. Therefore, such expert assessments must involve, in addition to a psychiatrist diagnosing a mental disorder, a clinical (neuro)psychologist.

As previously emphasised, the key issue is defining the normative boundaries; in other words, clarifying in which cases punishment should no longer be applied to persons with mental disorders, and on what basis. Once these boundaries are clear and established, psychiatrists and psychologists will be able to assess whether a given mental disorder exists and whether it affects the person's cognitive capacity in a way that brings their fitness to serve a sentence into question. Moreover, a uniform understanding of fitness to serve a sentence will lead to greater consistency in judicial practice. As a result, the legal system will be better equipped to ensure legal certainty and the protection of human rights in this complex and sensitive area.

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