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Victims in Criminal Procedure: A Review of Latvian Criminal Procedure Norms through the Prism of Minimal EU Standards

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The current paper is focused on the legal status of victims in criminal proceedings. The author has reviewed legal norms in Latvia in this regard from the perspective of European Parliament and Council Directive 2012/29/EU (25 October 2012), to establish minimum standards on the rights, support and protection of victims of crime, thus replacing Council Framework Decision 2001/220/JHA. The Directive includes conclusions from a study of the situation in Latvia as a part of the project "Protecting Victims' Rights in the EU: The Theory and Practice of Diversity of Treatment During the Criminal Trial." The project is being implemented by the Centre for European Constitutional Law and the Institute of Advanced Legal Studies at the University of London School of Advanced Study and funded by the European Commission. The author's thesis is that criminal procedure norms in Latvia have already enshrined a fairly high level of rights for victims, as based on the fact that for several decades, victims have been recognised as active participants in criminal proceedings. At the same time, however, several amendments to these norms are needed in order to satisfy the requirements of the Directive. Some would involve more precise or supplemented rules, but in other cases the potential changes can be seen as essential. The greatest changes will relate to the individual evaluation of victims and the individualised procedural processes which are based on the said evaluation.

Keywords: Victims in criminal proceedings, individual evaluation of victims, rights of victims, explanation of rights, protection of victims, legal aid to victims, compensation.

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Introduction

European Parliament and Council Directive 2012/29/EU (25 October 2012) to establish minimum standards on the rights, support and protection of crime victims, thus replacing Council Framework Decision 2001/220/JHA, was approved by the European Council of Ministers on October 4, 2012. The Directive can be seen as a successive step toward norms that are related to the protection of victims. Prior to the implementation of the directive, the most important legal instruments in this regard were:

- Council Framework Decision 2001/220/JHA (15 March 2001) on the standing of victims in criminal proceedings;¹
- Council Framework Decision 2002/629/JHA (19 July 2002) on combating trafficking in human beings;²
- Council Directive 2004/80 EC (2 April 2004) relating to compensation to crime victims;³
- The multi-annual programme 2010-2014 regarding the area of freedom security and justice (Stockholm programme) P7_TA(2009)0090;⁴
- Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Strengthening victims' rights in the EU, COM/2011/0274, final version;⁵
- Council Resolution 2011/C 187/01 (10 June 2011) on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings.⁶

There were several reasons why the author decided to look at how the minimal standards that are enshrined in the Directive are being implemented in Latvia. First of all, this is an important issue. Secondly, there have been no major studies or publications about the issue in Latvia, because the Directive is comparatively new and those who have focused on it have devoted more attention to the protection of victims in order to prevent repeat victimisation, etc.⁷, and procedural issues have been left without sufficient attention. Finally, to a certain degree, the work has already been done in this particular area of study. The author has offered a general look at the topic at the 71st Conference of the University of Latvia, with the paper being published in the summer of 2013.⁸ Because of the limited scope of that paper, however, attention was only focused on a few aspects of the status of victims. More in-depth examination of the way in which the Directive influences Latvia's Criminal Procedure Law involved a study conducted by Kristīne Strada-Rozenberga and the author as a part of the 2013 project "Protecting Victims' Rights in the EU: The Theory and Practice of Diversity of Treatment During the Criminal Trial," which was organised by the Centre for European Constitutional Law and the Institute of Advanced Legal Studies at the University of London School of Advanced Study and funded by the European Commission. The review of the situation in Latvia was provided in that framework. This created a desire to continue to review and publicly evaluate the effects of the Directive on the Latvian law, focusing on the aspects both already studied and those yet unexplored in the past. The author wishes to ensure that a broader range of readers can learn about the previous study in terms of the extent to which the forms of protection set out within Latvia's Criminal Procedure Law is in line with the requirements of the Directive. The author will focus on the criminal procedure aspects of the victim's status, as enshrined in the Directive, this time disregarding the procedures that are outside of the criminal procedure as such – support

services for victims, the training of the relevant specialists, etc. The issues in the current paper are only being reviewed on the basis of a comparison between norms in the Criminal Procedure Law (KPL),⁹ and the Directive, without a particular focus on how the norms are applied and perceived in practical terms. Professor Strada-Rozenberga has written a separate paper about these issues in this journal.

The review of victims' status has been divided into several sections, looking at individually important issues or a set of related issues. In each case, the author will review the relevant norms of the Directive, then address the KPL norms in this regard and provide a conclusion about the extent to which the norms are in line with the requirements of the Directive.

1 Recognition of victims, provision of information to victims, individual evaluation of victims

1.1 The definition of victims

Definition of a victim must be seen as one of the most essential issues in this area of research, because it enables identification of the range of people to whom the minimal requirements of the Directive must be applied in Latvia.

Article 2 of the Directive defines the concept of a "victim", as follows:

"For the purposes of this Directive the following definitions shall apply:

(a) *"victim" means:*

- (i) *a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;*
- (ii) *Family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death."*

It is important to note that the definition of "family members" in this regard is the following: *"family members" means the spouse, the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings and the dependants of the victim."*

In describing the situation, the author can repeat things that have been noted in other publications.¹⁰ There are several understandings of the concept of a "victim" in Latvian criminal procedure, including the KPL. This means that the person who has actually suffered from a criminal offence and the victim who takes a part in criminal procedure are recognised through a special decision by the handler of the process.

The KPL does not define the actual victim or regulate that individual's status. When it comes to a victim as a participant in criminal procedure, the law states that it is an individual or a legal entity which has suffered damages because of a criminal offence – moral damages, physical suffering or property losses (Section 95 of the KPL), also indicating that the victim can only be recognised through a special decision by the handler of the process (Section 96 of the KPL). The KPL also says that if the person has died, the victim in the criminal procedure can be the surviving spouse, relatives in a direct line and of the first or second degree in a collateral line, or affinity relatives of the first degree (Section 96 of the KPL).

The following things can be said when it comes to the positions that are enshrined in the Directive and the KPL in terms of comprehending the victim's status and the commensurability of this status:

- 1) If the requirements of the directive were to be fully enshrined in the KPL, it would mean including the status of the victim, as well as special instructions about procedures related to such persons. Particularly, the attention must be focused on the moment when the procedure begins, as well as on the provision of information to the victim about his or her possible status in criminal procedure, his or her rights, the support that the victim can receive, etc. To get a clear sense of the practical applicability of KPL norms, the text would have to clearly and unambiguously state and separate legal statuses, including the procedural guarantees for the actual victims, as well as for victims who are active participants in the procedure.
- 2) The status of a victim can be awarded to legal entities in Latvia, while the norms of the Directive apply only to individuals. That is no reason to reject the approach in which legal entities can be recognised as victims in Latvia, just because the guarantees in the Directive are mostly applied to individuals. Furthermore, there are no obstacles against separating those guarantees in Latvia, which do not apply to legal entities.
- 3) When it comes to a situation in which the actual victim of a criminal offence has died, it must be concluded that the KPL already regulates it by allowing a broader range of people to take on the status of the victim while also speaking to a narrower range of people than is indicated in the Directive. The Directive states that if the victim has died as a result of the criminal offence, then the status of a victim applies to that person's family members. This, in the sense of the Directive, applies to a spouse, a person who has had a permanent relationship with the victim, a person who has been part of a joint household with the victim, and then also brothers, sisters and dependents of the victim (Article 2 of the Directive). This clearly denotes that the KPL refers to a broader range of people, because the status of a victim is possible in any situation in which the victim has died – not just when the death has been a result of the criminal offence. The KPL also refers to adoptive parents (but not adoptees). The Directive, in turn, refers not just to spouses, as is the case with the KPL, but also to others who have had a close relationship with the victim, as well as to dependents. Article 19 of the preamble of the Directive also states that the member states must introduce procedures to limit the range of family members who can make use of the rights that are included in the Directive. This means that the KPL should have a more precise definition of the range of people who can obtain the status of a victim if the original victim has died. This also involves the creation of a mechanism that would enable limiting the range of relatives who can make use of the rights that are enshrined in the Directive.

1.2 Provision of information to victims

This issue relates to norms stated in Articles 3, 4 and 7 of the Directive. The essence of these norms can be expressed, as follows:

- 1) The victim must receive information from the very first moment when he or she has contacted the relevant institution – information about possible support, appeals about the procedure that relates to criminal offences, opportunities for protection, procedures for receiving legal aid, possibilities to receive compensation, the availability of translations, appeals of the decisions and actions of officials, contact information about the case, the availability of restoration of justice, and the possibility of receiving compensation for expenses;

- 2) From the moment when the victim has contacted the relevant institution and throughout the entire procedure, it must be ascertained that the victim understands the information that has been provided and that the victim is understood by the relevant institution in several senses:
 - a) Translation services must be provided to victims who do not speak the language in which the process is being handled;
 - b) Communications with victims must involve simple and comprehensible language;
 - c) When first contacting the relevant institution, the victim has the right to select a companion if that is necessary because of the effects of the crime and there are no objective obstacles against same.

When it comes to the first aspect, it has to be said that in accordance with the KPL, anyone who is involved in criminal procedure must receive information about all of his or her rights and obligations as soon as the relevant status is obtained. This also applies to the victims. The law clearly states that the handler of the process must provide timely information to people about their right to be recognised as victims. Once the status is assigned, people must be informed about all of the rights that are enshrined in the KPL in a detailed and precise manner – overall principles of victims' rights (Section 97), the rights of victims during pre-trial procedure (Section 98), the rights of victims at court (Section 99), the rights of victims at the appellate level (Section 100), and the rights of victims at the cassation level (Section 101). It must also be noted that certain procedural guarantees for victims and other aspects of this issue are regulated in other KPL norms. Thus, for instance, the right to receive compensation for expenses during the procedure is not cited in any of the aforementioned sections of the law; instead this issue is regulated by KPL norms which address the procedural expenditures.

This means that the practical information about the rights of victims depends on whether the guarantees are specifically defined in the KPL and on how they are defined. The author would like to briefly deviate from the initial decision to avoid reviewing the relevant practices to offer a concise description of conclusions that have been developed while observing those practices. If specific rights for victims are directly stated in those sections of the KPL which address the rights of victims – the right to legal aid, opportunities to receive compensation, etc. – then the victims receive such information as soon as they obtain the status of victims. Victims seldom receive information, however, about the rights that are enshrined in other sections of the KPL. When it comes to the issues like support institutions and their services, the KPL has nothing to say about them, and, as a consequence, the victims hardly ever receive information regarding these matters.

When it comes to the other issue of ensuring that the victim understands what is happening and is understood during the procedure, it has to be said that the requirement in the KPL that translation services be provided is fulfilled in all cases. The fundamental principles of the KPL state that victims and their representatives have the right to speak their own language during the procedure if they do not speak the state language. They have the right to a translator at no charge to themselves, and the participation of the translator is ensured by the handler of the procedure or another competent person. Procedural documents must also be provided in the language spoken by the victim and his or her representative (Section 11 of the KPL). The same rights for victims have been enshrined as an overall principle of rights (Section 97 of the KPL).

The same cannot be said about the right of victims to be addressed in a clear and understandable way. The KPL does not include direct requirements regarding this. In practice, handlers of procedure usually do not consider ensuring that victims understand, what is being said to them. Often the process involves only the presentation of copies of the law without any appropriate explanation thereof. Handlers of procedure often speak strict and formal legal language that cannot be understood by a layperson. One solution might be the publication of informational brochures for victims to contain and explain all the issues which relate to their status, their legal rights and obligations, list all the available support and protection services, etc., in a clear, understandable and non-legalese language. The KPL could be amended to state that handlers of process are obliged to prepare individualised explanations of rights and obligations for each and every victim. It is also true that, at this time, the KPL does not respond to the victim's right to bring along a "companion" apart from a lawyer.

1.3 Individual evaluation of victims

Article 22 of the Directive instructs the member states to ensure that victims are evaluated individually and on the basis of the relevant procedures in each country to address the need for special protection. Other norms refer to those victims who require specific protection, and have additional procedural guarantees.

The KPL does not, at this time, call for the individual evaluation of victims, and there is a single procedure for all of them. A slightly different, adjusted procedure is prescribed only for specific groups of victims – juveniles and those who require specific procedural protection. The specifics of this issue are basically enshrined in the KPL, but there are a few cases in which an individual solution is found, based on the views of a relevant specialist (for more regarding this matter, see the norms of the KPL about investigatory work that involves juveniles).

It can be hereby concluded that, as the requirements of the Directive are implemented, the range of victims who require special protection must inevitably be expanded, applying the status not only to juveniles, but also to other groups of victims, such as the victims of human trafficking, victims of terrorism and organised crime, victims of sexual violence or family violence, victims with special needs, etc. At the same time, it also has to be said that the recognition of a victim as one who requires a specific protection must be based less on the belonging of a particular victim to a specific group and more on the specific and individual evaluation of the relevant individual. This enables recognizing the special importance of this evaluation, as well as the need to increase the importance of an individualised approach in criminal procedure.

Several amendments to the KPL will be needed when it comes to procedures that are relevant to victims if additional procedural guarantees are to be offered to victims and, particularly, to those victims who require a specific protection. These changes might particularly relate to the specifics of investigations, including those who conduct them, when the investigations take place, how many investigatory operations are implemented, etc.

Generally, it has to be said that implementation of the Directive's requirements by amending the KPL and then putting the new requirements into practice can be perceived as a new development in victim protection, based on an understanding of the victim's role and of the need for a specific attitude toward this participant in the procedure.

2 The right of individuals to demand the launch of criminal proceedings and to appeal a decision to reject the launch of criminal proceedings or to end criminal proceedings

Let us now turn to the rights that are enshrined in Articles 5, 6 and 11 of the Directive. In brief, these can be described as the right to file a petition related to the language that is spoken in criminal procedure when receiving a written confirmation of the receipt of the petition, the right to receive certain information about “one’s own” case, and the right in certain cases to ask that a decision to fail to launch criminal proceedings be reviewed.

According to the KPL, every victim has the right to demand that criminal proceedings are launched. This right can be exercised through an application (Section 369 of the KPL). There are criminal offences such as petty theft, light assault and battery, defamation, etc., in which only an application from the victim can lead to the launch of criminal proceedings; without such an application, the process cannot begin.¹¹

A person who has suffered from a criminal offence can submit a written or an oral petition. The law does not stipulate that a confirmation of the receipt of such a petition is necessary, but if the victim asks for such confirmation, then it is provided and not refused. If the relevant institution decides to launch criminal proceedings, the person has the right to obtain the status of a victim and a participant in the criminal procedure (Section 96 of the KPL). A decision to launch criminal proceedings cannot be appealed (Section 372 of the KPL).

If the decision is to refuse to launch criminal proceedings, the person who has suffered harm from the criminal offence can appeal that decision before a competent official at the Prosecutor-General’s Office. In such cases, the request must be filed within ten days after the day when the person has learned that criminal proceedings are not to be launched. The appeal must be reviewed within ten days after the date upon which the appeal (or its translation, if the appeal has not been filed in the state language) has been received. In exceptional cases, the deadline for reviewing the appeal can be extended to 30 days (Section 373 of the KPL).

As noted above, every person who is involved in criminal procedure and does not speak the state language has a right to ensure that the process involves a language which he or she speaks, as well as that a translator is available. This also applies to victims of criminal offences.

When it comes to the right to appeal a refusal to begin a criminal investigation, the victim can file the same type of appeal before a prosecutorial official as is the case with the request to launch criminal proceedings. The prosecutorial decision is final and cannot be appealed (Section 373). This means that victims do not have the right to ensure that the issue is considered by a court.

Criminal proceedings include investigations, prosecutions, trials in court, etc. The process can be halted at any point at all if circumstances are discovered which lead to a decision to end criminal proceedings. A person who has the status of a victim can always file appeals about a decision to end criminal proceedings (including an end to criminal prosecution). Here, again, the victim must file the appeal within ten days after the decision has been received (Section 392.1 of the KPL), and the appeal must be reviewed in 10 or, in exceptional cases, 30 days’ time. In order to ensure the more effective utilisation of such rights, victims have the right to study the relevant case file.

Victims also have the right to appeal court rulings on ending the procedure or the final ruling in the criminal case. At the same time, however, an appeal which is aimed at convicting someone who has been exonerated by the first-level court can be filed only with the support of the relevant prosecutor.

All of this means that Latvian law includes minimal standards prescribed by the Directive when it comes to the rights of the victim in relation to launching the procedure and to requesting that a decision not to engage in criminal prosecution be appealed. The law provides victims with broad opportunities to file petitions related to the launching of criminal proceedings, as well as appeals of decisions not to do so or to suspend proceedings that have already begun. At the same time, it is likely that there should be more precise regulations about providing a written confirmation of receiving the aforementioned documents. There must also be a more thorough assurance of the availability and quality of translations and translator services.

3 The right of victims to submit evidence

The right of victims to submit evidence is regulated in the Directive as a part of the “right to be heard.” The rules are included in the chapter on participation in criminal proceedings, and this includes the right of the victim to submit evidence and to provide witness testimony during a trial. This article of the Directive is quite laconic, only saying that victims can testify in criminal proceedings and submit evidence, adding that if children are to be heard, then sufficient attention must be devoted to their age and level of maturity. Procedural rules are left to the discretion of the member states. In Latvia the right of victims to participate in evidentiary processes is fully in line with the Directive’s standards. The victim must be seen as a subject and a source of evidence. When it comes to victims being subjects of evidence, they have the right to ask for investigation and other activities, take part in the review of the case, express their views about each issue at hand, including the identification, examination, etc., or evidence, take part in each court hearing which deals with direct or oral evidence, submit applications, take part in court proceedings, and otherwise actively contribute to the evidentiary process. This applies only to those victims who are ready and willing to do so. When it comes to victims as sources of evidence, Latvian legal norms clearly state that they have the right to testify and to submit evidence in other ways. At the same time, victims are obliged to do this, and the refusal to comply can lead to unfavourable consequences. Victims can only refuse to testify against themselves and their relatives, which means spouses, parents, grandparents, children, grandchildren, siblings, as well as anyone with whom the relevant individual lives or with whom he or she shares a joint property. Criminal charges can be filed against people who refuse to testify or submit evidence without justification, who knowingly submit false evidence, or who file fraudulent documents when asking for the launch of criminal proceedings.¹²

The main method of obtaining evidence from victims is interrogation, and this process is basically regulated by the same rules which apply to witnesses. The rules are fairly generalised, and they are the same for victims and witnesses who are to be interrogated. The only exceptions relate to juvenile victims, for whom a shorter period of interrogation is enshrined in the law. Juveniles can be interrogated with the involvement of a specialist, and they also enjoy several other procedural guarantees.

4 The right of victims to protection

Chapter 4 of the Directive addresses the victims' right to protection. This relates to the general rights to protection (Article 18), the right to avoid contacts between the victim and the defendant (Article 19), the right to protection during criminal investigations (Article 20), the right to protection of the victim's private life (Article 21), an individual evaluation of each victim (Article 22), and steps to be taken in relation to victims who require particular protection (Articles 23-24). Here it must be noted that regulations relevant to the protection of victims are scattered through several sections of the KPL, mostly at the level of basic principles of criminal procedure. In some cases this relates to the norms that are devoted to specific aspects of criminal procedure. Among the general rules, we can look at the fundamental principle of guaranteeing human rights that is enshrined in the KPL and states that the criminal procedure must always take into account the internationally recognised human rights, never permitting unjustified obligations related to criminal procedure or any incommensurate intervention into the person's private life (Section 12 of the KPL). General rules about interrogations (Section 139 of the KPL) that relate to people who are taking part in investigations ban violence, threats, lies, or any other unlawful or amoral activities. The rules also ban anything that endangers the individual's health or life or damages his or her dignity. Investigations which require the individual to strip down must involve an investigator of the same gender, the exception being medical personnel.

Section 24 of the KPL includes fundamental principles about the protection of the individual and his or her property. The rules state that when people face threats because they are fulfilling their obligations in relation to criminal procedure, they have the right to demand that the handler of the process takes all of the steps defined by law to protect themselves and their property.

Special procedural protection for victims can be applied in those cases where the victim is experiencing serious threats (Chapter 17 of the KPL). This can apply to victims who are testifying or have testified in a criminal procedure that is related to serious or particularly serious crimes, to juveniles who testify in relation to specific types of crimes, as well as to other people whose endangerment can influence the testimony that they provide. When people are declared to be subject to special procedural protection, the process involves specifics at the pre-trial level and at court. Technologies can be used, for instance, which make it impossible to identify the protected person, closed court hearings can be held, etc.

As noted, the KPL does not address the individual evaluation of victims, which means that procedures can be adapted for the needs of each victim. Specific rules only apply to a certain set of juveniles, as well as to those people who receive special procedural protection. Without more specific mechanisms to protect victims, the practical protection of each victim depends on the relevant official's professionalism and responsibility in the criminal procedure. Of particular importance here is the will and ability of actual employees to act properly in each specific situation when it comes to the fundamental principles of criminal procedure. They must understand, for instance, that the number of interrogations and medical examinations is directly linked to the fundamental requirements of criminal procedure – such processes must not, without reason, intervene into the individual's private life. When determining the content of investigatory work, specialists must remember the need to protect the life, health, dignity, respect and inviolability of the individual, as well as the other rights which are granted to the person.

5 The right of victims to legal assistance

The right to legal assistance is enshrined in Article 13 of the Directive, and the rules are fairly general. Victims must have access to legal assistance if they have the status of a participant in criminal procedure, but the specific rules about this are left at the discretion of the member states. Latvia fully complies with this requirement of the Directive. The right to legal assistance rests with every person irrespective of whether he or she is or is not a “party” (i.e., an active participant) in criminal procedure. Accordingly, the right to legal assistance rests with people who have formally been declared as victims, as well as with actual victims who have not wished to receive that status. When it comes to victims who participate in criminal procedure, an overall principle is that the victim or his or her representative can seek the help of a lawyer in order to guarantee the relevant rights (Section 97 of the KPL). It must be noted that the lawyer can also represent the victim (Article 104 of the KPL). When it comes to the general differences between these statuses, a lawyer offers legal assistance to the individual and provides explanations, recommendations, etc., that are of a legal nature, while a legal representative replaces the victim in pursuit of the relevant rights. It must also be noted that in line with Article 104 of the KPL, if the protection of the rights and interests of juveniles is encumbered or not guaranteed, or if the juvenile’s so-called legal representatives submit a relevant request, then the handler of the process must take a decision on hiring a lawyer to represent the juvenile victim. In exceptional cases in which it is otherwise not possible to ensure the protection of the person’s rights and interests in criminal procedure, the handler of the process must take a decision to bring in a lawyer to represent a victim who is an impoverished or poor adult. In such cases the state pays for the legal assistance and covers the relevant costs. Rules about this process are defined by the Cabinet of Ministers.

6 The right of victims to receive compensation

The right of victims to receive compensation relate to three permanent rights for victims – the right to recover property, the right to receive compensation, and the right to receive compensation for losses incurred as a result of taking part in criminal procedure.

The right to recover property is enshrined in Article 15 of the Directive. The rules state that property that has been recovered during criminal procedure must immediately be returned to the victim unless it is needed to ensure the success of the procedure. Rules about this process are left to be defined by each member state.

The KPL addresses the return of property to victims. Property that has been lost because of theft, robbery, fraud, etc., is seen as criminally obtained property in the eyes of the KPL. There are two things that can be done with criminally obtained property – either it is returned to the victim or it is confiscated on behalf of the state. If the property has been declared to have been criminally obtained, the first issue relates to whether it must be returned to the owner. If not, then it can be confiscated. Section 356 of the KPL stipulates that the declaration that property has been obtained criminally can be approved by a court or prosecutor when the decision is taken to end criminal proceedings or during the pre-trial proceedings. Property can be declared to be criminally obtained during a pre-trial or unfinished procedure by a district (city) court via a particular procedural process (involving criminally obtained property) if the handler of the process has a sufficient evidence to show that

the property is of a criminal origin or has been involved in a criminal offence. The decision can also be taken by the handler of the process if during criminal procedure it has been found that the property is in the hands of the suspect, defendant or a third party and has been confiscated. This must be a property declared to be lost by its owner or legal manager. Once it is found, the owner or legal manager must prove his or her rights to the property so as to eliminate any sensible doubts about the matter.

It must also be noted that in accordance with Section 357 of the KPL, the property is returned to its owner or legal manager on the basis provided by the handler of the procedure, but only once the property is no longer necessary in relation to the goals of the procedure.

Chapter 12 of the KPL refers to the use of material evidence and documents. The rules prescribe that the property obtained during an investigation can be returned to the owner in return for a signature of receipt if it is found that the property is not of an evidentiary importance or if the necessary investigation has been completed, and the return of the property to the owner or manager will not hinder the ongoing procedure.

Requirements set down in the Directive regarding the return of a property to its owners are generally in place in Latvia, though there may be certain timeliness issues. Actions with criminally obtained property at this time are not regulated in a single and homogeneous manner, which means that there can be overlaps or disagreements about this. Earlier publications provide a discussion of this matter in greater detail.¹³

When it comes to compensation as such, Article 16 of the Directive states that the member states must ensure that victims in criminal procedure have the right to a decision on compensation from the criminal in a timely way, unless the laws of the relevant country state that the decision must be taken in another manner. Member states must also take steps to encourage criminals to pay appropriate compensation to victims. The KPL states that compensation is an element in the fair resolution of criminal and legal relations. Section 22 regulates the right to compensation for damages, stating that the person who has suffered harm because of a criminal offence has guarantees to demand and receive moral and material compensation in relation to moral offences, physical suffering, or property losses. Section 26 of the KPL prescribes, how people apply for compensation, how the request is reviewed, how the decision is made, etc. The legal norms in this section define compensation and the content of the applications for obtaining it. They also regulate the procedure of submitting applications, the scope of compensation, and the people who can be obliged to pay a compensation. Without discussing these norms in detail, it can be said that the essence of a compensation is that the criminal (or, in some cases, other persons) must pay a specific sum of compensation to the victim in return for damages. This compensation must be paid voluntarily or on the basis of a court order. This means that the Directive's requirements about the existence of a compensation mechanism are fulfilled in Latvia. When it comes to the fact that the member states must facilitate ways of encouraging criminals to voluntarily pay compensation, it has to be said that the KPL includes several norms which indirectly contribute to this end. For instance, this issue is important when making decisions about the possibility of applying simplified forms of criminal procedure. It must be mentioned that a person can be exempted from a criminal liability on the basis of a settlement only if the guilty party has fully paid compensation for all harm or damages that have been caused by

the criminal offence (Sections 379.1.2 of the KPL and Section 58.2 of the Criminal Law). An agreement on compensation for harm that has been caused is a mandatory prerequisite for reaching agreement in this regard (Section 437 of the KPL).

When it comes to the third right related to “compensation” for victims – the right to receive compensation for the expenses incurred because of participation in the criminal procedure, these rights are enshrined in Article 14 of the Directive, which states that the victims who take part in criminal procedure must be able to receive a compensation for expenses that they incurred because of their active participation therein. The procedure for such compensation is determined by the member states. The KPL says that the procedural costs relate to the sums that are paid out to victims so that they can cover travel expenses related to visiting the location where the procedure is taking place to enable their return home, paying for accommodation and covering the costs which victims receive as an average wage during the period of time when they are not at work because of their participation in the procedure (Section 367 of the KPL). The relevant processes and the amount of compensation are dictated by Cabinet of Ministers regulations on the procedure and scope of compensation for expenditures related to criminal procedure.¹⁴

It must be said that the norms in the KPL fully meet these requirements of the Directive. At the same time, however, a more effective approach to this process could be achieved. When it comes to the right to receive compensation for expenditures incurred during participation in criminal procedure, this should be stated as one of the general principles related to the victims’ rights.

7 The criminal procedure status of victims who are not residents of Latvia

Article 17 of the Directive addresses the special status of victims who are residents of other member states. Among other things, the Directive states that the member states must be particularly prepared to receive testimony from the victim as soon as a criminal offence has occurred, also stating that videoconferencing and teleconferencing must be used as much as possible. The member states must also ensure that people can submit petitions related to criminal procedure in their own country if that is not possible or if, in some cases, the person does not want to do so in the country where the criminal offence occurred.

When it comes to these norms in the KPL, it has to be said that in terms of so-called local procedural regulations, the KPL does not contain specific instructions as to what is to be done if the victim lives in another country. This means that if it is necessary to obtain information or evidence from victims, international co-operation legal norms are put into place in relation to assistance in conducting procedural operations (Chapter 18 of the KPL). This includes, among other things, procedural activities which involve technologies. It is recognised that the evidence obtained as a result of criminal and legal co-operation in accordance with criminal procedures in another country is comparable to the evidence that is obtained in accordance with the law itself (Section 676 of the KPL).

It must also be noted that the KPL does not directly include the instruction from the Directive about the immediate interrogation of the victim. Here it must be noted that interrogation of victims is seen as an initial and immediate investigatory process, but the people who implement it often treat the issue with insufficient care and with too much formality. This creates the need for a repeated interrogation of the

victim in a more detailed and precise manner. Furthermore, one cannot disregard the fact that victims from abroad probably do not speak Latvian, and there may also be problems in finding high-quality translation services in a timely manner.

Summary

When it comes to the norms set down in the Criminal Procedure Law of Latvia, as viewed through the prism of the minimal standards of the EU, several conclusions can be made:

- Full implementation of the minimal standards in the Directive that relate to the rights of victims will mean a new development in the criminal and procedural protection of the victims' rights in Latvia.
- Since victims in Latvia are considered to be active participants in criminal procedure – people who already have extensive procedural authority – in many cases this substantially exceeds the minimal requirements that are enshrined in the Directive.
- As the Directive applies to every victim of every criminal offence irrespective of whether the person has been declared to be a victim by virtue of a special decision by the handler of the process, the need for improvements of Criminal Procedure Law norms relates to the implementation of the victim's status in a precise manner.
- This does not, however, mean that it is necessary to reject the position of victims as active participants in criminal procedure, as it is stated in current norms of Criminal Procedure Law. This status can presumably be preserved, and the same is true of the status pertaining to an actual victim of a criminal offence, if the separation between these two statuses is drawn so as to regulate them with a sufficient precision. The status of a victim as an active participant in criminal procedure after that victim is specifically declared to have been a victim would enable an effective determination and identification of situations in which the actual victim has or has not wanted to take active part in criminal procedure. This, in turn, would create a mechanism that would ensure that those victims who wish to take active part in criminal procedure can do so, while those who do not wish to do so are not involved in the procedures in an unjustified and unnecessary manner.
- Reviewing the extent to which Latvia satisfies the minimal standards of the Directive that apply to victims' rights, one can conclude that, in most cases, Criminal Procedure Law norms include the relevant criminal procedure guarantees, though in some cases they must be made more precise or supplemented.
- Thus, for instance, the Criminal Procedure Law already ensures the right to appeal a decision to refuse to launch or continue criminal proceedings, the right to translation and legal services, the right to recover properties, the right to receive compensation, the right to receive compensation for expenses that have been incurred during the procedure, etc.
- There is a need for comparatively minimal specifications and supplements in terms of a few minimal requirements – the right, for instance, of victims to be informed if the defendant is released from prison, the right to choose a “companion” during the first contact with the relevant institutions, the right to receive written confirmation from the relevant institutions about receiving the petition to launch criminal proceedings, etc.
- It can be expected that the major changes will relate to the introduction of an individualised approach toward each victim in the Criminal Procedure Law.

First and foremost, this has to do with the need to introduce an individualised evaluation of victims. This individualised evaluation must be at the foundation of the application of individualised procedures, which includes a complex view of the entire criminal procedures' scope that relates to victims and their involvement therein. Procedures that are adapted in this manner include the specifics of investigatory operations as well as a whole series of practical aspects – ensuring “understandable” language, identifying the necessary forms of protection, etc.

- All in all, the determined changes in the Criminal Procedure Law cannot be seen as fundamental and they will not change the conceptions of victims and their rights. The Criminal Procedure Law will have to be supplemented with several norms which increase procedural guarantees for victims or groups of victims, but the view of Criminal Procedure Law norms through the prism of minimal standards that are enshrined in the Directive does not reveal strong incompatibilities; only comparatively small improvements are required.
- In conclusion, the greatest changes can be anticipated in the practical implementation of criminal procedure and in the area of support and protection for victims outside of criminal procedure as such. It is specifically from this perspective that the views about the protection of victims must become significantly different in order to satisfy the requirements of the Directive.

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Influence on Latvia's Notarial System by Occupying Powers during the World War II

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The Latin type of the notary services was in place in Latvia in advance of the World War II. The Soviet Union occupied the Republic of Latvia in the summer of 1940, and the Soviet system of law was imposed on the country. On June 22, 1941, the Soviets were replaced by German Nazis, and that regime existed in parts of Latvia until the end of the war. This paper is focused on reforms which the occupying powers implemented in Latvia's notarial system. The author would like to emphasise the fact that the origins of individuals were important when the notaries were selected – that was the most important amendment of all. The origins of individuals during the Soviet occupation meant belonging to a social class or referred to the employment of the individual or his or her parents. The Nazis, in turn, sorted the people on the basis of race and "purity of blood." Both occupying powers ignored the principle of equality when it came to the candidates for notary posts and to notaries themselves.

Keywords: Notary services, public notary, das Notariat, Soviet law, das sowjetisches Recht, laws in National Socialist Germany, Recht in nationalsozialistischen Deutschland.

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Introduction

Although Latvian historians have written many papers over the past decades about the events of the World War II and analyzed the consequences of those events, the fact that this relatively short period of time has not been sufficiently studied despite its saturation with radical and essential changes. There have been only a few publications from law historians which have evaluated the reforms which occupying powers made to the laws of Latvia during the World War II.¹ This is a very broad topic, since over the course of five years the governing ideology was changed several times. This meant the transformation of the entire judicial system, and so this paper is focused only on the transformation of the notarial system in Latvia during the World War II. Before the war, Latvia had the so-called Latin type of notary services, with notaries belonging to the judicial branch of government and being comparable to government officials. However, according to this model, the notaries were not

civil servants, but self-employed. This model was established by a decree in France on September 29, 1791, introducing a unified model for notary services in the entire country.² During the course of the 19th century, the French or Latin type notarial system was adapted in most of the continental Europe.³

The Latin type notarial system was established by the Russian Empire in accordance with new regulations that were approved on April 14, 1866 (*Временное положение о нотариальной части*).⁴ In Latvia the new rules were implemented on July 9, 1889, as a part of a broader set of reforms in the judicial system. After the establishment of the Republic of Latvia the principles of notary operations and their organisation did not change much. On December 6, 1918, the People's Council of the Republic of Latvia approved temporary regulations on Latvian courts and court proceedings. The courts and related institutions continued to use the local and Russian laws that had prevailed until October 24, 1917.⁵ Until the coup of May 15, 1934, the Republic of Latvia was a democratic country in which the rule of law prevailed. Notaries observed the principles of objectivity, neutrality, lawfulness and equality in their work, as required in the Constitution, various laws, and the notaries' code of ethics. A new law on notaries that was adopted on December 14, 1937, was passed in an authoritarian country, but it did not reject the Latin type traditions that had taken root in Latvia, preserving the principles which notaries in Latvia had observed before. Rules concerning notaries, however, were focused on the approval of experienced and educated people as notaries without any thought given to their origins.⁶

The Republic of Latvia was occupied by the Union of Soviet Socialist Republics (USSR) in the summer of 1940.⁷ Soviet law was introduced in the country. One year later, on June 22, 1941, the Soviet occupation was replaced by the Nazi German occupation, and at least in parts of Latvia it remained until the very end of the war.⁸ The Nazis insisted that they would reinstate the laws of the Republic of Latvia, but that was not done because Nazi ideology and the war did much to adjust laws and the judicial system.⁹ Socialist law, in turn, was reinstated in Latvia just as soon as the Soviets reoccupied the country. Between 1944 and 1946, Soviet law was reinstated under conditions of war and thereafter, and the operations of military and civilian institutions were also restarted.¹⁰

The occupying powers of the World War II introduced substantial changes in the organisation and operations of notary institutions, because the occupants reviewed fundamental aspects of the judicial system such as objectivity, neutrality, lawfulness, and the equality of all individuals before the law. Each of the powers implemented its own ideology and its own ideas about enemies of the people. The author will address the way in which the values of the occupying powers have influenced the organisation and operations of notary institutions.

1 Restructuring of notary institutions during the Soviet occupation (1940–1941)

The Republic of Latvia was occupied on June 17, 1940, but sworn notaries did not lose their jobs immediately. It took approximately six months before the occupying power was "legitimated"¹¹ and established by incorporating Latvia into the USSR as one of its Soviet republics.¹² Only at that point the reforms to courts and the judicial system took place. First of all, some laws deriving from the Russian Federation Soviet Socialist Republic (KPFSSR) were implemented. This was done via a decree from the Presidium of the Supreme Council of the USSR on November 26, 1940, "On the

Temporary Application of the Criminal, Civil and Labour Laws of the KPFSR in the Lithuanian, Latvian and Estonian Soviet Republics.”¹³

Sworn notaries continued their work until the end of 1940. On December 13 of that year, the People's Commissar for Judicial Affairs of the Latvian Soviet Socialist Republic (Latvian SSR) issued the Instruction No. 176 to the effect that all notaries were being dismissed as of January 1, 1941. Ironically, this instruction was in line with the 1937 law on notaries, because the law stipulated that notaries were hired and fired by the Minister of Justice.¹⁴ At that moment, there were 58 notary offices in Latvia.¹⁵

Decision No. 704 of the Council of People's Commissars of the Latvian SSR declared that as of January 1, 1941, new regulations about the state notarial system of the Latvian SSR would be in place. All laws and regulations which did not satisfy the new requirements were declared null and void, and on March 4, 1941, the instructions in relation to the issue were released by the People's Commissar for Judicial Affairs of the Latvian SSR.¹⁶

Although limitations on the work of notaries, the way in which notaries were appointed, and the competence of such individuals were all fairly similar to the law on notaries, the Soviet system of notaries differed from the Latin-type notarial system that was accepted in Europe. Notaries in the Soviet system lost their independence and in practice the new rules concerning their work were based on the ideas of Marxism and Leninism.

At the time when Latvia was occupied, the Soviet state had already undergone a certain amount of evolution. Soviet Russia was the “pioneer” and “flagship” of the Soviet law establishment. That was the reason why, in the territories that were occupied during the World War II, only certain laws from the KPFSR took effect at first. Later, special “local” laws were adopted. In some cases they spoke to small local specifics, but in general terms they were based on the KPFSR model. Like other governmental and judicial institutions, the notarial system in the Latvian SSR was established on the basis of examples from the KPFSR. This was done via new regulations on the state notarial system of the Latvian SSR, as adopted on December 16, 1940. The regulations lost force on November 20, 1946, when the Council of Ministers of the Latvian SSR approved Decision No. 958, “Regulations on the State Notarial system of the Latvian SSR.”¹⁷ It, in turn, was replaced by a new law on the Soviet republic's notarial system that was approved by the Council of Ministers on December 9, 1955.¹⁸

In 1940, the governmental notarial system of the KPFSR had experienced nearly a quarter-century of the genesis and evolution of its spirit. After the Bolshevik coup on October 25, 1917, the entire tsarist judicial system was completely dismantled.¹⁹ This related to the belief among those who had taken power that a new phase in the lives of people would begin in the wake of the revolution – no exploitation, and therefore – no rights or forced structures from the government. The new Soviet regime was initially meant to deny the previous regime, because it was believed that “*the proletariat cannot utilise the machinery of a bourgeois country. A socialist revolution must break that machine.*”²⁰

One consequence of the revolution was that Russia's statehood underwent fundamental transformations. Its goal was to set up a society in which there would be no state and no rights, because Communism would be achieved. Since Communism could not be achieved instantly, however, a socialist state was set up to achieve it and to bring communist ideals to life in the society. The socialist state was given much power, because its job was to fight against domestic and foreign enemies.²¹

The restructuring led to the establishment of the Soviet state and its laws. The Soviet state notarial system was fully established between 1917 and 1922.²²

On November 22, 1917, the All-Russian Central Executive Committee approved Decree No. 1, "On the Judicial System," thus liquidating the entire existing judicial system.²³ After the Bolshevik coup, all of the values that had governed Russian previously were revisited. This included families and properties – an area in which stability was partly guaranteed by the notarial system. Decrees in 1918 repealed the right of private real estate ownership, and people were no longer allowed to present, sell or inherit it.²⁴ The People's Commissar for Justice, Dmitry Kurskiy (1874–1932) wrote a letter to accompany a draft civil process code to say that "*under the so-called war Communism circumstances, civil case turnover has almost completely disappeared*".²⁵ Obligation rights only related to alimentation demands, the distribution of family properties, and everyday transactions such as purchase-sale, bartering, etc. These areas, too, were limited.

On February 3, 1918, the People's Council of Commissars (TKP) issued Decree No. 2 "On the Judicial System," specifying that notaries would handle notary functions. A law on the notarial system that had been issued in 1866 was declared null and void, and it was replaced by temporary regulations concerning notary institutions related to committees of people's deputies. The TKP also issued instructions regarding the operations of notary institutions.²⁶ Sworn notaries were replaced by people's notaries who were a part of local councils.

Late in 1918 it was suggested that the notarial system should be shut down altogether, but by February 1919, it was decided to preserve it after all. Notaries were part of the judicial investigation departments of cities and of local people's courts in rural areas.²⁷ It can be said that the notarial system of tsarist Russia was terminated between 1917 and 1921, because the old system of the Russian Empire was entirely dismantled.

The Soviet Union quickly introduced new economic policies aimed at recovery of the destroyed Soviet economy. A particular attention was devoted to the security of transactions and to the notarial system in this regard. A decree issued in March 21, 1921, "On Replacing Tax Revenues from Food and Natural Resources with a Natural Tax," allowed farmers to sell their produce in market, thus partly reinstating private retailing and private capital in trade and manufacturing.²⁸ This meant gradual restoration of civil law practices. The economic situation in the country became more stable.

On October 4, 1922, the Soviet government approved a law on notary services in the Russian SSR.²⁹ Prior to this, the government published theses about the notarial system, emphasising that the system was necessary to enable the government to monitor aspects of civil law, particularly in those cases where a government institution was one of the parties in a case. The public and legal nature of the Soviet notarial system was particularly emphasised, thus explaining the difference between the Soviet system and the notarial system abroad: "*The notary is a government official who is paid by the state. The notary works to guarantee socialist rights.*"³⁰ This law completely organised the Soviet notarial system. In the Latin notarial system, notaries enjoy the typical freedom and independence of judicial officials. Clients pay for the work of notaries in accordance with state-set fees. Soviet notaries, in turn, were part of the national system.³¹ Notaries were paid by the state, but their status was that of civil servants. The job of a notary lost its previous prestige and importance in the Soviet state.

In accordance with the 1922 law, notaries were appointed by the presidiums of the People's Legal Councils of the various districts of Russia. The job was open to people with suffrage rights, i.e., those who were not limited in terms of their political rights.³² The appropriateness of individuals for the post of a notary had previously been evaluated on the basis of their citizenship, qualifications and obedience before the law.³³ Now, however, other criteria were in place. Not all citizens could be hired for state jobs, because some of them were seen as enemies of the people and were limited in their rights.³⁴ This was clearly seen in the first declarations approved by the new regime. On January 12, 1918, for instance, the 3rd All-Russian Plenary Session of Workers', Soldiers' and Peasants' Councils declared that "*those who engage in exploitation have no role in any of the country's organs of power. Power must fully belong to the working people*".³⁵ One's status as a member of the community of working people depended on one's employment and lineage (the employment of one's parents), and this was true also when it came to selecting candidates for notary jobs. The 1922 law made it clear that the most important element in evaluating candidates for such jobs was the person's lineage and his or her belonging to the working people. Only those candidates who satisfied the criteria were further evaluated in terms of their knowledge and their experience.³⁶ Candidates had to pass a test to prove their knowledge about notary issues. The People's Justice Commissar approved a programme for the testing process. Late in 1922, a provincial court in Moscow established the first courses to train notaries, and people who were loyal to the new regime learned the fundamentals of politics, as well as of material and procedural law.³⁷

Soviet law on the notarial system spoke to instances in which notarial functions could be handled by other government officials – judges and local government representatives.³⁸

The Soviet notarial system was characterised by its dual linkage to the Ministry of Justice and the court, as inherited from the Russian Empire.³⁹ Notaries had limited opportunities to merge several jobs. They were allowed to work as pedagogues and to be elected to office. The right to be elected to offices in state and local government systems was contrary to the principle of a separation of powers, as well as the Latin-type order of notarial systems. Basically, Soviet notaries preserved their traditional functions:

- 1) Preparing notarial documents under circumstances provided for by law;
- 2) Notarisation of contracts if required to do so by law;
- 3) Notarisation of contracts if not required to do so by law, but desired by the parties;
- 4) Preparation of documents from notarial books and registers;
- 5) Storage of documents.⁴⁰

Other functions were also assigned to notaries that had previously been handled by different institutions.⁴¹ These included the issuance of confirmation about citizens who were lost without a trace or had died, confirmation that citizens were alive, and transfer of announcements from citizens and institutions to other citizens and institutions.⁴²

During the period before Latvia's occupation, the original 1922 law on the notarial system was replaced with several new versions:

- 1) The August 24, 1923, the law on the state notarial system, which was almost the same as the previous edition apart from a few precisions of norms so that they would be in line with the new Code of Civil Process;⁴³

- 2) The October 4, 1926, the law on the state notarial system of the Russian SSR was linked to the establishment of a federative country and to a decision taken by the Soviet Commissar on People's Council on May 14, 1926, on the fundamental principles of organising the state notarial system. Local councils of people's deputies appointed notaries on the basis of recommendations from a court. The law also expanded the competence of notaries;⁴⁴
- 3) The July 20, 1930, Russian SSR law on the state notarial system,⁴⁵ which involved a revision of the previous law so as to specify changes in civil and civil procedure laws.⁴⁶

The new versions of the law did not implement any essential changes in the organisation of the work of notaries or their jobs, instead expanding the competence of notaries. All of the republics of the Soviet Union, except for the Ukrainian SSR, introduced the model of notary services that was created in the Russian SSR. When new regulations on the Soviet Latvian state notarial system were drafted in 1940, the Soviet Russian, law on the state notarial system issued on July 20, 1930, was used as a foundation for the work.⁴⁷

Early in 1941, 47 state notary offices were established in the Latvian SSR. They employed 188 people, among whom 47 were notaries. Former notaries (19), former judges (5), former employees of the Land Book (4), former notary assistants and secretaries (17) and other people were appointed to office. Of them, 13 had a higher education in the law, one had taken a three-month course on the law, three had various higher education, 27 had a secondary education, and three had an elementary education. Much attention was devoted to the caste of each candidate, looking to see whether he or she was a member of the working people or an exploiter. The job was not open to people whose ancestors were "exploiters" or their "running dogs." Neither was it open to people who were not politically trustworthy because they had been politically active in the Republic of Latvia. Active social and political employees from the period of Latvian independence were dismissed if they were notaries.⁴⁸ The notaries who were approved in 1941 were declared to be good in that they satisfied Soviet criteria about Soviet citizens. Of these people, 20 were working people, 15 were farmers, three were craftspeople, and nine were servants. These data were presented to the Justice Commissar, Andrejs Jablonskis (1880–1951) by the director of the Notary Division, Rūdolfs Velde, in early 1941.⁴⁹

The restructuring of the entire state apparatus occurred in a methodical way which involved an understanding of mission and ideological values, because the Russian SSR had already developed experience in terms of establishing a socialist system of law. The Soviet notarial system reflected the legal relations and ideological positions of the society of the day, and this significantly differed from the previous system. Regulations about the system directly reflected the limits on civil law transactions (banning people from exploiting others, i.e., hiring salaried workers and removing manufacturing resources from the civil law system). Private ownership was limited, properties which the Soviet state considered to be manufacturing resources (land first and foremost) were nationalised,⁵⁰ the concept of "private property" was replaced with the idea of "personal property", public law dominated over private law,⁵¹ the state monopolised all areas of public relations (with notaries being salaried civil servants), the party took on a controlling role in all areas of public life, and there was only one proper world view that was rooted in Marxism-Leninism (those who took tests to become notaries had to answer political and ideological questions). Soviet doctrine did not distinguish between the private and the public law, feeling

that all rights were of equal public importance. State property hegemony and the regulation of economic life with national economic planning processes dictated the fact that imperative norms in the Soviet Union dominated over dispositive norms.⁵² Of essential importance here is the fact that the Soviet state, as opposed to a democratic one in which the rule of law prevailed, did not believe that all people were equal and had equal rights. Soviet ideology stated that those who were seen as enemies of the working people could face limitations of their rights⁵³ and were subject to repressions.

2 Restructuring of notary services during the Nazi occupation (1941–1945)

The Soviet occupation in Latvia was replaced by a Nazi German occupation from 1941 until 1945. Although Latvian law was formally reinstated during this period, several major amendments were made to it.⁵⁴ The amendments were based on Nazi ideology. Germany's intentions in Latvia were precisely marked out by Reichsminister Alfred Ernst Rosenberg (1892–1946), who wrote: *“Estonia, Latvia and Lithuania must become a German protectorate so that these territories can later be turned into components of Greater Germany. Racially appropriate elements shall be Germanised and colonised with the representatives of the German race, while undesirable elements shall be destroyed.”*⁵⁵

The occupied Republic of Latvia was turned into one general district that was divided into the Liepāja, Jelgava, Valmiera, Daugavpils and Rīga rural region commissariats. The city of Rīga was a separate unit of governance. Although instructions on a civilian system of governance had been issued, military governance remained in place in Latvia between June and August of 1941. The Germans established a branched structure of governance in Latvia, with a great many civil servants, police and gestapo officers, constables, gendarmes and representatives of the Wehrmacht. Accordingly, a great many German civil servants worked in Latvia. Historian Antonijs Zunda wrote that *“there were several reasons for this. First of all, many German institutions were established here in relation to the planned colonisation of the Baltic States. Secondly, Germans themselves wanted to live in the Baltic provinces, because the level of material supplies was better here than in Germany. Many joined the civil service because that allowed them to avoid military service.”*⁵⁶ The historian goes on to emphasise the fact that *“an exaggerated bureaucratic apparatus was typical not only of the Soviet, but also the Nazi occupation regime.”*⁵⁷ All instructions and rules were published in Latvian and German, but if there were differences in the texts, the official version was the German one.⁵⁸

The German regime reinstated the notarial system of the Republic of Latvia. The general commissioner of Latvia, Otto-Heinrich Drechsler (1895–1945), issued a decree in this regard on October 15, 1941: *“I declared that notaries would reinstate their operations in the territory of the independent Latvian state as soon as I approved them. Laws had to be implemented that were in force on June 17, 1940. Sections 37, 60, 62 and 76.5 of the December 14, 1937, law on notaries are null and void. I have taken over the rights which the law awarded to the justice minister.”*⁵⁹ It is important here that the notary law that was approved during the authoritarian period of governance in Latvia, with the Minister of Justice having an influence on the notarial system, served the interests of the Nazi occupants, because enabled allowing the general commissioner to assume control over notaries by taking over “the rights of the

justice minister.” Although the operations of notaries were reinstated in accordance with the 1937 law, there were fundamental alterations in regulations that related to notarial acts and books, their organisation and their storage. The decree stated that “*Notarial acts and books which apply to:*

1. *Confirmation of heirs;*
2. *Protection of inheritance;*
3. *Proclamation of someone being lost without a trace or dead;*
4. *Mortgaging of buildings;*
5. *Executive acts on the basis of documents shall be transferred immediately insofar as that has not yet happened to the relevant judicial institutions.*⁶⁰ Because of these amendments, notaries lost much of their independence and sovereignty.

On March 13, 1942, a decree was issued on the temporary operations of local judicial institutions in the Latvian general district. The decree set out foundations for the appointment of judges as well as prosecutors, investigatory judges, commanders of places of incarceration, notaries, attorneys and private attorneys.⁶¹ Section 4.1 of the decree stated that all people involved in the judicial systems including judges, “*shall be presented by the general director of the Judicial Board to the general commissioner for approval.*”⁶² Section 8.1 stated that “*local courts shall begin their operations in civil cases, particularly civil disputes, insofar as their authority reaches.*”⁶³ Although the operations of courts were restored, the handling of public registers was suspended until new rules about them could be put in place.⁶⁴

It was only on June 13, 1942, that the new rules were approved on the rights and activities that were in force in the general district of Latvia in terms of rulings and decisions.⁶⁵ The new rules affirmed the existing German tactic of leaving “the rights of the independent Latvian state” in place insofar as this was not in violation of Nazi ideology and the interests of Germans in Latvia.⁶⁶

The rules decreed that “*as of July 2, 1941, norms that were in force in the independent Latvian state until June 17, 1940, are in force in the general district of Latvia insofar as they:*

1. *Are not in violation of the taking over of governance by the Great German state, or*
2. *Have not been amended or repealed since July 1, 1941 and have not involved different rules since July 1, 1941.*⁶⁷

Legal norms that were introduced by the Soviet regime between June 18, 1940, and July 1, 1941, were nullified. It is of an essential importance here that this applied not only to the laws but also, in part, to legal transactions. Section 3 of the regulations stated that:

- “1. *Legal relations emanating from family and inheritance law shall be based on the norms that were in force as of June 17, 1940, even if these relations were created between June 18, 1940, and July 1, 1941;*
2. *Other legal relations that were created between June 18, 1940, and July 1, 1941, shall also be considered on the basis of the legal norms that were in force on June 17, 1940, insofar as the application of Soviet law is in contradiction to healthy legal emotions.*”⁶⁸

Similar legal regulations applied to court rulings and decisions handed down by courts during the Soviet era, as well as to decisions taken by Soviet-appointed notaries in relation to wills and heirs.⁶⁹ This was clearly dictated by the regulations:

“5. § *The following rules shall apply to court rulings and decisions, as well as to notary decisions related to the notarisation of wills and heirs, as issued in Latvia between June 18, 1940, and July 1, 1941:*

6. § *The following shall be considered null and void:*

1. *Decisions by Soviet notaries related to the notarisation of wills and heirs, Soviet court rulings and decisions that amend or overturn Latvian court rulings and decisions that took force prior to June 18, 1940;*
2. *Soviet court rulings and decisions that had not yet taken effect as of July 2, 1941.*⁷⁰

Unlike Soviet ideology, Nazi ideology did not attack the idea of private property. This meant significant differences in legal regulations, particularly in terms of private law. This, of course, had an influence on the work of the notarial system. On April 28, 1942, the commissar for the rural district of Rīga issued an announcement to owners of nationalised buildings, asking “*the former owners of nationalised buildings to submit requests for the transfer of the said properties to their management and use.*”⁷¹

The Nazis restored the system of private property, as well as the state-regulated and controlled traditional private law circulation, insofar as this was possible under conditions of war. However, the Nazi regime also amended laws in a manner that was alien to the Republic of Latvia, because the equality of residents before the law and the judicial system was liquidated. People were grouped in accordance with their lineage. For the Soviet regime, this first of all applied to social class, but the Nazis divided up the population on the basis of race and “purity of blood.”

Inspired by social Darwinist theories, Adolf Hitler (1889–1945)⁷² established a national socialist political concept in which he saw the state as a unified and healthy organism for the German nation. Representatives of other nations in Greater Germany were aliens or “guests” who could be used to benefit the Germans or destroyed. Soon after the Nazis took power, on April 7, 1933, the regime approved a law on the restoration of the professional civil service, which stated that only Aryans were allowed to be civil servants. Officials who did not satisfy this requirement were sacked.⁷³

The Nazis insisted that Aryans were a “super race” that consisted of Germans alone. The government took care of racial purity and hygiene, banning people with several inborn diseases⁷⁴ from procreating, and also banning mixed marriages.⁷⁵ On September 15, 1935, a law to protect the blood and honour of the German nation was approved, barring people with German or related blood to marry Jews (a Jew was anyone who had at least one Jewish grandparent).⁷⁶ Existing marriages could be nullified, and this involved a system in which prosecutors filed objections before a court.⁷⁷ Children who were born in violation of the rules about an unacceptable marriage were seen as bastards and were known as “hybrids” (*Mischling* in German).⁷⁸ Although the Nazis primarily attacked Jews, other non-Aryans, “people with mixed blood”, or people who were married to Jews or in-laws of Jews, faced limitations on their rights.⁷⁹

Nazi Germany used the idea of racial purity to try to transform the society. All sectors of the law, beginning with criminal law and concluding with family law, were amended in accordance with the new concept. New and ever new laws were approved. On October 18, 1935, for instance, there was a new law to protect the inborn health of the German people (*Gesetz zum Schutze der Erbgesundheit des deutschen Volkes*).⁸⁰ These laws represented substantial interference in the private lives of local residents. These changes affected not just individual laws or sectors of the law, but the entire system of jurisprudence.

In marking out his political positions in 1933, Hitler insisted that only proper Germans could work as notaries. This racial qualifications for notaries were an entirely new idea in the system.⁸¹

Nazi ideology was implemented in the occupied Latvia in terms of everyday lives and the law. People in a single territory were subject to different legal relations.⁸² This was because on April 27, 1942, a decree was issued on the application of German law to German citizens in the occupied Eastern territories. Germans were subject to the law of Greater Germany, and the occupied territories had a system of courts and institutions which only worked with Germans.⁸³ First of all, German courts were established, and the assignment of cases was based not on territorial or legal principles, but instead on the lineage of the parties. The courts only handled cases in which one or both of the parties were Germans. If there were questions about this, then the German Supreme Court was asked to rule on the matter: *"Where the nationality of a party to a case creates doubts about whether the case should be heard by a German or local court, then a ruling shall be handed down by the German Supreme Court with mandatory effect. The local court shall suspend the hearing of the case and transfer it to the German Supreme Court via the offices of the general commissioner."*⁸⁴ In those Eastern territories that were occupied by the Nazis, a German notarial system was established to provide services only to Germans; in Latvia it took place in 1943.⁸⁵ In reporting on this new situation, the newspaper *Tukuma Ziņas* reported that *"notaries appointed in Germany can be given rescindable authority to serve as German notaries in the occupied eastern territories."*⁸⁶ This meant that most employees of the German notarial system were appointed in Germany, though there were exceptions which were described in Section 8. § (1) *"In certain cases, German citizens who have not been appointed as notaries in Greater Germany, but are able to serve as judges, may be appointed as German notaries in the occupied Eastern territories."*⁸⁷

Germans themselves were divided into two groups in accordance with their lineage – the so-called State Germans (*Staatsdeutsch*) and those who belonged to the German nation (*Volksdeutsch*). Baltic Germans in Latvia were in the latter group. This division was included in the legal norms such as the February 17, 1942 decree to supplement laws related to punitive sanctions in occupied Eastern territories: *"The sentence of death or, under less serious circumstances, a sentence of hard labour shall be handed down for anyone who engages in violence against a State German or a person belonging to the German nation because of that person's belonging to the German nation."*⁸⁸

The anti-Semitism that was characteristic of the whole Nazi system was also manifested in the law. Nazi-occupied Latvia limited the right of Jews to choose their professions. They and their relatives were not allowed, for instance, to work for courts or related institutions. The aforementioned decree of March 13, 1942, on temporary operations of local judicial institutions in the general district of Latvia stated, in Section 4.2, that *"Jews, hybrid Jews, and persons married to or direct in-laws of Jews shall be strictly prohibited from any activities at local courts."*⁸⁹

The right of Jews to a fair trial was also circumscribed. An April 28, 1942, decree on customs law in the Eastern territories, for instance, stated that *"6. § (1) The Reich commissar of the Eastern territories may temporarily decree that process of appeals, collection of debts and sanctions can depart from the legal ideas of Greater Germany. The said shall not be in effect insofar as defendants or petitioners who are not Jews have the right to demand a court trial in the relevant case."*⁹⁰

Notaries, too, encountered the consequences of Nazi racial policy in terms of attacks against Jews. Executive regulations about things to be done with Jewish property in the eastern Reich commissariat were approved on October 14, 1942: “Section 1. All property of Jewish residents in the eastern Reich commissariat, including lawsuits filed by Jews against third parties, shall hereby be seized retroactively to the date upon which German units occupied the relevant territory.” Section 5 added that “legal transactions with Jews that have been concluded since the occupation of the district shall receive the authorisation of the general commissioner or his authorised institution if they shall be in force. Such authorisation shall be issued only upon demand. The demands shall be filed prior to the deadline of December 31, 1942.”⁹¹

As noted, Nazi Germany formally reinstated laws that were in force in Latvia prior to the Soviet occupation, however, the occupants made fundamental amendments. The rule of law was ignored in that the approved norms were often retroactive, and there was no more equality before the law and the courts – principles that were a part of the law in the Republic of Latvia. Extraordinary courts were established, and acts which could be in violation of the law were implemented (because, as noted above, “The Reich commissar of the Eastern territories may temporarily decree that process of appeals, collection of debts and sanctions can depart from the legal ideas of Greater Germany”).⁹² All of this created a sense of insecurity when it came to legal relations. Many of the limitations directly or indirectly affected the notarial system, too.

Summary

1. Prior to the Soviet occupation of Latvia, the December 14, 1937 law on notaries was in effect. According to the law, notaries belonged to the judicial system, were independent in their duties, and were paid for their work by their clients. Qualifications for the job of a notary set out the criteria that were related to education, work experience, age and citizenship. Notaries were banned from holding other jobs apart from educational work. Latvian notaries were expected to observe the principles of objectivity, neutrality, lawfulness and equality among individuals. This was enshrined by law and in the code of ethics of notaries.
2. When the Republic of Latvia was occupied by the Soviet Union during the summer of 1940, socialist law was implemented there. Regulations about the Soviet Latvian notarial system that were implemented on December 16, 1940, nullified the 1937 law, instead setting up a Soviet notarial system on the basis of the one in the Russian SSR. All of the notaries of the Republic of Latvia were dismissed on January 1, 1941. The former notaries who “were not enemies of the working people” were approved as Soviet Latvian notaries. Of 57 notaries who had worked in Latvia prior to the Soviet occupation, only 19 were reinstated.
3. The Soviet notarial system differed from Latvia’s model in that the wages of notaries were paid by the state and that the independence of notaries in their work was severely circumscribed. Notaries were granted competence in relation to issues that had previously been handled by other institutions such as courts and civil servants. Notaries were allowed to hold not just educational jobs, but also elected office, jobs as court assessors, etc. This violated the principle of separation of powers. The most essential difference, however, involved the qualifications of notaries, with new qualifications such as lineage and political correctness becoming more important than the candidate’s experience and knowledge.

Soviet law ignored the principle of equal rights among people, because some people faced limited rights, including the right to work as a notary.

4. The Nazi German occupation replaced the Soviet occupation in Latvia from 1941 until 1945. Although the Nazis insisted that they would reinstate the laws of independent Latvia, the promise was not fully kept due to Nazi ideology and the war. The general commissioner of Latvia, Otto-Heinrich Drechsler issued a decree on October 15, 1941, to reinstate the operations of notaries and the December 14, 1937 law on notaries, but several sections of the law were declared null and void. Administrative rules were substantially changed in terms of the handling and storage of notarial acts and books.
5. The Nazi regime, like the Soviet regime, ignored the principle of equal rights for everyone, because people were limited on the basis of their lineage. Where the Soviet regime had considered a person's lineage first and foremost on the basis of social class, the Nazis divided people up on the basis of race and "purity of blood." This was based on ideology and the social Darwinist theory of an Aryan "super race" made up of pure-blooded Germans and no one else. People who were not Aryans – Jews and the Roma, for instance – faced limitations on their rights, including the right to hold government positions and notary jobs.
6. People in a single territory were subject to various legal relations, because, following the April 27, 1942 decree on the application of German law for German citizens in the occupied Eastern territories, Germans were subject to the law of Great Germany, with a system of courts and other institutions in the occupied territories that only worked with Germans. German courts were established in early 1942. They handled the cases in which one or both parties were Germans. A German notarial system was established in 1943 with German notaries providing services exclusively to German clients.

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- ¹³ Padomju varas konstitucionālie akti Latvijā (1917–1957) (The Constitutional Acts of the Soviet Regime in Latvia (1917–1957). Rīga: LVI, 1957, p. 270.
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- ¹⁵ These data come from a report that was filed by Rūdolfs Velde, director of the Notary Division of the Latvian SSR. The Soviet state did not recognise notaries, as was the case in countries which accepted the Latin type of notary services, Latvia included, instead recognising notary offices. See *Велде, Р. Начальник Отдела нотариата Латвийской СССР “Докладная записка о деятельности государственных контор Латвийской ССР в первом квартале 1941 года.”* (Velde, R. “A report on the operations of state notaries in the Latvian SSR, first quarter of 1941”).
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- ²² The word “state” is emphasised here because notaries in the Soviet model lost the independence that is typical for Latin-type notarial systems. A 1955 set of regulations about the state notarial system of the Latvian SSR does not speak to the location of notaries in the state apparatus or to the notary's rights or guarantees of independence.
- ²³ For the decree, see: Всероссийский Центральный Исполнительный комитет “Декрет о суде” (22.11.1917). Available: <http://rusarchives.ru/statehood/08-18-dekret-o-sude-1917.shtml> [last viewed 29.05.2013].
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Infringement of the Inviolability of the Home in Russian and German Criminal Codes

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The article focuses on the analysis of the norms of the Russian and German Criminal codes, providing for criminal liability for infringements of one of the main human rights – inviolability of the home (Article 139, Russian Criminal Code; Sections 123, 124, German Criminal Code).

Keywords: Russian Federation, Germany, Criminal Code, criminal liability, infringement of the inviolability of the home.

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Infringement of the inviolability of the home in Russian and German Criminal codes

Legislation of many countries sets down criminal liability for the encroachment on one of the main rights of a man – the right to the inviolability of the home. The legal basis of this right is provided in various international legal documents and in the national constitutions. For example, Article 12 of the Universal Declaration of Human rights stipulates that “*no one shall be subjected to arbitrary interference with his... home ...*”.

This main right can be enjoyed by any person, while the protection embraces only those premises, where a person’s private life is conducted, and the right to the premises arises from either ownership, tenancy, use or other legal relations.

Article 23 of the Russian Constitution provides that “*home is inviolable. Nobody can enter the dwelling against the will of people, living in it, with the exception of cases set down by law or by a court order*”.

It is noteworthy, that “*the scope of premises, protected by Art. 25 of the Russian Constitution, is quite broad. Apart from houses and apartments, this scope includes caravans, temporary cabins, hotel rooms, yachts etc., if they are used as living quarters by people who have the right not to admit others into the place of their private lives. In certain cases this condition can be also applied to professional premises*”¹.

In Germany inviolability of the home is set forth in Article 13 of the Basic Law of the land (1949):

“(1) Home is inviolable.

Searches may be ordered only by a judge or, in exigent circumstances, by other organs as specified by law, and may be carried out only in the form prescribed by law.

In other cases intrusion into a dwelling and other abridgements may only be excused by purposes of averting general danger or danger to particular persons, and, as provided by law, for averting the threat to general safety and order, specifically, for urgent relief of housing shortage while combating epidemics and protecting endangered juveniles”.

Both Russian and German Criminal Codes set down the norms, which describe the elements of criminal offences relating to interference with the inviolability of the home. Chapter 19 of the Russian Criminal Code contains Article 139 “Violation of the inviolability of the home”, while Chapter 7 “Crimes against public order” in the Special part of the German Criminal Code sets down two criminal offences, violating this main right of man and citizen: breach of the peace of the home (§ 123) and serious breach of the peace of the home (§ 124).

To proceed, we should consider these norms in detail.

Public danger of the crime, specified in Art. 139 of the Russian Criminal Code, is determined by unlawful intrusion into private life of a citizen, abridgement of his will and, thus, by infringement of personal rights and freedoms. It stems from the fact that Art. 139 of the Russian Criminal Code protects only those premises where a person’s private life is conducted, and the right to the premises arises from either ownership, rental, use or other legal relations.

The immediate object of the crime is social relations, providing for the inviolability of the home of man and citizen. Anyone can be a holder of the right to the inviolability of the home (a Russian citizen or a person not enjoying Russian citizenship). The legal framework for this is Art. 12 of the Universal Declaration of Human rights, which sets down that “*no one shall be subjected to arbitrary interference with his...home ...*” Therefore, when the term “citizen” is used in describing the elements of the offence in the Russian CC, it should be interpreted broadly. Another fact of importance is the person’s lawful residing in the dwelling (e.g. as an owner, tenant etc.).

The objective aspect of Art. 139 of the Russian CC can be described as unlawful entering the dwelling, committed against the will of a person residing in it. Thus, inviolability of the home is construed as any unlawful intrusion into other’s dwelling (e.g. staying in the dwelling without the owner’s knowledge, unlawful use of the dwelling in the owner’s absence, etc.).

Moreover, the Russian CC of 1996 discarded the particularization, characteristic of the Criminal Code of the Soviet Russia (1960). Article 136 of the Soviet Code specified unlawful search, unlawful eviction or other unlawful actions.

The Federal law of March 20, 2001 added a note to Art. 139 of the Russian CC. It specifies how the term “home”, used in the CC norms, should be interpreted. This term embraces

- 1) individual houses with all its residential and non-residential premises;
- 2) residential dwellings regardless of its form of ownership, which are part of housing resources and suitable for permanent or temporary habitation;
- 3) other dwellings or premises, which are not part of housing resources but designated for temporary habitation².

Thus, in the Russian CC “home” is construed as, first and foremost, a house, an apartment, a room, in which people live and which is designated for permanent or

temporary habitation. The position of the Russian judiciary regarding the qualification of the perpetrator's actions as violation of the inviolability of the home has a sound legal basis. It considers irrelevant the period of time during which the victim has been using the premises as dwelling. Court opinions of some other countries also qualify unlawful intrusion into premises, provided to the victim for temporary use (for example, a hotel room) as infringement of the inviolability of the home, if it happens against his will. These perspectives are, certainly, well-founded³.

In the Russian legislation the notion "unlawfulness", when applied to intrusion, is defined, as follows. The Russian Constitution sets down, that intrusion into one's home is allowed only in the cases provided for by the federal law or by a court order. All other cases of intrusion into one's home against the resident's will are deemed to be unlawful.

Intrusion is considered unlawful, if there is no legal basis for an unauthorized person to be in his home. Russian courts do not qualify as violation of the inviolability of the home any actions, related to intrusion in exigent circumstances (for example, to prevent flooding, fire, etc.). These cases are considered as exigency, though formally they may infringe a person's right to the inviolability of the home.

The notion of "intrusion" has rather a broad interpretation in the Russian judicial decisions. It includes a secret or open intrusion into the dwelling, committed with overcoming obstacles or without such, if the perpetrator intrudes into the borders of the dwelling without consent of the people residing in it. *"Intrusion into the dwelling is criminal not only in case of open disregard for obtaining consent, but also if it is carried out deceitfully, for example, by providing a forged search warrant, etc."*⁴ Along the same lines, not only intrusion into the dwelling, but also installing special technical devices for audio and video surveillance therein without the knowledge of the residents, should be deemed as unlawful intrusion.

The subjective aspect of the crime, defined by Art. 139 of the Russian CC, is characterized by the direct intent. The perpetrator of the crime is aware that he is violating the inviolability of the home and intends to commit this action. The motives and aims of the violation may be various. However, for the purpose of distinguishing between the violation of the inviolability of the home and arbitrary behaviour (Art. 330 of the Russian CC) determination of the motive is of a special significance. Courts have to consider cases, when a person, that *de facto* has lost his right to reside in the dwelling, intrudes into it against the will of its residents. A former spouse who has long been living in a different place can serve as an example. Such an action is often viewed by courts as violation of the inviolability of the home.

The perpetrator of the crime is a legally sane person that has reached the age of 16.

The crime is deemed completed, starting with the moment of intrusion into the dwelling. Then a question arises: can we regard as intrusion the following action: the perpetrator rings the doorbell, the host opens the door, and the perpetrator puts his foot into the doorway, thus preventing the closing of the door? In a view of judicial decisions of a number of countries, we should answer this question in affirmative⁵.

Article 139, part 2 of the Russian CC describes an aggravated version of this crime. The aggravating feature is using violence or threatening to use it while intruding into the dwelling. The violence, used by a person while illegally intruding into the dwelling, can be manifested in inflicting minor bodily harm, battery, etc. Threatening to use violence is manifested in the moral pressure on the victim, indicating that the perpetrator intends to use physical violence. If in the process of illegal intrusion into the dwelling grievous or medium gravity harm or death is caused,

the perpetrator's actions are defined cumulatively by Art. 139 and Art. 111 of the Russian CC, or Art. 105. It is also maintained that, if during the illegal intrusion torture is used, the perpetrator is responsible cumulatively for offences described in Art. 139 and 117 of the Russian CC.

A particular aggravated version of this crime is described in Art. 139, part 3. Its salient feature is perpetrator's use of his official capacity to intrude into the dwelling. It is justly argued that "*such persons violate the inviolability of the home when they intrude into other's dwelling without the relevant competence (e.g. if the warden of a dormitory conducts a search, an inspection, a seizure), and when these actions are performed by competent persons without legal grounds, or even with legal grounds but without a warrant (e.g. an investigator conducting a dwelling inspection without a prosecutor's or a court's order)*".⁶

When a person abuses his power, and his actions possess the relevant elements of the crimes, he may be prosecuted cumulatively for the offences described in Art. 139 and Art. 286 of the Russian CC (if the perpetrator holds a government office) or for crimes described in Art. 139 and Art. 203 (if the perpetrator is a senior manager of a business or other entity).

Currently, in Russia there are rather few court cases relating to violation of the inviolability of the home (Art. 139 of the Russian CC). In contrast, in Germany prosecutions for violating Art. 123 of the German CC are mounted more often.⁷

Section 123 of the German Criminal Code sets down criminal responsibility for violation of the inviolability of the home. In comparison with Art. 139 of the Russian CC, this section offers a broader definition of the crime. It can be explained by the fact that Section 123 of the German CC "Violation of the inviolability of the home"⁸ construes "home" not only as a dwelling, but also as business premises⁹ or enclosed premises, or closed premises, designated for public services or transportation. Here lies the main distinctive feature pertaining to the violation of the inviolability of the home according to the German CC and its fundamental difference from the criminal offence described in Art. 139 of the Russian CC.

Special features of legally protected interest (*Rechtsgut*) in Section 123 of the German Criminal Code

In German criminal law writing there is no uniformity regarding the content of the legally protected interest (*Rechtsgut*), which is infringed by this criminal action. Such diversity of opinion is rooted in the classification of this legally protected interest as an individual, not public interest, despite the location of Section 123 in the chapter describing criminal offences against public order (Special part of the German CC). This is the point of view held by the majority of German legal scholars and supported by a long history of judicial decisions.¹⁰ Their views can be summarized, as follows: a legally protected interest in this case is the right to peace (privacy) in the home (*Hausrecht*)¹¹, which is substantially different from the civil law concept of ownership. This interest can be described as "a special individual legal interest"¹². It means, among other things, that a person has a discretionary right to decide who can be present and who cannot be present in a certain area. Another line of reasoning maintains that this norm protects a limited private space of a particular person.¹³ Traditionally, this legal interest (*Hausrecht*) "is embodied in a personified limited sphere of freedom of a certain person".¹⁴ Therefore, in the view of

some German legal scholars, this criminal offence is a special delict against personal freedom and infringes on a special individual personified legal interest.

The opponents of the perspective discussed above are the minority. They argue that a legal interest protected by this norm cannot be defined as a special individual legal interest.¹⁵ In their opinion, Section 123 embraces not only dwellings but also business premises, and the classification of these as a personal area appears questionable. However, in my view, the first definition of the legally protected interest is more valid, since any of the premises, specified in Section 123, should be, to some extent, protected from unauthorized access, not desirable by a legally authorized person. The access procedure to the premises, specified in the norm, can obviously vary. However, this norm provides different protection to a dwelling and to business premises. When applied to a dwelling, it protects a private, family life of a man, the access to which can be granted only by this person. Business premises (for example, a commercial facility) also need protection against unauthorized access – in particular, businesses need to protect commercial secrets, production-related features, as well as their production or working areas.

To sum up, both Russian CC and German CC norms on the violation of the inviolability of the home protect rights and interests of a person and provide for inviolability of his dwelling.¹⁶ A more consistent approach (in comparison with Special part of the German CC) is manifested in the Russian CC, as this norm is contained in Part VII “Crimes against a person”.

Section 123 of the German CC contains a long descriptive disposition: “*Whoever unlawfully intrudes into the dwelling, business premises or other enclosed property of another, or into closed premises designated for public service or transportation, or whoever remains therein without authorization and does not leave when requested to do so by the authorized person...*”

German legislators, as mentioned above, offer quite a broad definition of the inviolability of the home. The protection, according to this norm, is guaranteed not only to a dwelling as such, but also to business premises or enclosed premises, or closed premises, designated for public services or transportation. Here lies one of the main differences of the norm, according to the German CC, from the criminal offence described in Art. 139 of the Russian CC. Let’s take a closer look at these terms.

“Dwelling” is construed as a generic notion. It comprises all residential premises of a person or a group of people, a family, as a rule, or those used for the same purposes.¹⁷ This notion embraces hotel rooms, boats, trailers and camping tents, i.e. “dwellings”, designated for temporary residence. However, “dwelling” does not include the means of transport.¹⁸ This can be justly accounted for by the difference of purpose – the means of transport are not designated for residence. Russian legal scholars hold the same view.

The opinion of German courts, arguing that the term ‘dwelling’ does not embrace the premises used only for temporary night lodging, appears to be quite valid.¹⁹

In some cases German courts also view auxiliary premises (e.g. backrooms, halls, stairwells, sanitary premises, etc.) as “dwellings”.²⁰ Furthermore, if they are not a part of a person’s private area, still, in certain cases they may be classified as enclosed premises. The term ‘enclosed premises’ also comprises newly erected houses and tenantless residential buildings. Specific features of the German norm on the inviolability of the home, in my opinion, fully support such a perspective.

To conclude, in the framework of the violation of the inviolability of the home in the Russian and German Criminal codes the notion of ‘dwelling’ is interpreted similarly. However, this is the only common ground shared by these codes, since German legislators have a broader view regarding the violation of the inviolability of the home: this crime implies not only intrusion into a dwelling, but also into business premises or other enclosed property of another, or into closed premises designated for public service or transportation. Let us proceed with analysis of these notions.

The notion “business premises” covers detached premises, used temporarily or permanently mostly for business, research, artistic or other similar activities.²¹ Some German legislators argue that the term can also embrace movable structures, for example, trailers, travelling circus, etc.²² In my view, such an interpretation is perfectly justified.

The following court cases illustrate the viewpoint described above.

The Supreme court of the land (*Oberlandesgericht*) held in Cologne on July 4, 1982 stated, that the premises, relating to foreign missions and consulates on the German territory, and if they are not dwellings, are classified as business premises (*Geschäftsräume*), according to Section 123 of the German CC.

According to the criminal case files, at 9 a.m. on August 3, 1981 the enclosed territory of the Iranian Embassy in B. was broken into by members of Muslim student society. This action was a part of the protests against persecution of religious and political dissenters, in which the Khomeini government was, in their opinion, involved. Some protesters took control over and disabled the security system of the consulate. Placards, condemning Khomeini’s actions, were brought into the Embassy. The staff of the embassy demanded that the protesters leave the consulate and the area immediately. The commanding police officer also demanded to leave the enclosed territory. The protesters did not comply with the police orders and were forcibly removed from the area. All the protesters, detained during the removal, were prosecuted. They were found guilty of the violation of the inviolability of the home and sentenced, according to Section 123 of the German CC, to a fine of 30 daily wages, 10 DM each. The appellate instance upheld this decision.

The defendants were absolutely rightly convicted according to the German CC, as Section 3 of the CC provides that the German criminal law is applicable to all actions committed on the German territory. Foreign embassies are a part of the German territory.²³

Another case illustrating the broad interpretation of the terms “business premises” and “enclosed premises” took place in Oldenburg on January 21, 1985. The court of Oldenburg convicted C. of the violation of the inviolability of the home. He intruded into the gallery – an accessory building of a mall (a trade fair facility), which was not used as a trading space.²⁴

The term “enclosed premises” is construed to include any premises, owned by somebody and which are somehow protected against unauthorized access (e.g. by a fence or a wall). The extent to which the premises should be protected against an unauthorized access is arguable. In my opinion, to assess it correctly, it should be assumed that putting up a prohibiting notice (e.g. “No access”) is insufficient for applying the norm to the perpetrator’s actions. It is obvious that such notices cannot guarantee a complete protection against unauthorized access.

German courts also maintain that even a vacant building, regardless of its intended use, in some cases may be protected according to Section 123 of the German CC.²⁵ It is possible, if the legally authorized person retains the right to prevent unauthorized access. However, the Criminal Law Senate of the Supreme Court of

the land in Stuttgart held that a condemned building with broken doors and windows is not included in the term “enclosed premises”. This reasoning was behind the sentence (October 29, 1982) imposed on K, who was acquitted after intruding into a collapsed detached building with broken doors and windows, meant for demolition.²⁶ The Court ruled that the building, formerly used as a dwelling or business premises, but currently vacant and designated for demolition, is not covered by the protection of Section 123 of the German CC.

One more concept, peculiar to the German norm on the inviolability of the home and absent from Art. 139 of the Russian CC, is the notion of “enclosed premises, designated for public services or transportation”. It embraces such premises that are naturally or constructively protected from public access. Some German legal writers argue that enclosed premises can be located in a building.²⁷ This perspective appears quite valid. The term ‘premises designated for public services’ covers, for example, schools, government offices, courts – i.e., those, in which the activities, based on public law, are conducted. The premises designated for public transportation include, first and foremost, those used by public transport and are expressly assigned for this purpose. They cover both business premises and means of public transport. German courts justly regard as such the stations, waiting areas, trams, buses, etc.

A further analysis of Section 123 of the German CC reveals that the disposition of the norm contains two different courses of action (in German criminal law terminology – the first and the second alternatives):

- 1) intrusion into the premises mentioned above; or
- 2) remaining therein without authorization and not leaving when requested to do so by the authorized person.

The first alternative of Section 123 of the German CC. Intrusion takes place when the perpetrator steps inside the premises mentioned above against the will of the authorized person. Here the German norm is similar to Art. 139 of the Russian CC. German legal scholars hold that for an intrusion into a flat to happen, stepping inside is sufficient. Intrusion implies not only bringing inside the perpetrator’s body, but also its part (e.g., putting the perpetrator’s foot in the doorway to prevent closing of the door).

On the whole, German criminal legislators and courts provide a much broader interpretation of the “intrusion” feature, as compared to the Russian criminal law. According to the German perspective, intrusion does not necessarily mean a physical intrusion. The “intrusion” feature may be discovered even within the psychological impact on the victim (e.g. a loud voice, disturbing noise, ringing the doorbell or phone calls at night). A debatable issue relating to the intrusion feature is its presence in the case of throwing objects into the premises, for example, when someone throws trash into a neighbour’s window. Russian legal scholars might find such an interpretation of the intrusion feature rather controversial.

German criminal law writers and courts reasonably maintain that the intrusion feature appears only if the intrusion is carried out against the victim’s will. The will must be expressed clearly and unambiguously (orally or implied by actions). However, it is arguable whether intrusion takes place if the perpetrator intrudes into the premises regardless, not against, the consent of a legally authorized person. The controversy is rooted in the fact that the procedure for the access to different types of premises, namely, a dwelling, business premises or other enclosed property of another, or into closed premises designated for public service or transportation (which

in German criminal law writing are termed objects of crime, “*Tatobjekt*”), varies. In my opinion, we can decisively state that intrusion, both against and regardless of an authorised person’s will, amounts to the crime in question. An example of this is the situation, when the authorized person does not have an opportunity to express his will. Article 139 of the Russian CC, to reiterate, refers only to intrusion in the home against the person’s will. Consequently, Russian legislators give an unequivocal answer to the question stated above.

A court case can further clarify this issue. On March 6, 2003, 11.25 p.m., an employee of the “V-d” hotel discovered an unauthorized man in a restaurant’s backroom. He was detained and brought to Passau police station. There he was identified as X., formerly employed by the hotel. Later on, in his room, the police found X’s belongings: a rucksack, a jacket and a bunch of keys to some premises of the “V-d” hotel. The investigation established that X., who was unemployed, had broken into the “V-d” hotel premises and then decided to commit a theft from the restaurant’s backroom. A complaint for criminal prosecution of X. was filed by the restaurant’s manager.²⁸

German legal scholars also debate the following issue: if the perpetrator enters the dwelling with the consent of the authorised person (for example, as a guest), and in the dwelling he assumes the intent to commit a theft, do his actions amount to the intrusion into a dwelling?²⁹ I suppose, they do not. If, however, later on the owner finds out the perpetrator’s intent and demands that the perpetrator should leave the dwelling, the perpetrator’s actions amount to the violation of the inviolability of the home. This situation is described in the first paragraph of the Second alternative, Section 123 of the German CC: “*whoever remains in the said premises without authorization and does not leave when requested to do so by the authorized person...*”

It is noteworthy that the “illegality” feature does not define a concrete crime, but indicates illegality of the conduct in its entirety.

The second alternative of Section 123 of the German CC. The feature of “*remaining in the said premises without authorization and not leaving when requested to do so by the authorized person*”, appears when the perpetrator will not leave the said premises. Therefore, it is omission. The notion of “commission by omission” is described in Section 13 of the German CC: “*Whoever fails to avert a result, which is an element of a penal norm, shall only be punishable under this law, if he is legally responsible for the fact that the result does not occur, and if the omission is equivalent to the realization of the statutory elements of the crime through action.*”³⁰ It should be pointed out that the experience of German legislators relating to this issue was used in the Russian CC, when constructing the norms on recklessness.

The alternative in question is a distinguishing feature of the violation of the inviolability of the home, according to the German CC, as compared to the Russian CC, Art. 139. I am favouring the introduction of the relevant changes to Art. 139 of the Russian CC. The following German court cases may serve to clarify my point of view.

Considering the abovementioned feature of the crime the German courts assume that the request of the authorized person to leave must be clearly and unequivocally expressed in the oral form, at least once or implied in his actions.³¹

The request must come from the person possessing the legal interest, protected by the norm – the right to the inviolability of the home (*Hausrechtsinhaber*), or from a person not possessing the right, but delegated certain rights for exercising the right. In the norm under review this person is defined as “authorised person” (*Berechtigter*). In the framework of the first and the second alternatives of Section 123 of the German CC, this notion covers a person possessing the right to the inviolability

of the home (*Hausrechtsinhaber*), or his lawful representative, i.e. a person who has either by law or by means of a transaction, been delegated the power to exercise this right. In the framework of the second alternative, the scope of authorized persons, i.e. those, who can express the request to leave the premises, is broader. It embraces not only a person possessing the right to the inviolability of the home (*Hausrechtsinhaber*) and his lawful representative, but also persons charged with guarding the inviolability of the home (the so-called "*Hausrechtsschutzpersonen*"), for example, in the absence of the owners.³² According to German legal writing, it is debatable, though, that all members of the right holder's (*Hausrechtsinhaber*) family always possess this right. In this respect German legal scholars are positive about the following: in the framework of the second alternative, family members have the right to demand leaving the premises only if they were delegated this right by the holder (*Hausrechtsinhaber*). It is problematic to establish the fact of delegating the right, and in each case the party must argue their case in court.

In this respect, a court case can further clarify the matter. The Second Criminal Law Senate of Cologne in its Sentence of December 14, 1966, ruled that the right to the inviolability of the home "*may be protected by a minor³³ family member, even if he/she does not possess clear powers to do so*". The details of the case are as follows: in February, 9, 1965, the perpetrator, who was advertising for newspapers and offering to buy annual subscriptions, entered the residential premises, where a girl of 15, Gabriela S., was sick in bed. The girl's mother, who was renting the apartment, was absent. The defendant's conduct disturbed the girl, causing discomfort. The girl repeatedly requested the defendant to leave the apartment, but he did not comply with the request. The court found him guilty of the violation of the inviolability of the home (Section 123, paragraph 1, Alternative 2).³⁴

The subjective aspect of the crime (*subjektiver Tatbestand*) implies the presence of intent, even if it is indirect. The perpetrator of the crime must know, that he is intruding into the premises, which is the object of the crime (*Tatobjekt*), or remains there despite the request of the authorized person to leave. Here lies a certain similarity between the subjective aspects of the crimes described in Section 123 of the German CC and Article 139 of the Russian CC.

There was an interesting court case based on the following circumstances: a person entered a hotel room, which he mistakenly believed to be his, and proceeded to take a bath. The authorized users of the room found him in the bathroom. The man was, certainly, not prosecuted according to the norm in question, since he was sincerely mistaken regarding illegality of his conduct. A mistake occurred.³⁵

Paragraph 2 of Section 123 contains a procedural instruction, that the crime in question must be prosecuted, as mentioned above, only if the victim files a complaint. Such a norm construction is characteristic of the Special part of the German CC.

Section 124 is the second norm in the Special part of the German CC providing for the criminal liability for the violation of the inviolability of the home. It describes a serious violation of the inviolability of the home. This norm sets down a separate criminal offence, not an aggravated version of Section 123, as it might appear to a Russian lawyer, who could be misled by the name of the norm.

Section 124 provides that: "*When a crowd of people publicly gathers with intent to join forces to commit acts of violence against persons or things and unlawfully intrudes into the dwelling, business premises, or other enclosed property of another, or into closed premises designated for public service, then anyone who takes part in these acts shall be punished with imprisonment for not more than two years or a fine.*"

The disposition of this norm contains the features of two criminal offences and is a specific blend of these crimes: violation of the inviolability of the home (§ 123) and violation of public order, accompanied by violent actions of a group of people (§ 125).

The legal interest protected by this norm along with the right to the inviolability of the home, is public order. Therefore, the location of the crime in Chapter 7 of the Special part of the German CC appears justified.

The disposition of the serious violation of the inviolability of the home contains the same alternative courses of actions as in § 123, with the only difference that they must be committed by a crowd of people jointly. The notion of “crowd of people” is judgmental. German courts establish the content of the notion with the regard to the circumstances of each case. As a rule, a group of 15–20 people³⁶ is the standard, however, in some circumstances, their number may be lower.³⁷ In estimating this feature, German legal writing cites the Decision of the 4th criminal law Senate of August 29, 1985, which rules what must be considered a crowd of people.

The decision was made in the case about the violation of public order, accompanied by violent actions of a crowd of people. It is not necessarily an innumerable crowd of people, but such a group of people, whose number cannot be determined at once. The same view is maintained in the German legal writing.³⁸

Thus, for example, the Sentence of the Federal court of May 31, 1994, points out that, for a group of people to be deemed a “crowd of people”, it must be so large that, if one or two people join or leave it, it will be unnoticeable. Another essential feature of a “crowd” is its ability to be perceived as a single entity: they must be located in space in such a manner, that other people will think so.³⁹

German courts hold that the “public” manner of such a gathering appears, when already gathered people can be joined by any crowd of people.

Another mandatory feature of the crime is the purpose – a crowd of people gathers for a reason – with the intent to commit violent actions against people or property.⁴⁰

This norm is also peculiar to the German CC and absent from the Russian CC.

Summary

In this article we have conducted a comparative legal analysis of the norms of the criminal code of the Russian Federation and the criminal code of Germany, which establish criminal liability for violation of such a fundamental right of a man and a citizen as the inviolability of home.

The analysis reveals both general similar approaches and differences in solving relevant problems. Such general approaches should include the fact that the legislators of all countries strive, using various branches of the law, to protect the man’s housing rights as an important part of his private life from unlawful attacks on inviolability of home: no one has the right to enter private home against the will of its inhabitants, with the exception of cases established by law or on the basis of a judicial decision.

The main difference is that the German legislators, as we have repeatedly noted above, rather broadly interpret the violation of home privacy. Under this provision of criminal law not only the housing itself shall be protected, but also production premises and premises protected from the access of strangers, as well as the closed spaces for public services or transport. This is one of the main differences characterising the composition of the act of violation of the inviolability of home as stipulated

in the Criminal Code of the Federal Republic of Germany from the Art. 139 of the Criminal Code of the Russian Federation.

The analysis of the both countries' norms leads to the conclusion that the general approach of the legislators both in Germany and Russia when criminalizing socially dangerous behaviour related to the violation of the inviolability of home, has resulted in the enactment in the relevant structures of such a criminogenic characteristic as the nature of the act itself, expressed in violation of absolute legal prohibitions.

To conclude the present research paper, it should be pointed out that there is a similarity of perspectives in the Russian and German legislation, providing for the protection of the fundamental right of a man and citizen – inviolability of the home. However, in spite of this similarity, the criminal codes of these two countries contain considerably different norms, setting down criminal liability for the infringement of this right. The analysis of the specific features of these norms was provided in the article.

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- ⁸ The translation of the notion “*Hausfriedensbruch*” as violation of the inviolability of the home is the closest possible equivalent of the Russian term. The literal translation should read as “violation of the inviolability of a premise (home)” in the broadest sense of the word. This meaning will be used in the further analysis of Section 123 of the German CC.
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Victims and their Criminal Procedure Status in Law Enforcement Practices in Latvia

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The current paper is devoted to the practical aspects of the status of victims in criminal procedure when it comes to crimes that have been committed. The author has tried to offer an illustrative answer to the question of what people who are involved in practical terms in work with victims think about legal regulations and practical implementation of same regarding the victims. The paper includes a concise review of Latvia's criminal procedure norms to the extent required for this discussion, looking at the law as of August 1, 2013. The discussion is focussed on the following issues: 1) public information about the issues related to the involvement of victims in the practical aspects of criminal procedure; 2) the views of more than 100 practical specialists (prosecutors, judges, attorneys, mediators) who were surveyed on the topic of currently important aspects of victims; 3) statistical data related to victims and their involvement in criminal procedure. Some of the data in this paper were obtained and/or utilised in relation to a study that is being conducted by the Centre for European Constitutional Law in partnership with the Institute of Advanced Legal Studies, School of Advanced Study, University of London, "Protecting Victims' Rights in the EU: The Theory and Practice of Diversity of Treatment During the Criminal Trial." The study is being financed by the European Commission.

Keywords: Victims in criminal procedure; information about the rights of victims; settlement of cases; compensation; legal aid to victims.

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Introduction

There is no denying that the issues related to crime, criminals and victims are of importance in the modern world. For many years, those who committed criminal offences were the main issue in this regard, while comparatively recently there has been an increasing focus on victims. This is clearly seen in the initiatives of the

European Union in terms of protecting victims. The most visible result has been European Parliament and Council Directive 2012/29/EU (25 October 2012). The Directive identifies minimal standards related to the rights, support and protection of victims, thus replacing Council Framework Decision 2001/220/JHA.¹ Professor Ārija Meikališa has offered a more detailed review of the Directive in this journal. The purpose of this paper, in turn, is to examine the understanding of victims and their status, focusing on the practical aspects thereof. The author has analysed various statistical data and reviewed the opinions of people whose everyday work relates to victims in civil proceedings. A survey of such individuals was conducted in June 2013. Due to technical reasons, the author did not manage to receive responses from investigators, and the representatives of victim support organisations also did not demonstrate any interest in the process. Answers were given by 23 prosecutors, 42 attorneys, 36 judges and 9 mediators. Thus, this paper reflects the views of 110 specialists in the field. The aim is to discuss the views of those people who work directly with the victims. The author has chosen not to look at the views of victims themselves, because this has been addressed quite extensively in other studies.² For illustrative reasons, the author has made use of various statistical information that is publicly available or has been specifically requested.

1 The definition of a victim and of criminal procedure status of same

Sections 95 and 96 of the Latvian Law on Criminal Procedure (KPL)³ discusses victims as active participants in criminal procedure, stating that the following characteristics relate to the same:

- A victim in criminal proceedings may be a natural person or legal person to whom harm has been caused by a criminal offence, that is, a moral injury, physical suffering, or a material loss.
- A victim in criminal proceedings may not be a person to whom moral injury was caused as a representative of a specific group or part of society.
- If a person dies, the victim in criminal proceedings may be the surviving spouse, one of the ascending or descending relatives of the deceased, or the adopter or a collateral relative of the first degree of such deceased.
- The person desires or has agreed to be a victim as an active participant in criminal proceedings.
- The person has been declared to be a victim by the person who is handling the proceedings.

In discussing the understanding a victim in criminal procedure, the fact must be noted that a victim is not just the person who suffered victimhood because of a crime, but also his or her relatives in the case when the original victim has passed away. This is seen in Section 95.3, as indicated above. In practice, this is not a “dead” norm. According to the Information Centre of the Latvian Interior Ministry (IC), there were 43 criminal proceedings in which the victim was a representative of a deceased person, 75 in 2012, and 23 during the first six months of 2013. Asked to state the three most common crimes in which the relatives of a deceased victim have been declared victims, the IC provided the information contained in Table 1.⁴

The sections of the Criminal Law which are referenced in the Table 1 include Section 116 (murder), Section 125.3 (voluntary assault which has led to the involuntary killing of the victim), and Section 260.2 (violation of road traffic safety rules that has led to the death of the victim).

Table 1

Criminal proceedings in which the victim is a representative of a deceased person

Section of Criminal Law	Year of decision		
	2011	2012	2013 (6 mounths)
260.2	17		
125.3	9		
116	4		
260.2		34	
116		16	
125.3		13	
125.3			7
260.2			6
116			6
Total	43	75	23

Despite the fact that there have been comparatively few cases in this regard, the survey of personnel indicates that the relatives of a deceased person have been declared as victims quite frequently – 76% of surveyed attorneys, 91% of prosecutors, and fully 100% of judges said that they had encountered such cases. This makes it possible to assume that the IC does not have complete data, and that may be the case because the specialists who conduct criminal proceedings do not provide it with full information. Asked about who specifically was declared a victim in such cases, respondents most often mentioned wives, husbands, sisters, brothers, parents and children. One respondent said that “usually it is a single individual.” In another case, the declared victim was a brother even though the original victim’s father and mother were both alive.

Because the aforementioned elements from the KPL allow victims or their relatives to choose whether or not they wish to be classified as victims, the survey of prosecutors, attorneys and judges included a question focused on how often victims in criminal cases have, in their experience, expressed the desire to be classified as victims in the criminal case. Most of the respondents agreed – 55% of attorneys, 52% of prosecutors and 53% of judges said that this happens “in most cases,” and none answered “Hardly ever” (Figure 1).

This shows that most victims decide to take on the status of a victim in criminal proceedings. Analysis of KPL norms show that this allows the individual to take part in the process actively and, insofar possible, influence it. The question arises as to what the victims wish to achieve by becoming involved in criminal proceedings. The survey respondents were asked about the main reasons why victims decide to take part in criminal procedure, and the results are shown in Figure 2.

The above results demonstrate that most respondents find material compensation to be the main reason for becoming involved in the process, while still many others said that they hoped that the criminal would be punished. Fewer than 10% of attorneys, prosecutors and judges listed a different reason as to why victims wished to take part in criminal procedure, while among mediators, nearly one-half did do. 8% of judges believe that victims do not have any particular reason for taking part, while among others this view did not attract much support.

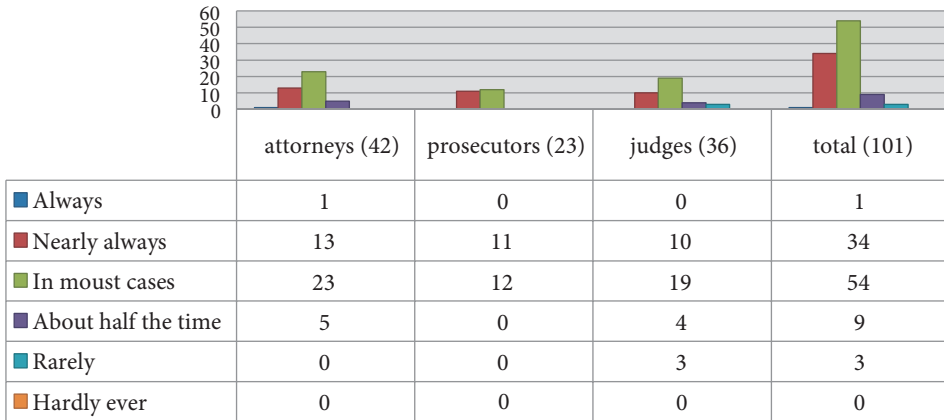


Figure 1 Do actual victims of a crime decide to “obtain” the status of a victim in criminal proceedings?

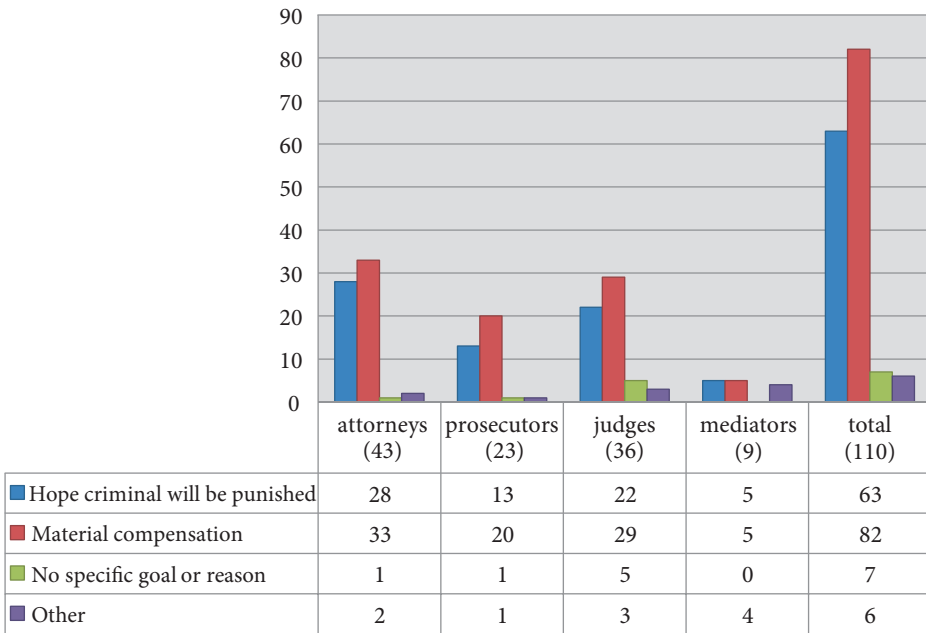


Figure 2 The main reasons why victims take part in criminal proceedings (multiple answers possible)

The author also wished to find out how justified the decision to obtain the status of a victim is in terms of achieving the desirable result. It seemed important to ask judges and prosecutors, who are officials who handle criminal proceedings, whether they believe that the active participation of victims in the process can seriously influence its development and results. The overview of the responses is shown in Figure 3.

This clearly shows that the decision by a victim to take on the official status of a victim in criminal procedure can be seen as tactically justified, with 74% of



Figure 3 Does the active participation of a victim substantially influence the development and results of the process?

prosecutors and 61% of judges saying that the active participation of the victim can influence the process and its results.

The final question about this issue relates to when the status is obtained. Section 96 of the KPL says that the last moment when a person can be declared a victim is when the first-level court hearings begin. If the victim dies after the process begins or during an appeal of a ruling, the appeals court can declare a relative of the deceased party’s to be the victim. The survey of prosecutors, judges and attorneys reveals that in most cases people are declared victims during pre-trial investigations. Asked whether they have encountered instances in which people declare their desire to be officially classified as victims during the criminal prosecution, 22% of prosecutors said that they had never encountered such cases, 48% said that they have hardly ever seen such a case, and 30% said that it was uncommon. Those who said that they had encountered the situation were asked why the person was declared a victim only during the time once the prosecution began, and 33% said that the investigator had not explained the relevant rights clearly, another 33% said that the victim changed his or her mind, and 24% said that the individual saw reason to be declared a victim only when a specific person was charged with the crime. Among the 36 judges who were surveyed, 44% had seldom encountered a situation in which a person was declared a victim during trial proceedings, 44% had done so only a few times, and 11% had never experienced such a case.

An equally important issue here is how people can lose the status of a victim. If victims can receive the status, can they also reject it during criminal proceedings? The KPL does not directly speak to this matter, so there can be no unambiguous answer to the question in practice. The author has written about the issue before. In the paper “Victims and their Status in Criminal Proceedings,” she wrote that “if each person is given the right to decide on whether or not he or she wishes to be classified as a victim, then that person also has the right to reject that status.”⁵

When it comes to understanding this issue in terms of the current practices, it must be said that the situations in which victims wish to reject their status are quite

uncommon. As shown in Figure 4, such a situation has been frequently encountered only by 6% of judges and no prosecutors, it has been experienced rarely or only in some cases by 78% of judges and 74% of prosecutors, and 26% of prosecutors and 14% of judges have never encountered it.

When it comes to those who handle criminal procedure, the situation is characterised by the answer to the next question depicted in Figure 5: “If you have encountered such a situation as the handler of the process, what have you done in response?”

Sadly, the respondents did not explain what the “other” option was, so a precise view of what employees do is not available. Personal interviews, however, make it

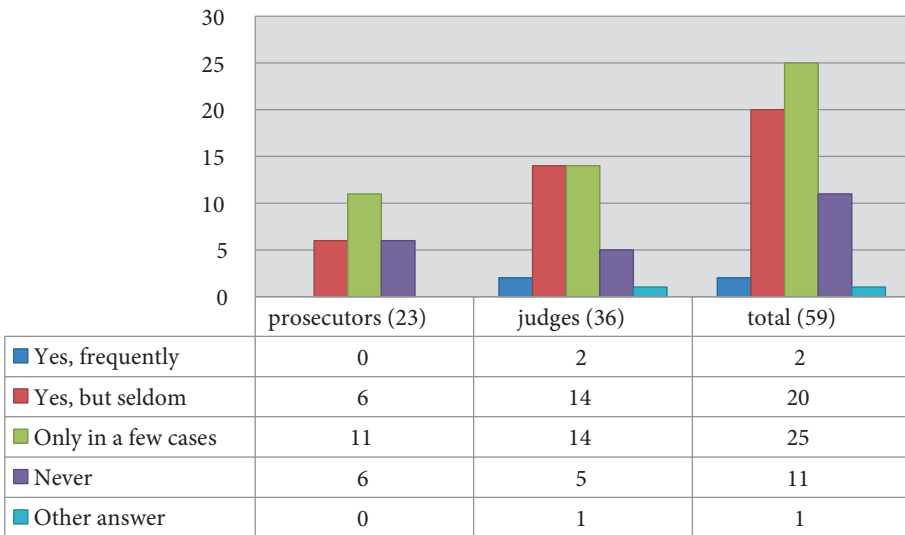


Figure 4 Do victims reject their status in criminal procedure?

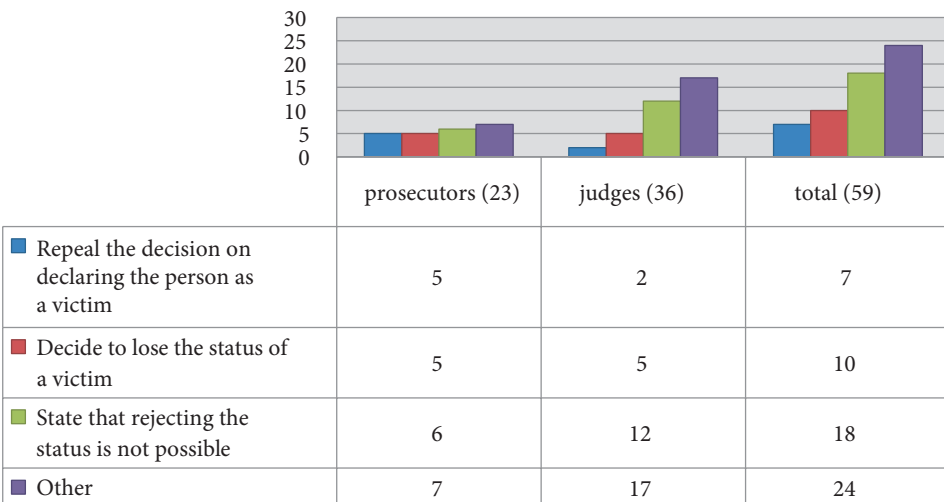


Figure 5 What handlers of criminal procedure do when a victim rejects his or her status

possible to conclude that in most cases, such requests are rejected because the status of a victim does not place any additional obligations on the person’s shoulders. It is also true that if the person does not want to take advantage of the status, he or she does not have to do so. This means that in practice, the desire of victims to reject the status is not recognised, which means that if a person has been declared to be a victim, then he or she cannot reject or lose that status.

2 Informing victims about their rights, obligations and other issues related to the status of a victim

One of the most essential procedural guarantees for victims that is included both in the Directive and the KPL is the declaration that victims must be appropriately informed about their status, rights, obligations and other aspects of the status of a victim, and that this must be done in a comprehensible and understandable way. In order to find out whether victims really receive information about these aspects, the author asked her respondents to think about their professional observations so as to know whether the information about the issue is always presented, presented more often than not, presented rarely, or presented hardly ever or never. Respondents were asked to evaluate the provision of information about the rights that are enshrined in the Directive, as well as the obligations of victims. The answers are provided in Figures 6 to 18.

The survey data show that information about support for victims is very dissatisfactory, because only one of the 101 respondents who were surveyed said that such information is always provided. Less than 22% of respondents said that this happens in most cases, and among attorneys, the proportion drops to 14%. This may be in part because the KPL does not directly speak to the so-called support events. It is also possible that the practitioners do not have a clear understanding of the issue.

The data provided in Figure 7 confirm that the information about the right to petition for the launch of criminal proceedings is provided at a better level, but not in all cases. Although a bit more than 70% of respondents said that such information

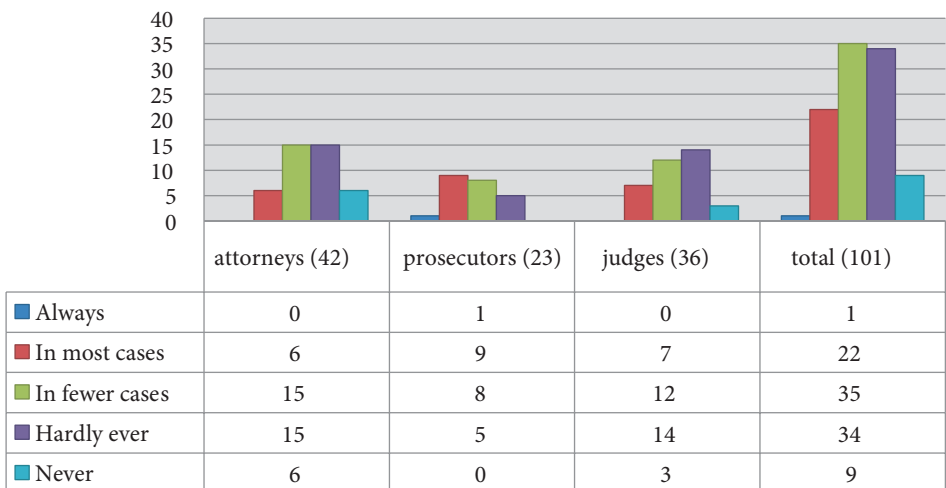


Figure 6 Information about support (medical assistance, specialist support, psychological support, etc.)

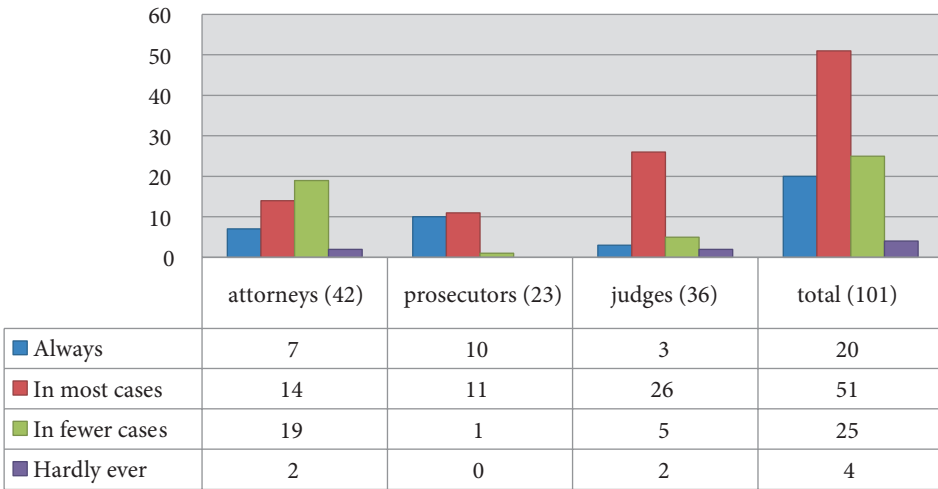


Figure 7 Information about the right to petition for a launch of criminal proceedings

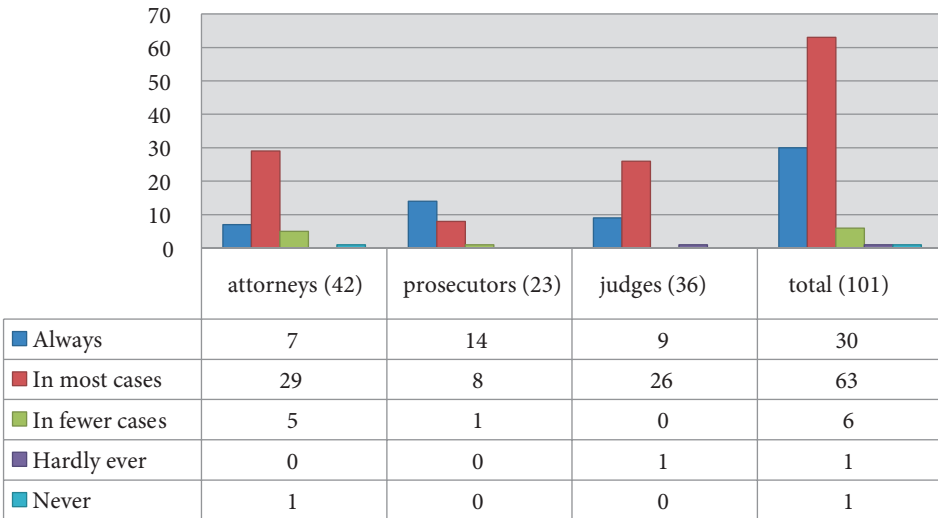


Figure 8 Information about the right to obtain the status of a victim

is provided always or in most cases, the fact that 30% of respondents said that this happens seldom, hardly ever or never at all is a worrisome indicator.

According to the data presented in Figure 8, it can be said that the situation is better when it comes to informing people about their right to obtain the status of a victim. 82% of surveyed attorneys, prosecutors and judges say that such rights are explained always or in most cases, and a majority of prosecutors (61%) say that this happens always. A majority of attorneys, who tend to be comparatively critical when it comes to the provision of information about rights, in this case say that people are told about the right to obtain the status of a victim in most cases or always.

As evidenced by Figure 9, the situation with informing people about their right to receive legal aid is poor. Only less than 39% of surveyed attorneys, judges and

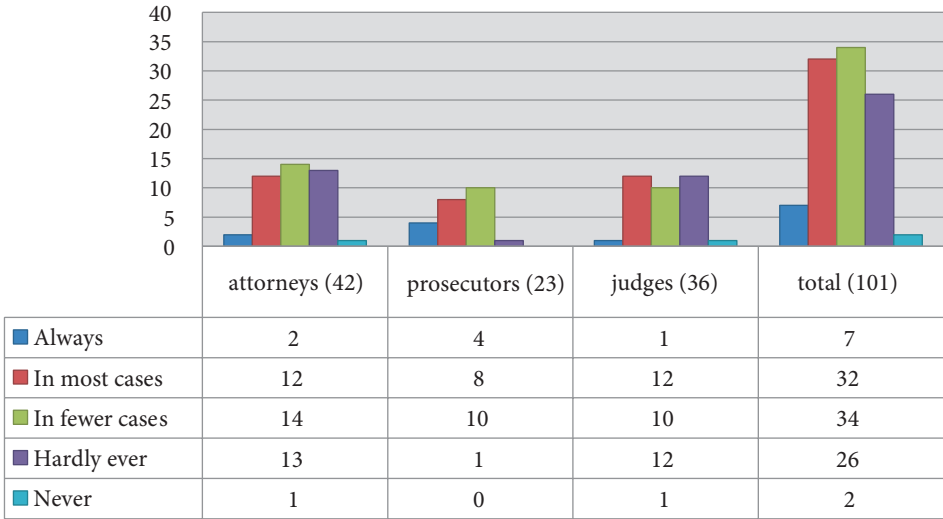


Figure 9 Information about the right to legal aid

prosecutors confirm that such information is provided always or in most cases. Among them, 30% are attorneys, 52% are prosecutors, and 36% are judges. A total of 61% of respondents say that such information is provided seldom, hardly ever or never.

An even harsher image relates to the information about the right to protection reflected in Figure 10. Fewer than 22% of surveyed attorneys, judges and prosecutors admit that such information is provided always or in most cases. Among them there are 13% of attorneys, 44% of prosecutors, and 17% of judges. 78% of respondents said that the information is provided in fewer cases, hardly ever or never. It must also be noted that the largest percentage of surveyed employees – 15% said that the information is never provided.

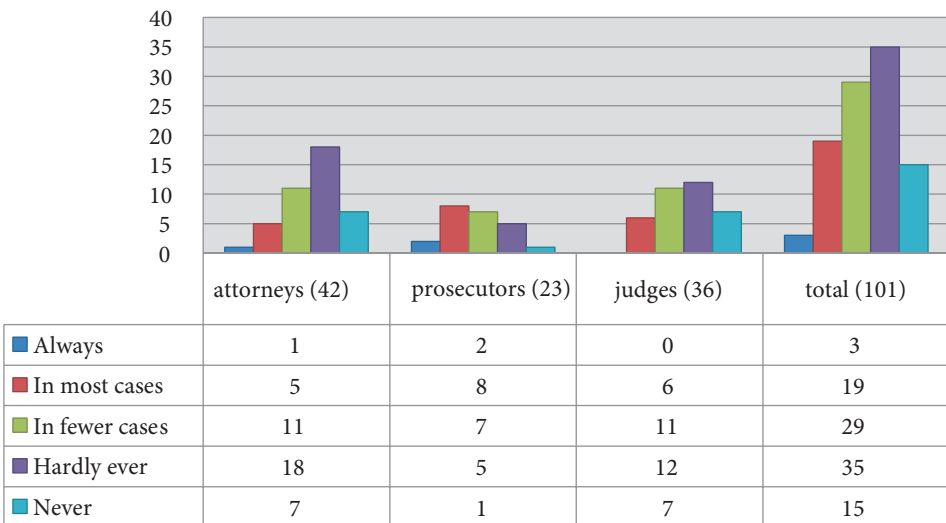


Figure 10 Information about the right to protection

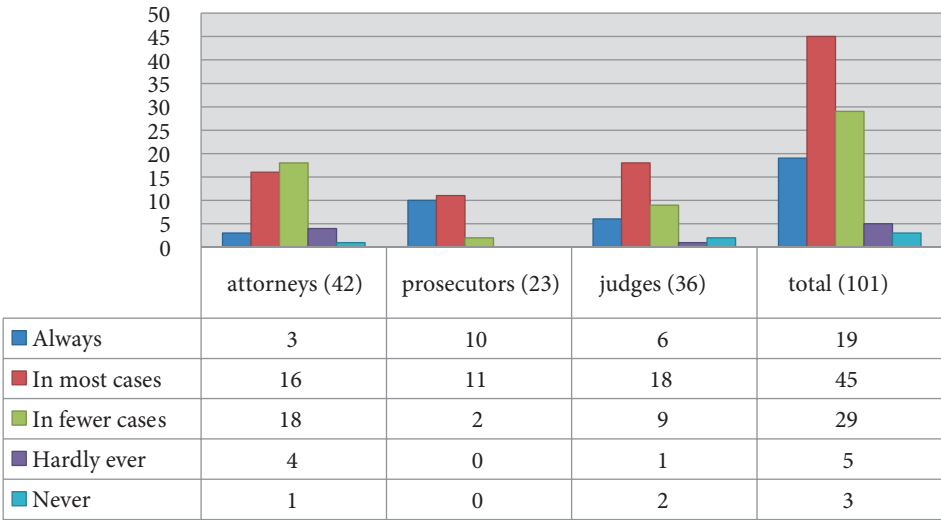


Figure 11 Information about the right to compensation

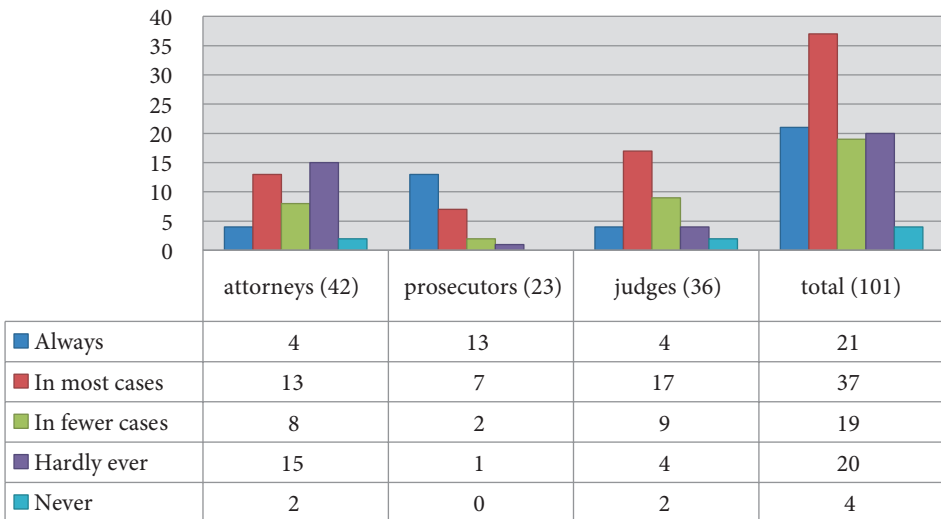


Figure 12 Information about the right to receive a translation

The situation with information about the right to compensation is comparatively better. Figure 11 shows that 63% of respondents say that victims receive such information always or in most cases, but it has to be noted that most of the attorneys do not agree with that, with 55% of them responding that it happens in fewer cases, hardly ever or never. The same is claimed by a comparatively large percentage of all survey respondents – 37%.

When it comes to the right to receive a translation, it has to be said that 57% of respondents said that such information is provided always or in most cases, while 24% argue that it is offered hardly ever or never at all, as depicted in Figure 12. In this case, it is interesting to note the difference between the evaluations of attorneys, prosecutors and judges. A majority of judges and an absolute majority of attorneys

confirm that information about such rights is offered always or in most cases, but most of the attorneys say that it is offered in fewer cases, hardly ever, or never.

As shown in Figure 13, similar evaluations were offered when it came to the right to submit complaints. 57% of respondents say that such information is provided always or in most cases, while 20% note that it is offered hardly ever or never. Here again it is interesting to look at the different views of attorneys, prosecutors and judges. Most judges and an absolute majority of prosecutors claim that information about these rights is given always or in most cases, but most of the attorneys say that it happens in fewer cases, hardly ever, or never.

According to Figure 14, 56% of respondents said that the information about the right to achieve a settlement of a case is provided always or in most cases, while 43% said that it happens in fewer cases or hardly ever. Here, once again, there are

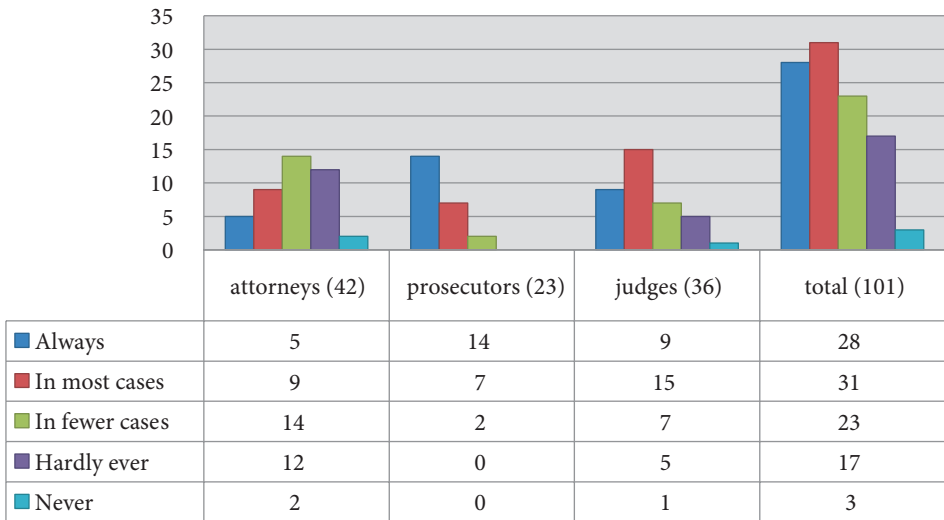


Figure 13 Information about the right to submit complaints

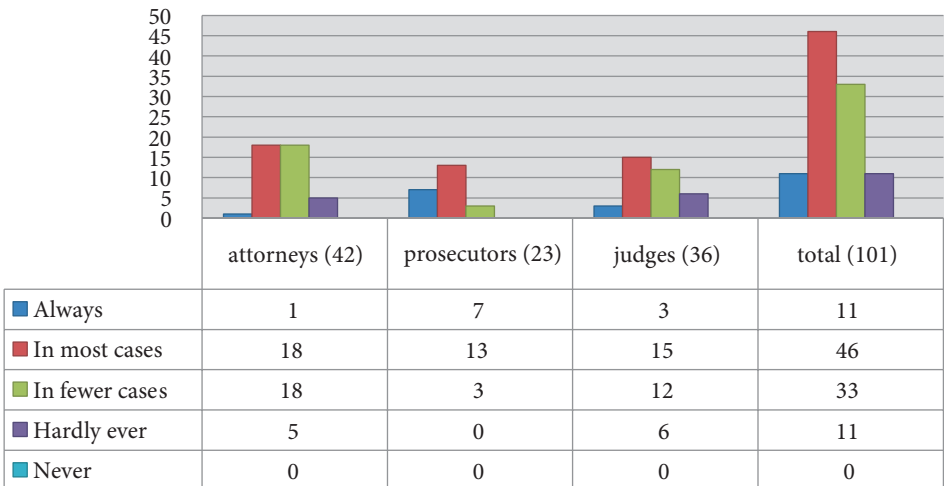


Figure 14 Information about the right to settle a case and about the consequences of same

substantial differences between the views of prosecutors, judges and attorneys. An absolute majority of prosecutors (87%) confirm that victims receive such information always or in most cases, but only 45% of attorneys say so, with 55% admitting that it happens in fewer cases or hardly ever.

A very harsh scene appears when it comes to information about the fact that victims have the right to receive compensation for losses incurred during criminal procedure (see Figure 15). Only 30% of respondents say that such information is provided always or in most cases, while 70% say that it happens in fewer cases, hardly ever or never. It is essential to understand, moreover, that 52% of prosecutors agree with this view, and in most cases they feel that the most important thing is to inform victims about their rights. To a certain extent the fact that such information is not too widespread can be attributed to the fact that these rights are not specifically listed in the KPL, instead emanating indirectly from the part of the KPL, which speaks to property losses and, specifically, procedural expenditures.

58% of respondents say that victims always or in most cases receive the information as to how they can contact the handler of the process, while 41% say that this happens in fewer cases or hardly ever. Once again there are fundamental differences in the views of prosecutors and attorneys. 29% of attorneys claim that such information is hardly ever given, and only one of the 23 prosecutors who were surveyed said the same (see Figure 16).

A very radical difference in opinion is revealed in Figure 17 regarding the information about the right of the victim to be informed about the development of criminal proceedings. 44% of respondents say that such information is provided always or in most cases, but that is true only among 21% of surveyed attorneys. 60% of them admit that this happens hardly ever or never. Judges are comparatively sceptical about this matter, with 50% responding that information about these rights is provided in fewer cases or hardly ever.

Comparative unanimity is seen in evaluations about whether victims are informed about their obligations (see Figure 18), with 76% of respondents answering that this information is provided always or in most cases. This is the issue where one

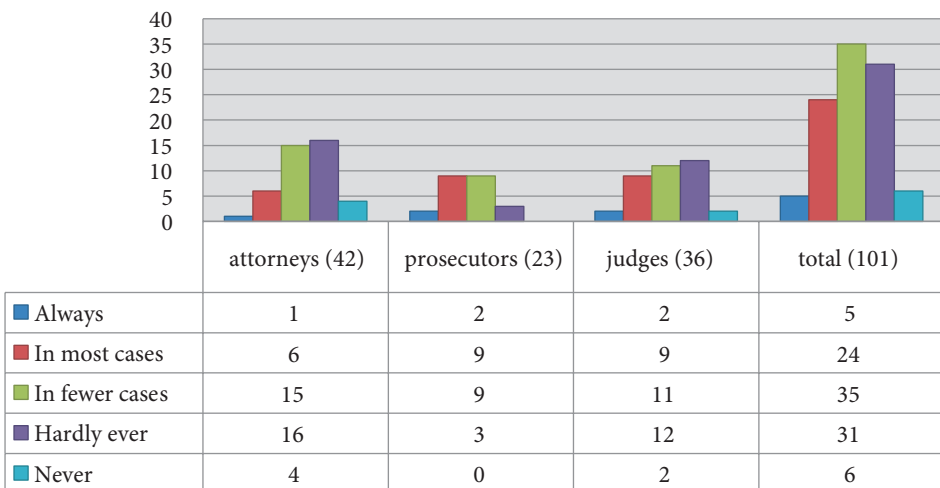


Figure 15 Information about the right to receive compensation for losses incurred during criminal proceedings

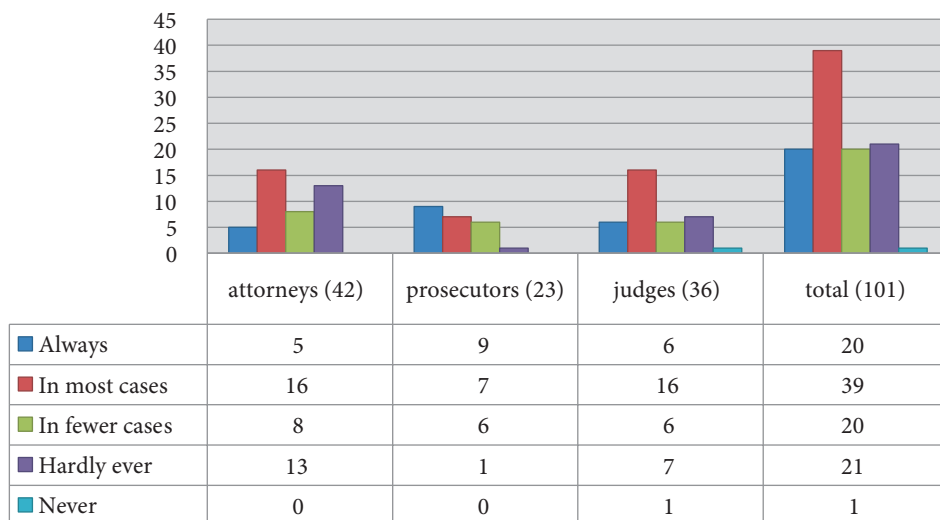


Figure 16 Information about contacting the handler of the process

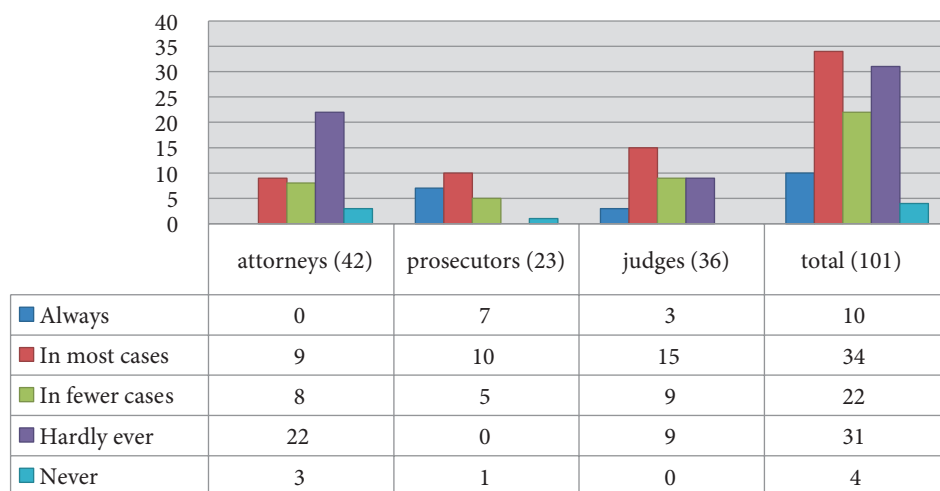


Figure 17 Information about the right to be informed about developments in criminal procedure

can find the largest proportion of respondents saying that the information is always provided (33%). This is also one of the few cases in which a majority of surveyed attorneys replied that the information is provided always or in most cases.

An evaluation of answers that were given in terms of the provision of information about the status, rights and obligations of victims and other issues related to that status and elements therein, leads to several conclusions. All in all, the views about the extent to which victims are informed about elements of their status in criminal procedure are not particularly pleasing. Although the system is in line with the requirements of the Directive and the KPL, the application of the norms in practice should involve a situation in which the answer “always” is given to all of the various elements of the victim’s status; however, that is not the case. In none of the

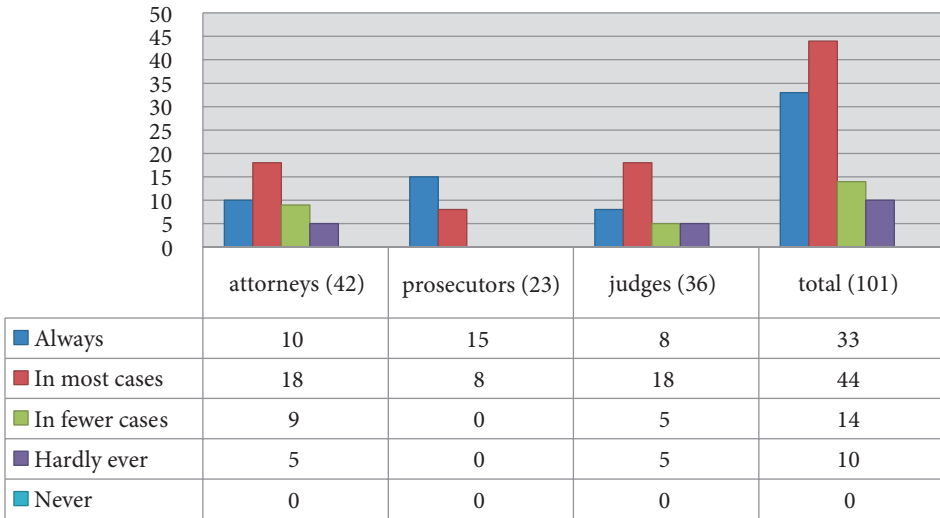


Figure 18 Information about obligations related to criminal procedure

aforementioned areas did 50% or more of respondents say that the information is always provided. Only in two cases did the answers “always” and “in most cases” add up to more than 75%, and that is unforgivable. Those areas were the information about the right of the victim to obtain that status, as well as the information about the victim’s obligations. In most cases, the answers “in fewer cases,” “hardly ever” and “never” totalled up to 50% or more – the right to receive information about the development of criminal proceedings, information about the right to receive compensation for losses that relate to the process, the right to protection, the right to legal aid, and the right to receive help from the relevant support services. It must also be noted that prosecutors were most likely to offer positive answers about information related to elements in the victim’s status, and comparatively few of them answered “hardly ever” or “never” in response to the questions. Still, even the prosecutors have been critical about issues such as the availability of support for victims and the right to receive the aforementioned compensations. Attorneys were most critical in their answers, seldom saying that information is always provided and instead giving the answers “in fewer cases” and “hardly ever.” To a certain extent, these differences in opinion may be down to the fact that when answering the questions, prosecutors were evaluating their own work and that of their colleagues, and this might have encouraged them to be “gentler” in their approach. Attorneys, in turn, could express their views about handlers of the process, and that may have created a conscious or subconscious desire to be “stricter” in criticising others, including their opponents. When it comes to judges as respondents and to the answers that they gave, it must be concluded that they were between prosecutors and attorneys, and an interpretation of this must involve the fact that judges expressed views about their own work and that of their colleagues, also evaluating the things which officials do during pre-trial proceedings.

In concluding this sub-chapter, it has to be said that the information about the elements of a victim’s status is among the weakest elements in the application of the law. Rapid and essential improvements are very much needed. At the normative

level, the rights of a victim and so on are enshrined at the appropriate level in Latvia, but in order to ensure that these interests are truly protected, the rights must be brought to life in practice. First and foremost, this relates to appropriate information about the victim's rights, etc.

3 Organisations to support victims

Given the special role that the Directive assigns to organisations which support victims, this study to a certain extent addressed also the work of such services, mostly looking at how their work is perceived by practical employees. There are several organisations which support victims, both governmental and non-governmental. The Legal Aid Administration, for instance, is a government institution which provides legal aid and pays compensation to those who have been victims of criminal offences. The State Probation Service allows victims and clients of the probation system to reach a voluntary agreement with the involvement of a mediator. Information about the work of such institutions is quite extensively available to the handlers of criminal procedure and to the victims themselves. Apart from the government institutions which provide assistance outside of criminal process as such, there are many other, non-governmental organisations, e.g.:

- The Skalbes organisation, which is an NGO that provides psychological crisis assistance on the 24/7 phone line 6722-2922. It provides psychological consultations and information about the support that is available to victims.
- The Dardedze centre is an NGO which offers consultations and assistance to the children who have suffered from violence.
- The Talsi Administrative District Crisis Centre is an NGO which helps to establish healthy and strong families, defends the rights of children and women, and implements relevant programmes.
- The Victim Support Centre is an NGO that offers legal aid, free psychological consultations, as well as assistance to victims and criminals who wish to settle a case.
- The Marta Women's Resource Centre is an NGO that offers support to women who have suffered from violence or human trafficking.⁶

These are not the only institutions which offer support. The homepage of the National Police, www.vp.gov.lv, for instance, also lists organisations such as Mars Street, the Crisis Centre for Street Children, the Rīga Centre for Social Rehabilitation and Support for Orphans, the Māra Centre Crisis Centre for Women and Children, the State Children's Rights Protection Inspectorate, "Save the Children!", the Rīga City Council Children's Rights Defence Centre www.bernutiesibas.lv, the Association to Seek Lost Children, the University of Latvia Psychological Aid Centre, as well as a number of psychological support institutions for victims in other parts of Latvia – the Aizkraukle Psychological Aid Centre, the Allaži Children's and Family Support Centre, the Cēsis Psychological Aid and Support Centre, the Latgale Psychological Aid Centre 'Valentia', the Jaunpiebalga Parish Rehabilitation Centre "Life Energy" (for children addicted to psychoactive substances, www.atkariba.lv), the Līvāni Social Support Centre "White House" (www.baltamaja.lv), the Liepāja Creative Psychology Centre "For the Family" (www.gimenei.lv), the Ventspils Crisis Centre for Families and Children "Shelter", and the Valmiera Crisis Centre for Children Suffering from Violence.⁷

Let us discuss a few of these centres. The aforementioned Dardedze Centre offers consultation and support for children who have suffered from violence so as to

prepare them for investigation and court proceedings. If the relevant institutions or an attorney requests written conclusions about the child, then a psychological examination is conducted so as to prepare a report about the possible violence. The centre also has special facilities for investigation that involves children (and employees of the relevant institutions make comparatively active use of these facilities).⁸

The annual report of the Marta resource centre for women in 2011, in turn, indicates that during the course of that year, the centre offered 1,895 social work, legal, psychological, psychotherapeutic and growth-related consultations.⁹ 1,282 of these consultations were offered on site, while the remaining 613 were provided electronically or via the telephone. The 2012 annual report, in turn, shows that a social worker provided 426 consultations, attorneys provided 566, psychologists provided 278 (115 of them involving children who had suffered violence), a psychotherapist offered 389, an individual growth trainer provided 17, and a masseuse provided her services to four women. The Marta centre operates a telephone hotline to deal with issues of violence, human trafficking and safe jobs abroad. Over the course of the year, 123 calls were received – 47 about family violence, nine about possible victims of human trafficking and their relatives, and four related to risks related to seeking a job abroad.¹⁰

Despite the aforementioned facts, information about the available support is comparatively minimal (see Figures 19 to 25). This is evident in the answers given by employees when asked whether victims at this time have access to support services that are free of charge, are confidential, and operate in the interests of the victims.

As can be seen in Figure 19, only 5% of respondents said that such services are available, while 38% strictly said “no.” The other 50% said that the availability of such services depends on the extent to which the victim is actively interested in receiving them. Once the subjective attitude of respondents was determined in terms of the support organisations’ availability, it seemed of interest to look at what the respondents think about the work of the relevant institutions in terms of providing information to victims about the support services and their work. Attorneys were asked whether the institutions offer sufficient information to victims about the

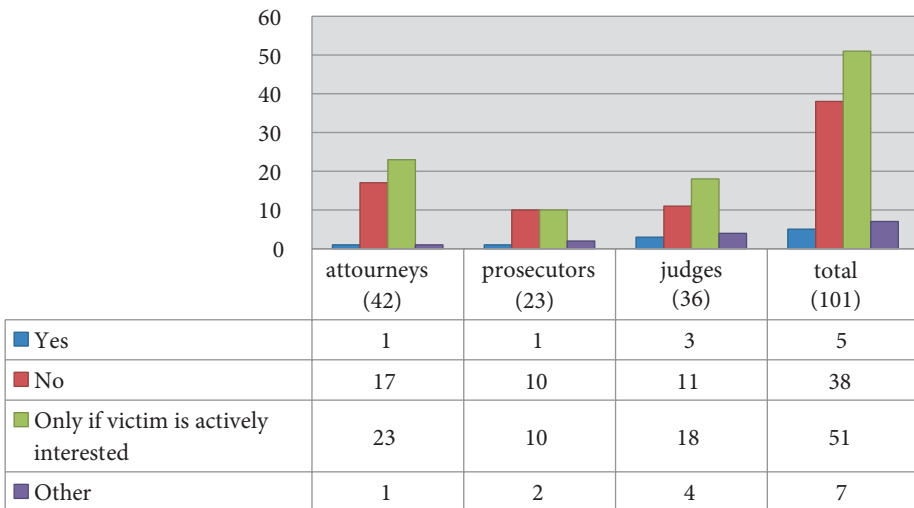


Figure 19 Availability of confidential support services

services and whether they send the victims to such institutions. 35 of the 42 attorneys who took part in the survey responded “no” (83%), while only two (5%) said “yes” and five (12%) chose another answer.

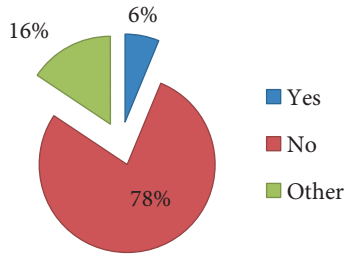


Figure 20 Do the relevant services offer sufficient information to victims about support services and send the victims to such institutions? Attorneys (42)

Judges were asked to answer two questions:

- 1) According to their professional observations, do the relevant institutions provide victims with sufficient information about support services during pre-trial proceedings, and are they sent to such institutions?
- 2) Have you yourself recommended that a victim make use of the services of the support services?

The Figures 21 and 22 show the responses.

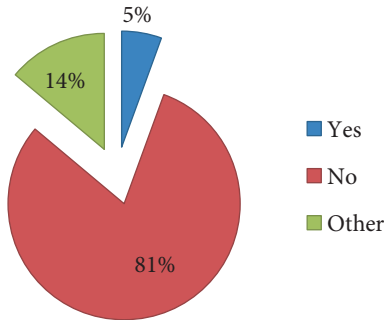


Figure 21 Do the relevant services offer sufficient information to victims about support services and send the victims to such institutions? Judges (36)

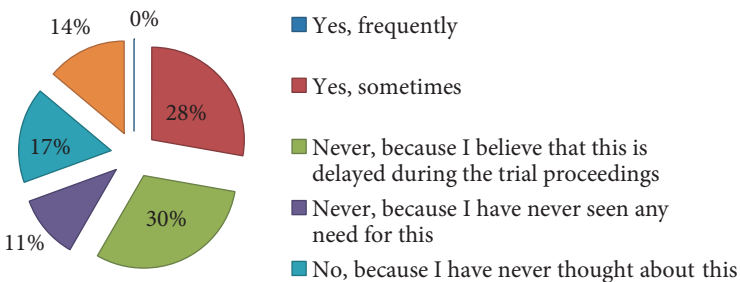


Figure 22 Have you yourself recommended that a victim make use of the services of the support services? Judges (36)

Prosecutors, in turn, were asked to evaluate the activities of investigatory institutions in this regard, as well as to evaluate the activities of prosecutorial services and their own work (see Figures 23 to 25).

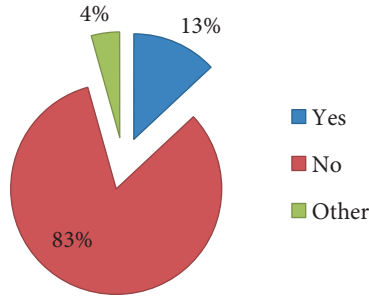


Figure 23 Do the relevant investigatory services offer sufficient information to victims about support services and send the victims to such institutions? Prosecutors (32)

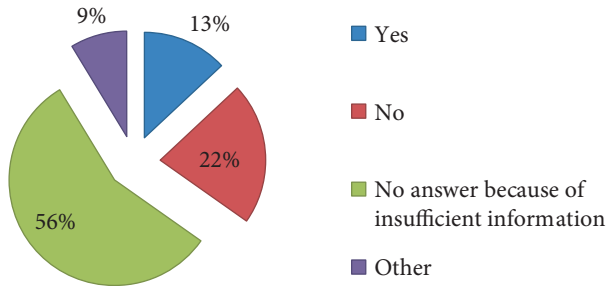


Figure 24 Do prosecutorial institutions offer sufficient information about such services to victims during pre-trial proceedings and send them to the relevant institutions? Prosecutors (23)

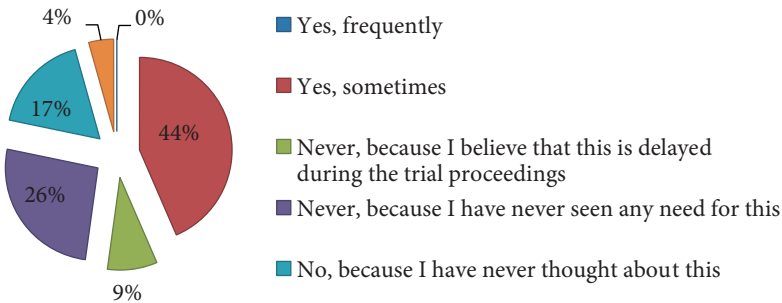


Figure 25 Have you yourself recommended that victims make use of support services? Prosecutors (23)

The respondents admit that in an absolute majority of cases the information about support services is not provided, although they are more lenient when evaluating their own work. There are two facts in the aforementioned responses which

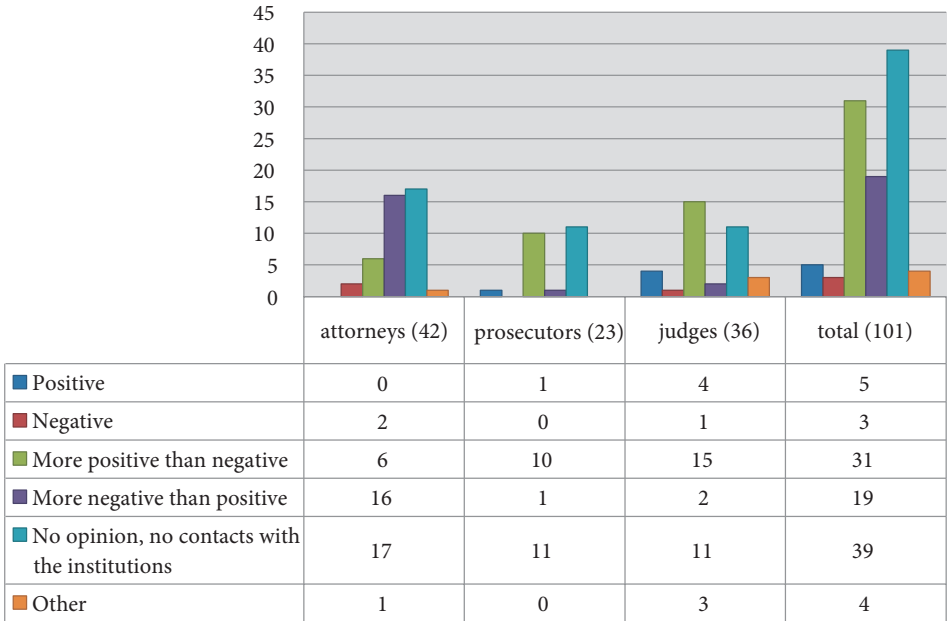


Figure 26 An evaluation of the work of victim support institutions

deserve attention – 30% of judges honestly admit that they have never recommended that victims make use of support services, while 56% of prosecutors say that they will not evaluate the work of their colleagues because they have insufficient information about this matter.

Respondents were next asked to evaluate the operations of the support organisations (see Figure 26).

Given the previous answers, it was no surprise that nearly 39% of respondents said that they could not offer an assessment because they had never had any contacts with the relevant institutions. 37% of respondents rated the operations of the institutions positively or more positively than negatively, while 22% rated them negatively or more negatively than positively. It must also be noted here that attorneys were far more critical in responding to this question.

This shows that the operations of victim support services are largely unknown to attorneys, prosecutors and judges. This means that one of the first things that should be done to strengthen the victim support institutions is to create greater understanding about the areas in which they work, as well as the content, necessity and availability of the services. If participants in legal procedure were to be more familiar with these matters that would clearly increase the level on which the victims receive the relevant information.

4 Investigations related to victims

The Directive speaks to various aspects of investigatory work, and consequently the author asked attorneys, prosecutors and judges to offer their views about four relevant issues:

- 1) The timeliness of interrogations;
- 2) The length of interrogations;

- 3) Repeated interrogations;
- 4) Medical examinations.

In relation to the timeliness of the process, respondents were asked to answer this question: As far as you have observed in terms of your work, does the interrogation of victims during pre-trial proceedings usually occur without any unnecessary delays, immediately after news of the criminal offence have been received, and at a competent institution? The responses are depicted in Figure 27.

These responses show that judges and prosecutors agree on this issue, with 75% of judges and 78% of prosecutors saying that interrogation of victims occurs without unnecessary delays almost always or in most cases, while 57% of attorneys said that this happens only sometimes or hardly ever.

The next question illustrated by Figure 28 had to do with the duration of interrogations: As far as you have observed in terms of your work, is the duration of pre-trial interrogations appropriate?

Here it can be seen that a slightly fewer than 48% of respondents say that the duration of interrogations is almost always or in most cases appropriate, while fewer than 42% admit that the interrogations are sometimes too short and too careless, and 10% argue that they are too long.

Since repeated interrogations may be troublesome for victims, respondents were asked whether this happens to an unnecessary degree. Different groups of respondents were asked to answer different questions. Attorneys were asked to respond to the general question of whether the repeated interrogation of victims is or is not

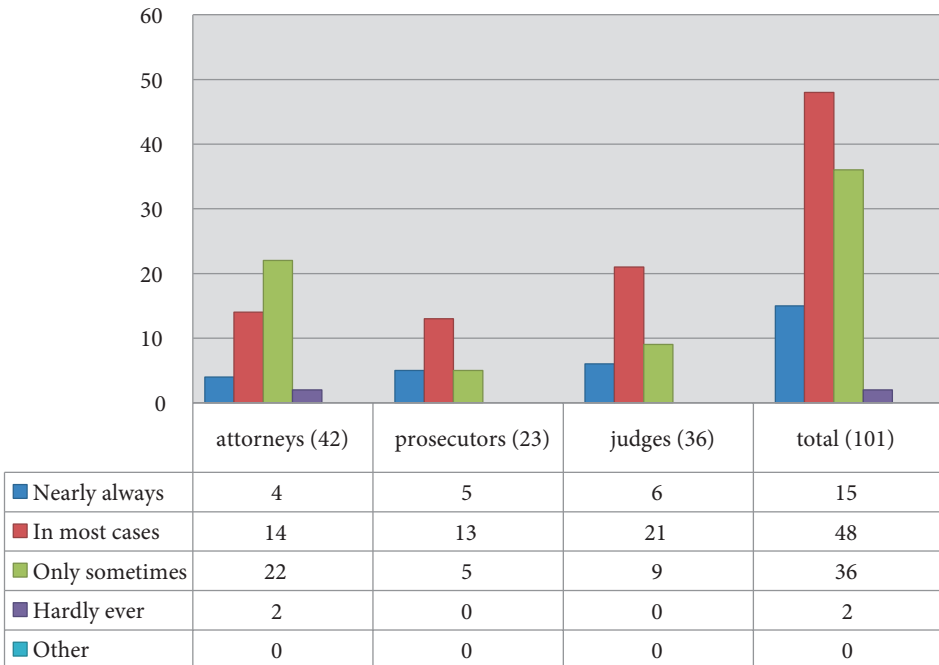


Figure 27 As far as you have observed in terms of your work, does the interrogation of victims during pre-trial proceedings usually occur without any unnecessary delays, immediately after news of the criminal offence have been received, and at a competent institution?

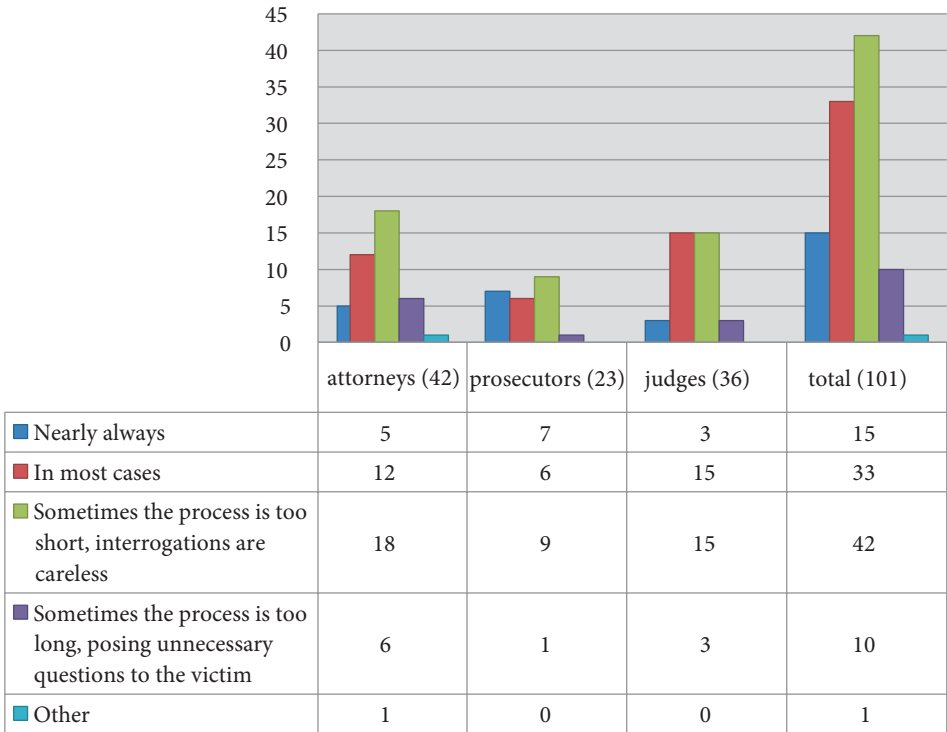


Figure 28 As far as you have observed in terms of your work, is the duration of pre-trial interrogations appropriate?

common in criminal proceedings. 62% said no, while one-third said yes. Judges and prosecutors were asked two questions:

- 1) Have you encountered unnecessary repeated interrogations during pre-trial proceedings?
- 2) Is the repeated interrogation of victims necessary for the court? The views of prosecutors and judges did not differ much when answering these questions (apart from those who answered “other”).

In responses to the first question, both confirmations and denials were equally common. In terms of the second question, most prosecutors and judges said that repeated interrogation of victims is necessary. This means that improvements in this area might apply to the pre-trial interrogation of victims, focusing greater attention on the first interrogation so as to avoid unnecessarily repeated interrogations that may be problematic for victims.

The last question related to the information from victims related to medical examinations (see Figure 29). The Directive’s preamble includes concerns about excessively encumbering and unnecessary examinations, and so attorneys, prosecutors and judges were asked to evaluate the relevant practices.

These answers fully overturn the belief that there may be unnecessary or too many medical examinations. 46.5% of respondents said that the process is appropriate, while 43.5% said that it is not appropriate because there are too few examinations or that the examinations are cursory. Only one respondent thought that there are too many examinations.

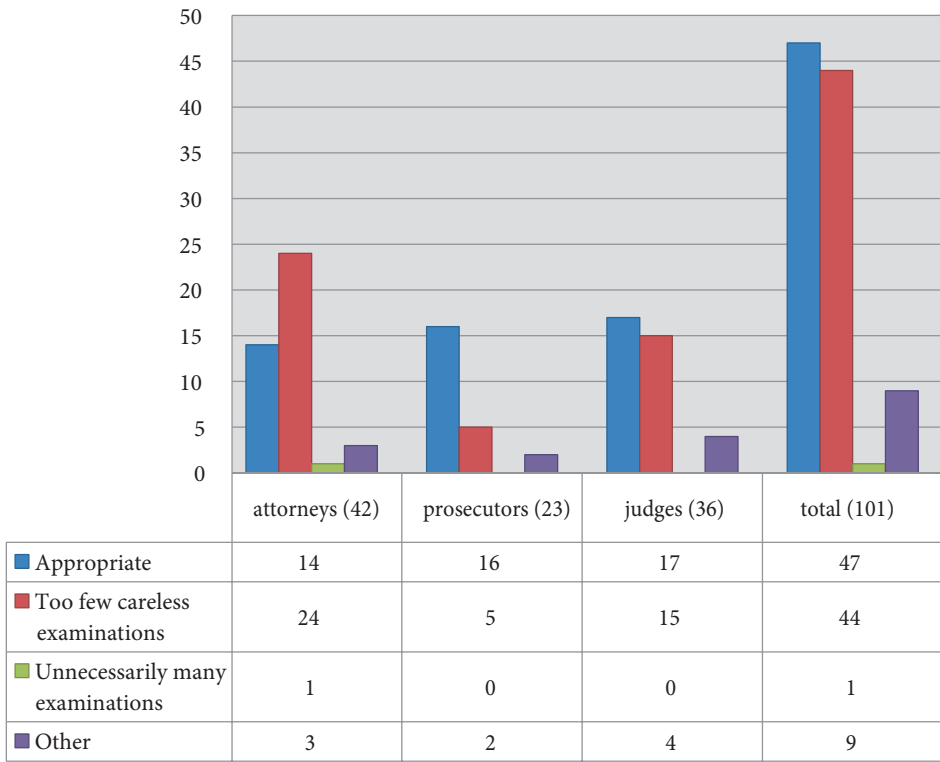


Figure 29 An evaluation of medical examinations

5 Compensation for victims

There are two aspects in relation to compensation for victims insofar as the relevant guarantees are enshrined in the Directive, which are worth the consideration – the compensation for harm caused by a criminal offence and the compensation for expenditures that victims have incurred because of their participation in criminal proceedings.

The compensation for harm caused by a criminal offence at this time involves two manifestations – the state compensation that is paid in accordance with the relevant national law¹¹, as well as the compensation which victims receive from the people who are found guilty of the relevant offence or who have been responsible for the activities of such people.¹² The latter process is more related to criminal procedure than the former one is, and that is why this study is more focused on it. It must also be noted that state compensation is not the main issue here in that such compensation only applies to a narrow range of individuals.¹³ It is also true that the payment compensation from the state does not preclude the victim from demanding additional compensation from the guilty party. For illustrative purposes, the author can offer data about state compensation paid in 2013 (see Tables 2 and 3).¹⁴

Official statistics show that 49,905 criminal offences were registered by the Interior Ministry in 2012.¹⁵ There is no reason why the number of offences should have declined substantially last year, and that shows that state compensation is paid in very few cases. Accordingly, the issue of compensation in criminal proceedings is and will continue to be of importance.

Table 2

State compensation for victims

	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII	All
Applications	52	45	59	44	59	31	45	40	40				415
Approval of state compensation:	43	41	41	60	33	37	36	42	37				370
Death	11	10	7	12	7	3	11	6	10				77
Sexual offences	10	6	8	13	9	10	2	9	8				75
Major bodily harm	8	8	7	10	5	5	14	14	9				80
Medium-level bodily harm	14	17	19	25	12	19	9	13	10				138
Refusal of state compensation	9	4	7	7	13	5	3	4	3				55

Table 3

Sum of state compensation to victims, LVL

Total	26892.19	22420.00	20087.69	31440.00	19140.00	19000.00	20520.00	20160.00	21700.00				201359.88
Death	9700.00	7600.00	5600.00	8600.00	5600.00	3000.00	8800.00	4000.00	7000.00				59900.00
Sexual offences	5320.00	3780.00	3920.00	7840.00	5040.00	5600.00	1120.00	4880.00	3360.00				40860.00
Major bodily harm	5460.00	4340.00	3920.00	5400.00	2800.00	2800.00	6440.00	7280.00	6140.00				44580.00
Medium-level bodily harm	6412.19	6700.00	6647.69	9600.00	5700.00	7600.00	4160.00	4000.00	5200.00				56019.88

To recall the previous question about how the respondents view the main motivation of victims when it comes to becoming involved in criminal proceedings, i.e., to receive compensation, two questions were posed in relation to compensation, applications for compensation, and the importance thereof. This time nine mediators were also asked to answer the questions. The first one depicted in Figure 30 relates to the frequency at which applications for compensation are submitted.

The above data reveal that 94% of respondents said that this happens nearly always or frequently, while only 5% said that it happens seldom. It must be noted that most of those who said that it happens seldom were mediators, while very few attorneys, judges and prosecutors said the same.

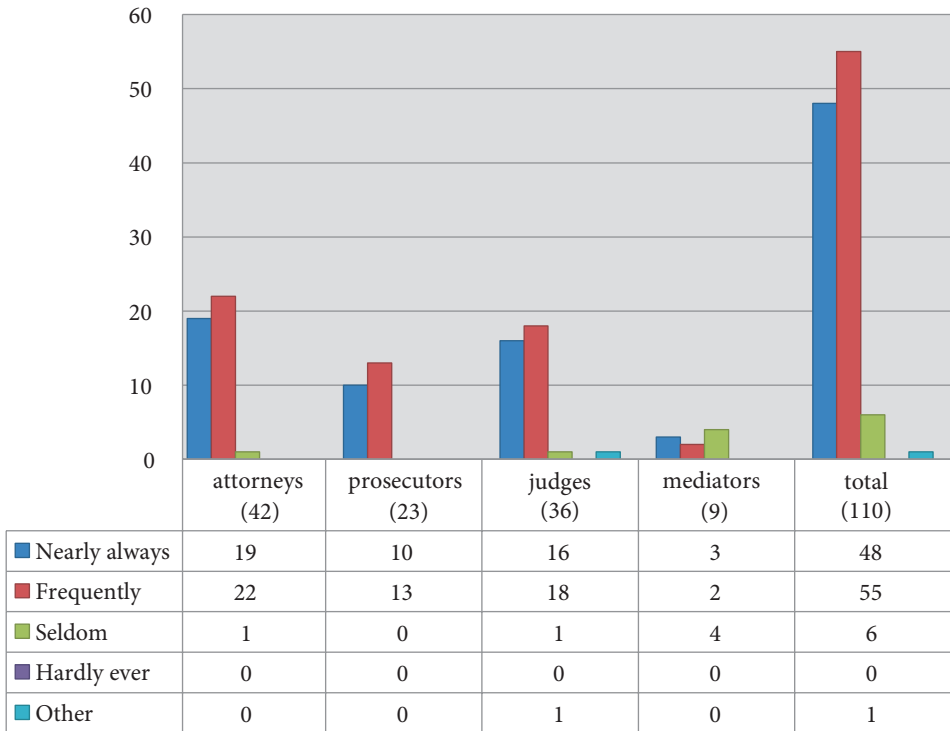


Figure 30 Do victims make use of the right to seek compensation?

Considering whether the main reason why victims take part in criminal proceedings is that they wish to receive material compensation, the respondents were asked whether the interest of such people diminishes once they have received the compensation (see Figure 31).

These answers show that 84% of respondents say that the interest of victims diminishes after they receive compensation nearly always or in most cases, with only 14% saying that this happens seldom or hardly ever. This shows that material compensation is the main motivation for victims in terms of actively taking part in criminal proceedings, also noting that interest in this diminishes once the compensation is received.

The other aspect of compensation relates to whether victims receive compensation for expenses that they have incurred during criminal proceedings – something that refers to Section 367 of the KPL. Respondents were asked whether victims make use of this right (see Figure 32).

The above responses demonstrate that 58% of respondents say that requests for such compensation are received seldom or hardly ever, while 37% of respondents say that this happens frequently. Considering these responses in the context of how often victims ask about the right to receive such compensation, one must conclude that victims make use of the right to receive compensation more often than they receive information about it. This means that they learn about the opportunity from people who are not involved in the proceedings. Still, it has to be said that even though victims often ask for compensation of the expenses that they have incurred, comparatively many responses reveal that these requests are submitted seldom or

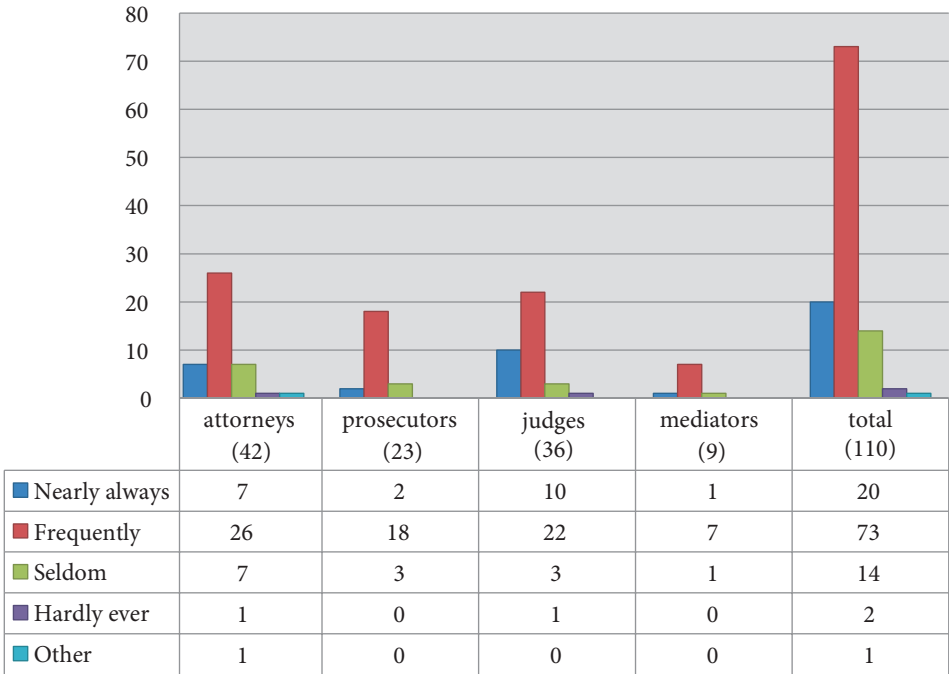


Figure 31 If victims receive compensation during criminal proceedings, does their interest in the proceedings diminish?

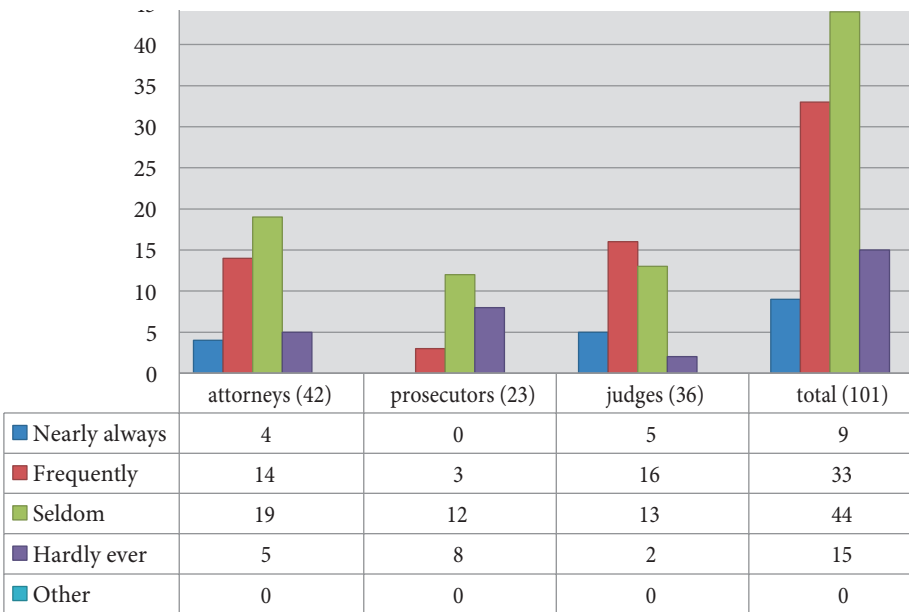


Figure 32 According to your professional observations, do victims often ask for compensation for expenses incurred during criminal proceedings?

hardly ever. This means that by no means all victims make use of the procedural guarantees that are always awarded to them. Another negative trend here is that most prosecutors have encountered the relevant situations seldom or hardly ever, which means that inadequate attention is devoted to this issue during the pre-trial proceedings.

6 Settlements of criminal cases

Several studies and publications have been devoted to the settlement of criminal cases during the past decade. Among them are several important publications in Latvia.¹⁶ These have recommended essential improvements to legal regulations and their application. There have been some essential changes in this regard as a result of these scholarly recommendations, as well as other circumstances which relate to the legal regulation of this particular issue. One issue that has not changed is the fact that, depending on the criminal charges that have been filed, a settlement can prohibit criminal procedure (KPL, Section 377.10), exempt an individual from the criminal liability (Section 379.1.2), or have no decisive procedural consequences. In recent years, the use of settlements to prohibit criminal procedure has been amended not in relation to Section 377 of the KPL, but instead in relation to instructions in Section 7 of the KPL which speak to those cases in which criminal procedure can only be launched if the victim files a petition in this regard (such procedures must be ended if settlement is reached). This applied, for instance, to offences against the state until this year, as defined in Section 90 of the Criminal Law (KL) when this part of the law was stricken via amendments that took effect on April 1, 2013. Only in 2011 were the criminal offences referred to in Section 185.1 of the KL included in this category. The next statistical data in this paper show these changes very evidently. When it comes to the overall application of Section 377.10 of the KPL, it has to be said that between 2010 and the first half of 2013, the number of criminal procedures that were ended because of a settlement increased in 2011 and 2012, while there was a decline in 2013. The situation differed in terms of specific criminal offences. An overview is provided in Table 4.

There have also been essential amendments to rules concerning a settlement as a reason for exempting an individual from criminal liability in accordance with Section 379.1.2 of the KPL. The most important amendments to the KPL and KL took

Table 4

Criminal procedures ended on the basis of Section 377.9 of the KPL¹⁷

Section of law	Year of decision			
	2010	2011	2012	2013 (1 st 6 mos.)
90	0	0	0	0
130	18	130	167	72
157	0	1	6	2
159.1	5	3	3	2
160.1	0	0	1	0
185.1	9	251	287	116
260.1	74	57	34	19
Total	556	1,040	1,147	477

effect on April 1 of this year, and they have been reviewed in great detail in the journal *Jurista Vārds*.¹⁸ It is particularly important to note that once the amendments took effect, there were very important requirements in relation to a settlement as a cause for exempting someone from criminal liability (KPL, Section 379.1.2). In the past, the law did not include any direct indications as to people who could be exempted from criminal liability as the result of a settlement. Neither did it include any rules about the content of the relevant settlement. The new version of the law states that a person who has committed a criminal offence or a less serious criminal offence can be exempted from criminal liability except in cases when the criminal offence has led to the death of an individual, but only if a settlement between the suspect and the victim or a representative of the victim has not led to exemption from criminal liability during the past year and if the suspect has fully prevented any harm caused by the criminal offence or has paid compensation for any losses that have been incurred. Due to this reason, it was interesting to look at statistics related to Section 397.1.2 in terms of the three most common criminal offences with respect to which these rules are applied, also looking at how practices have changed since the aforementioned amendments took effect. Illustrative data are found in the Table 5.

There are several important conclusions that can be drawn from these data. First of all, the number of cases in which a settlement has led to an exemption from criminal liability has tended to decline since 2013. If the number of applications of Section 379.1.2 of the KPL does not increase during the second half of 2013, then the total number of such cases during the course of the whole year will be lower by one-half than in 2010. This increase also cannot be predicted by the amendments to the KPL and KL that took effect on April 1, 2013, thus substantially reducing the range of incidents and offences with respect to which a criminal procedure cannot be ended with the help of a settlement. It is also true that in the context of the aforementioned prerequisites for the use of a settlement, Section 279.1.2 related to criminal procedure in accordance with offences listed in Section 175 of the KL have been ended to an equal degree as was the case with Section 379.1.2 of the KPL between April and June 2012 and January and March 2013, when the amendments were not yet in force, as well as between April and June 2013, when the additional prerequisites had to be utilised. This led to the assumption that before the amendments took effect, those who were handling criminal procedure chose to use a settlement only if the prerequisites for the process were satisfied, etc., or that those same people did not even notice the new rules.

Respondents in the survey were asked to state their views about settlements in terms of several related issues. The first question is whether a settlement is in line with the essence of criminal procedure (see Figure 33).

As can be seen in these answers, the absolute majority of respondents said that a settlement is in line with the essence of criminal procedure or that this depends on the criminal offence that was involved.

Asked about the cases in which a settlement should be offered, the respondents offered a great variety of answers, but those that were mentioned most often were the cases involving property losses, involvement of juveniles or first-time offences, many cases in which the victim wants to settle the case because it facilitates understanding of the situation at hand, only in those cases when a real compensation has been paid, etc.

Mediators were asked about what victims expect from a settlement, and several answers could be ticked off. Six of the nine mediators who filled out the

Table 5

Criminal procedure ended on the basis of Section 379.1.2 of the KPL¹⁹

Sen of Law (top ctio3)	Year/period of dicision							
	2010	2011	2012	2013, 1 st 6 mos.	4 Jan. to 30 June 2011	4 Jan. to 30 June 2012	1 Jan. to 31 March 2013	4 Jan. to 30 June 2013
185	364							
180	193							
130	142							
185		96						
180		86						
175		85						
260.11			153					
175			86					
180			65					
260.11				49				
175				46				
126				43				
180					27			
185					19			
126					18			
260.11						43		
175						23		
185						19		
126							27	
175							22	
260.11							20	
260.11								29
175								24
126								16
Total	1198	704	667	283	175	171	142	141

questionnaire said that victims expected the guilty party to apologise, eight said that the victim wanted to know why the offence was committed in the first place, one said that the victim expected to reach an agreement with the guilty party, nine said that the victim was interested in compensation, and two ticked the answer “other.”

Attorneys, prosecutors and judges were also asked to express their views as to a settlement which did not allow criminal procedure to be pursued. The responses are shown in Figure 34.

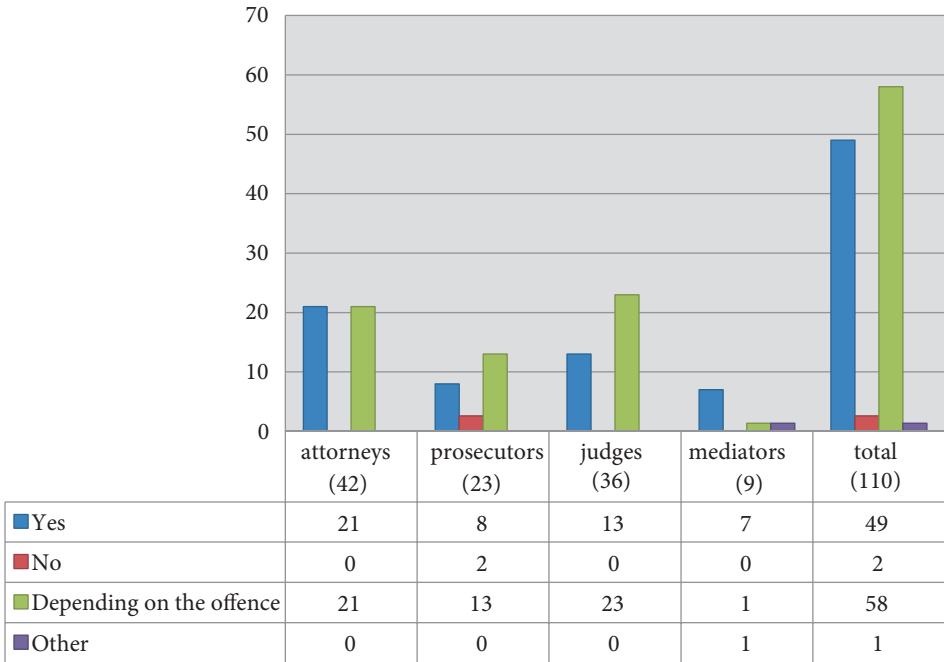


Figure 33 Is a settlement in line with the essence of criminal procedure?

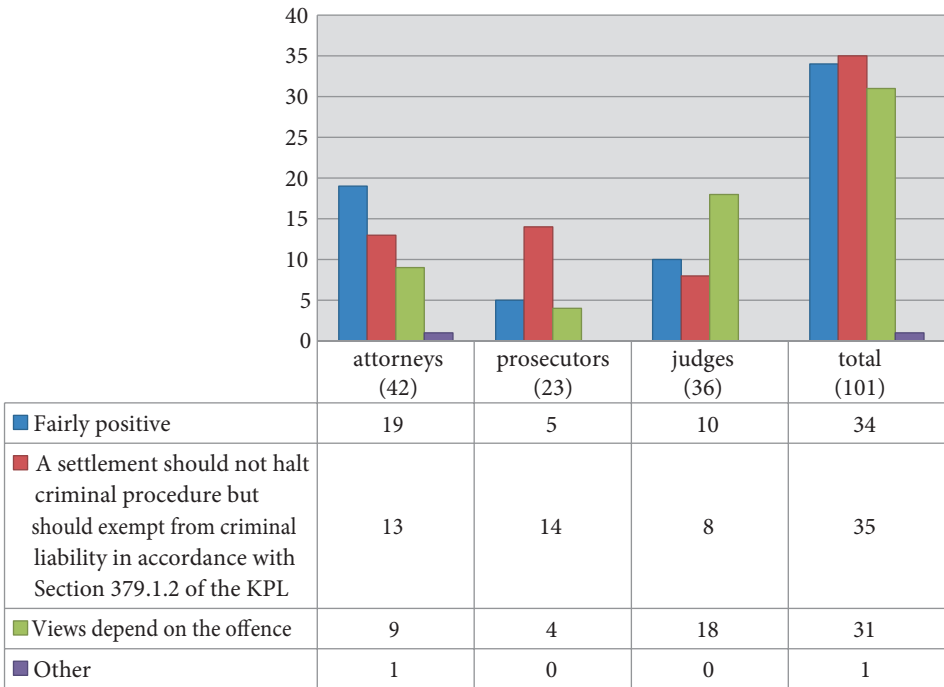


Figure 34 Views about a settlement which does not allow criminal procedure to be pursued

As can be seen here, the answers are by no means homogeneous, and equal numbers of respondents have positive views about a settlement as something which halts criminal procedure, that the settlement should not be an obstacle against criminal procedure, or that it all depends on the offence that has been committed.

The KPL also allows employees of the State Probation Service (VPD) to help in pursuing a settlement. In recent years, the VPD has done active and effective work in facilitating and organising settlements. In its 2012 annual report,²⁰ the VPD offered data about settlements that require no further comment.

- The trends in this area can be seen in numbers – there were 51 requests to organise a settlement in 2005, 251 in 2006, 744 in 2007, 1,140 in 2008, 745 in 2009, 440 in 2010, 696 in 2011, and 706 in 2012. The rapid drop in 2009 had to do with the financial crisis which began in 2009 and continued until 2013. The work of the VPD was substantially curtailed with the rule that it could only organise settlements during the pre-trial stage of the process.
- In 2012, 15% of all the probation clients who were involved in a settlement were juveniles.
- In 2011 and 2012 settlements were requested most often by those who had committed a criminal offence, but the number of requests from prosecutors increased by 19% in 2012, while the number of requests from the police declined by 20%.
- Settlements have most often been requested in the context of less serious criminal offences and crimes, but in 2012 there was a substantial increase in settlements related to serious criminal offences in which juveniles were involved.
- Most settlements related to theft, fraud or misappropriation at a minor level, theft, fraud or misappropriation at a minor level when the offence was committed repeatedly, theft involving access to a flat, other venue or warehouse, or the purposeful destruction or damage of the victim's property.
- When it comes to the results of settlements, there were several positive trends in 2012. For the second year in a row, there was the same number of conditional settlements. The number of incidents in which a settlement was not reached declined a bit, and the sad fact is that the number of cases in which a settlement was interrupted increased in 2012. That was mostly because the person who committed the criminal offence was unwilling or unable to pay the demanded compensation to the victim or did not agree to do so in the period of time that was established.
- Analysis of the results of settlements in 2012 show that the parties reached agreement 272 times, agreed without conditions in 104 cases, and did not reach agreement in 28 cases. These results can be seen as positive, because nearly 60% of the cases in which both parties arrived at a settlement meeting led to an agreement. In 2012, 76% of participants in settlement attempts agreed on compensation which related to compensation for the victims, in 22% of cases it involved an apology, only 2% involved specific work, and in 1% of cases it involved work and compensation.

Given the active work of the VPD and the ideas included in the Directive about the involvement of mediators, the author sought the views of practical workers about the conclusion of a settlement with the VPD with the participation of a mediator.

Mediators were asked whether effectiveness of settlements increases if a mediator is involved, and all nine respondents answered yes. Attorneys, judges and

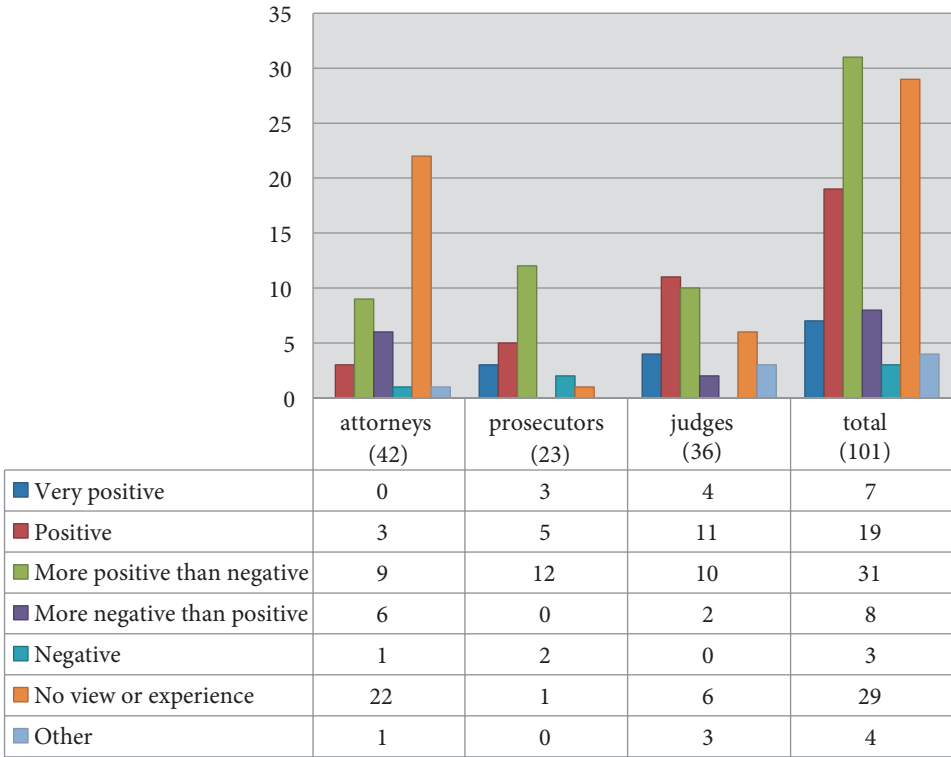


Figure 35 Evaluation of the work of the State Probation Service in relation to settlements

prosecutors, in turn, were asked to evaluate the work of the State Probation Service (see Figure 35).

The above numbers show that more than 56% of respondents have positive views about VPD operations, while fewer than 11% have negative views. 29 of the respondents had no view about the matter, because they have had no contacts with the work of the VPD. It is interesting that most of them are attorneys.

The overall conclusion here is that the fairly active operations of the VPD have proven themselves to be effective, and the amendments to the KPL that speak to the rights of the handler of the process and to the obligation to approach the VPD in terms of organising a settlement and that took effect on April 1 of this year will improve the overall situation to an even greater degree.

7 Legal aid to victims

One of the most important procedural guarantees for victims, to be sure, is the right to receive legal aid from an attorney in criminal proceedings. A professional attorney can take part in the defence of a victim’s interests in two ways – as a representative of the victim or as a provider of legal aid to the victim. With the aim of determining whether the involvement of a attorney in criminal procedure improves the defence of the victim’s interests, respondents were asked about their observations in terms of whether the defence of a victim’s interests is more effective if an attorney takes part in the procedure as a representative of the victim or as a provider of legal aid (see Figure 36).

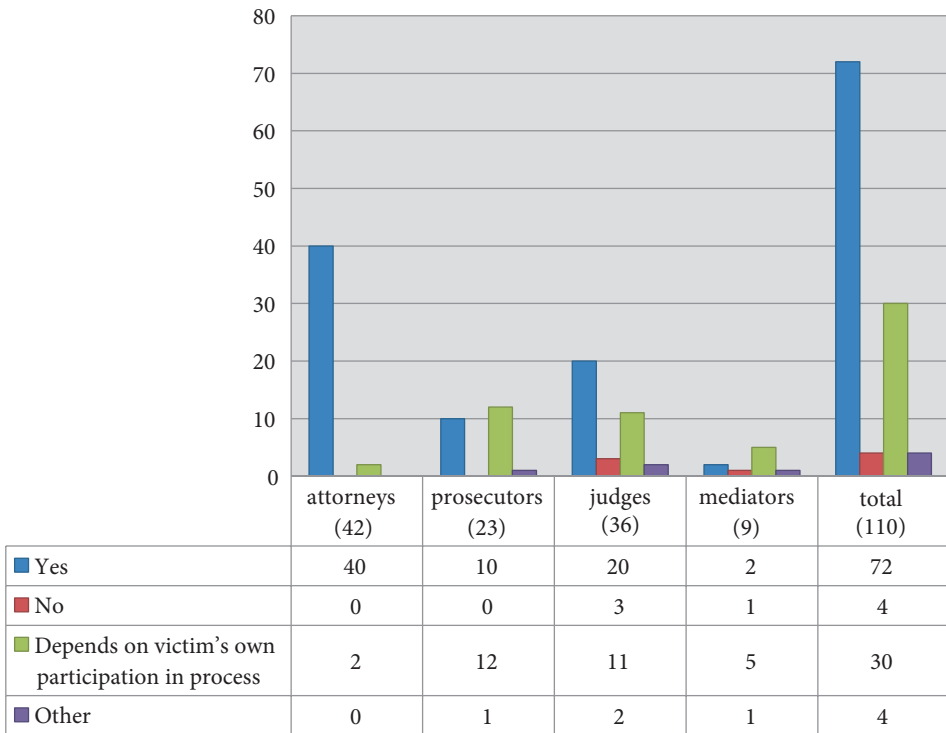


Figure 36 Is the defence of victim interests more effective if an attorney takes part as a representative of the victim or as a provider of legal aid?

These answers show that most respondents (65%) answered the question in affirmative, while the next largest group (27%) argued that this depends on the victim's own ability to take part in the process actively. It is important to note the fundamental differences here among various groups of respondents. Nearly all attorneys (95%) said yes to the question, while most prosecutors and mediators believed that the participation of an attorney in the defence of a victim's interests depends on the capacities of the victims themselves. Most judges believe that the participation of attorneys makes the process more effective and ensures the defence of the victim's interests to a greater degree.

According to the existing law, not all victims in criminal cases receive the state-financed legal aid. Respondents were asked whether such aid should be provided to all victims (see figure 37).

The above figures show that approximately equal numbers of respondents support and reject the idea that all victims should be provided with state-financed legal aid.

As depicted in Figure 38, more distinction in views was observed when respondents were asked whether there should be cases in which the participation of an attorney in defending a victim's rights is mandatory.

As shown in Figure 39, the absolute majority of all respondents, as well as in each group of respondents, in supporting the mandatory participation of an attorney in the protection of a victim's interests. Respondents were next asked about the cases in which this should happen, with an opportunity to indicate several answers.

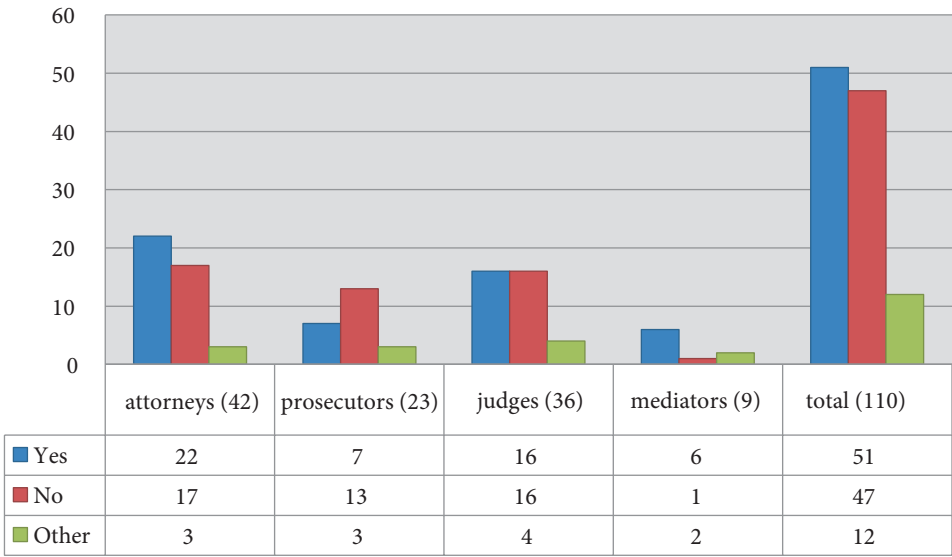


Figure 37 **Should all victims receive state-financed legal aid?**

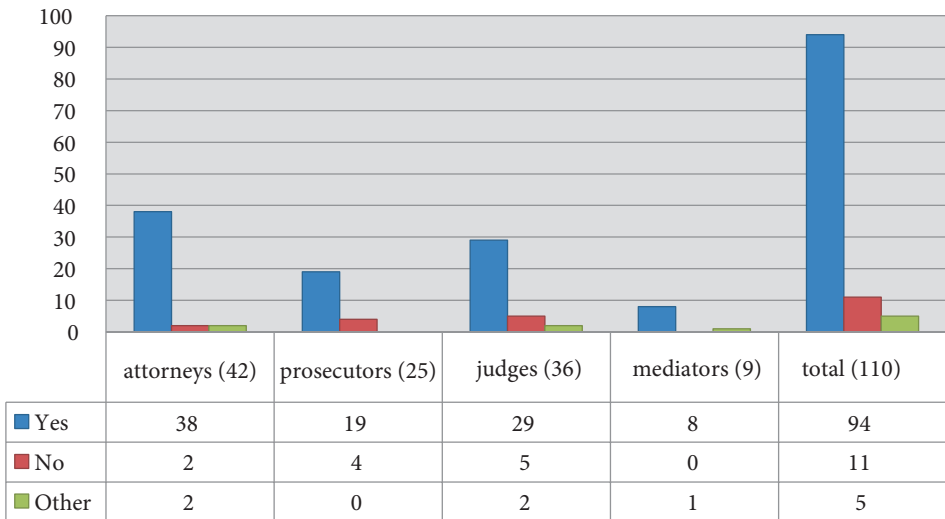


Figure 38 **Should the participation of an attorney in the protection of a victim's interests be mandatory in some cases?**

A majority of respondents believe that an attorney's participation should be mandatory for victims who suffer from physical or mental disorders, as well as when the victim is a juvenile. Other options, including the mandatory provision of aid to poor people, are supported by the minority of respondents.

The final question about legal aid focused on the main benefits for victims when an attorney represents a victim or provides legal aid in criminal procedure. The point here was to obtain information from professional observations of those cases in which the participation of an attorney really helps the relevant victim. Here, again, multiple answers were offered, and respondents made active use of them in

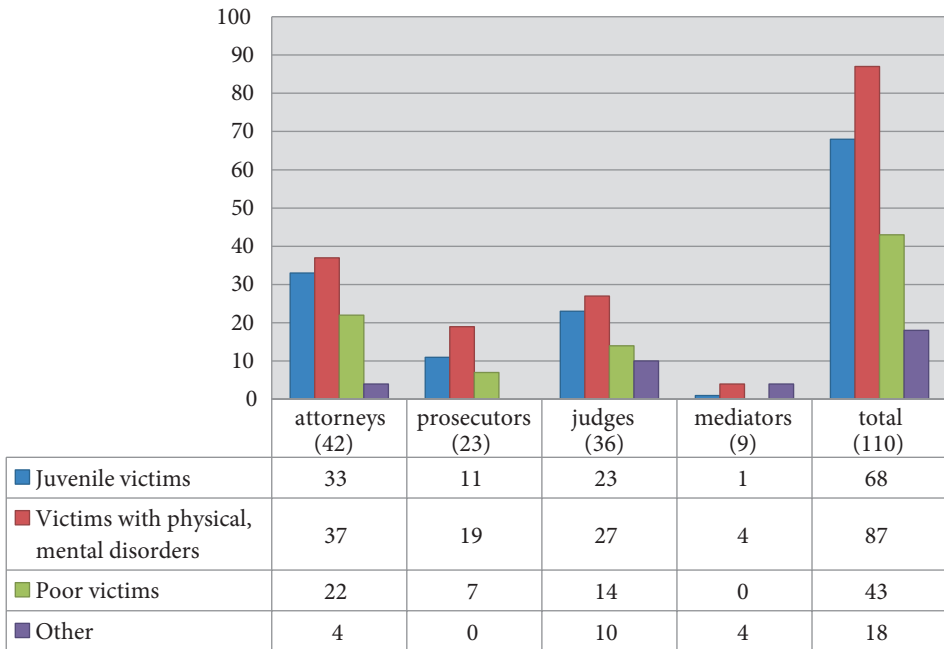


Figure 39 When should the participation of an attorney in the protection of a victim's interests be mandatory?

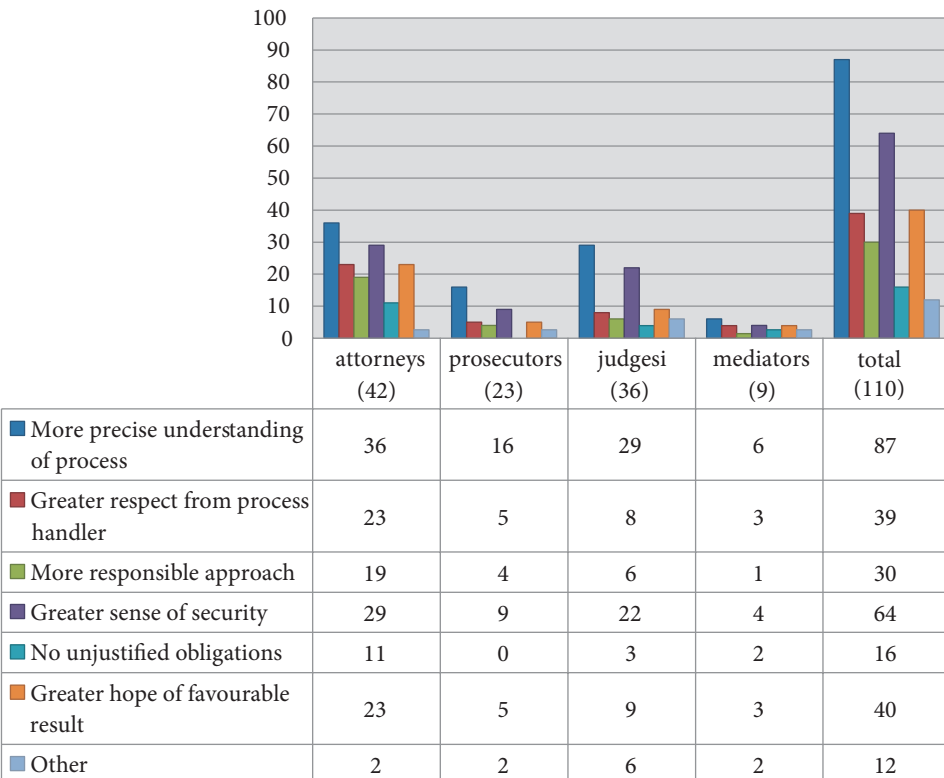


Figure 40 Benefits for victims from the participation of an attorney in criminal procedure

the sense that, on average, each respondent chose more than two options (for an overview, see Figure 40).

Overall and in each group most of the respondents said that the main benefit from an attorney’s participation is that the victim has a more precise understanding of the process. More than a half of the respondents indicate that victims have a greater sense of security when an attorney takes part. Only among attorneys did the majority of respondents say that an attorney’s participation ensures greater respect on the part of the handler of the criminal procedure, with few respondents in other groups agreeing with this view.

The bottom line here is that the participation of an attorney in protecting a victim’s interests is an effective procedural guarantee, one that is supported in various groups of practical participants in criminal procedure.

8 Aspects of the defence of victims

Finally, the author presented respondents with a few general and possibly provocative questions. The first question, illustrated by figure 41, focused on whether there are cases in which victims make use of their rights in a dishonest manner.

These answers show a comparatively positive attitude about the participation of victims, because an absolute majority of all respondents, as well as in each group, say that dishonesty on the part of victims is uncommon or occurs in just a few cases. This is positive, in that irrespective of the reasons why victims choose to take part in criminal procedure, the malicious misuse of their rights is an uncommon thing.

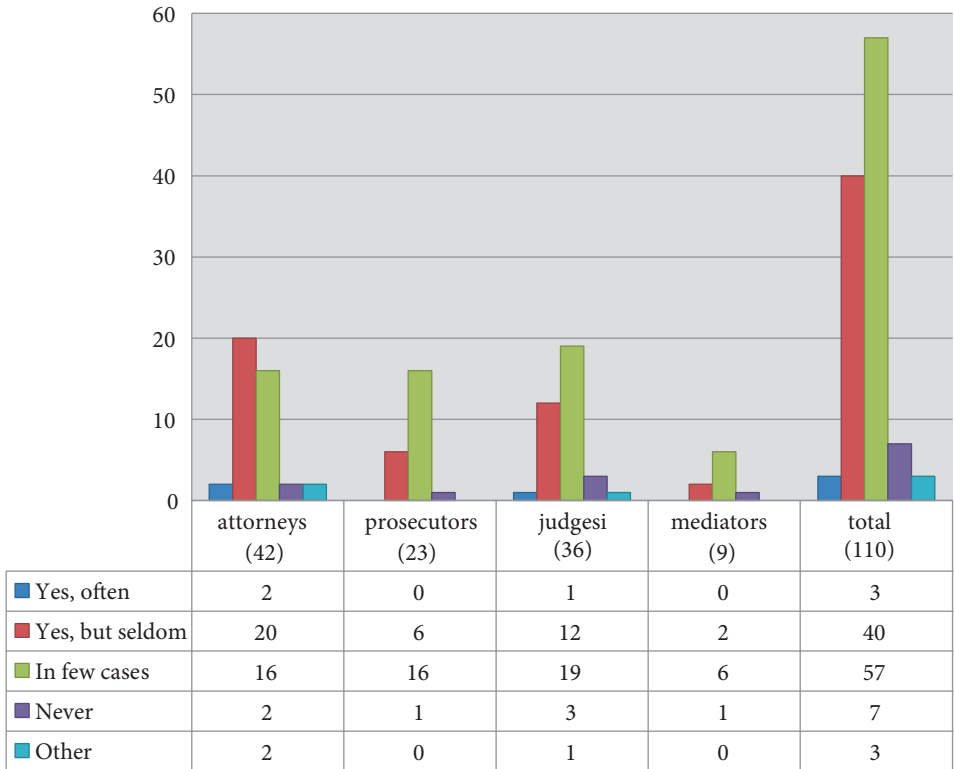


Figure 41 Do victims sometimes use their rights dishonestly?

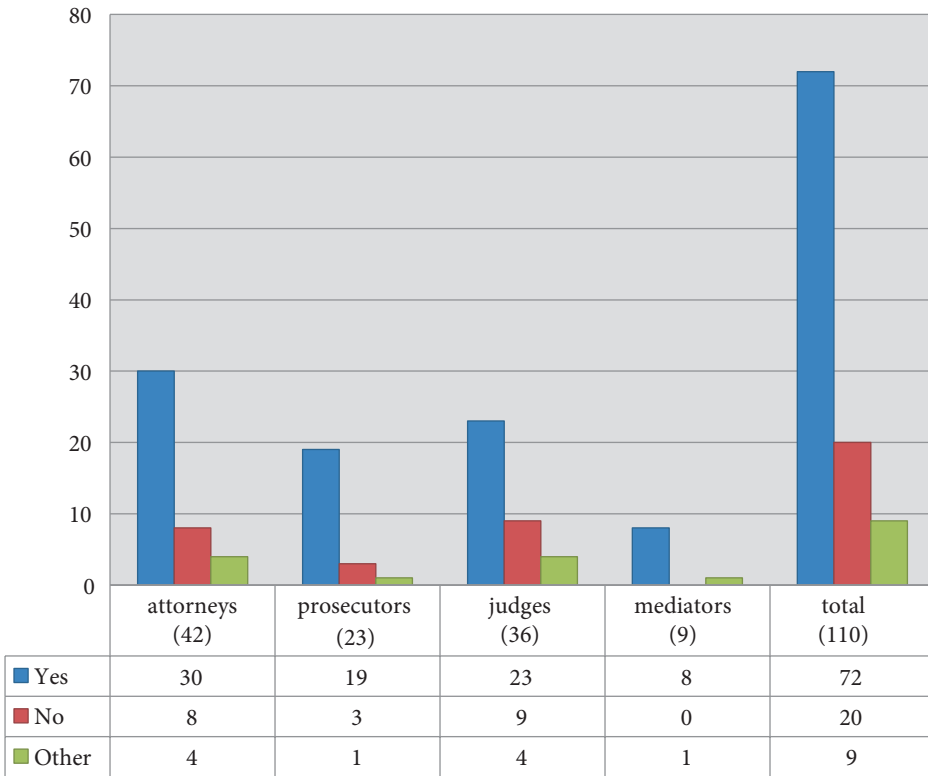


Figure 42 **Should victims take an active part in criminal procedure?**

Next respondents were asked whether victims should take an active part in criminal procedure in the first place (see Figure 42).

Here a fairly extensive homogeneity of views is represented. Among all respondents and in each group, the absolute majority of respondents reply in affirmative, and that means that the participation of victims is not, in most cases, seen as a hindrance to the process. On the contrary, it is supported.

Finally, the aspects of the status of victims in criminal procedure have been reviewed by scholars and by victims, but there has been little examination of the views of practical workers who encounter victims in their everyday professional work when it comes to the most important aspects of the defence of victims in Latvia at this time. An open question about this led to a wide variety of answers. Several respondents argued about the impossibility of receiving compensation for damages because the defendant has no money. Others pointed to effective protection of the victim against family violence, the provision of an effective defence, great availability of initial support procedures, increased state compensation, a failure to inform victims about their status and the relevant rights and obligations, the limited ability of victims to speak about the case in court, the need to reduce or eliminate contacts between the victim and the convict, and protection of a victim from the influence of defence attorneys.

A few very interesting thoughts were expressed by few of the respondents. Some said that a victim is helpless if the handler of the process is not active and interested

in the procedure. One specific proposal might really improve the defence of victims in a substantial way without any major investments of time or resources – that victims should be ensured the right to receive at least one free consultation with an attorney when a criminal case has been launched and the individual wishes to have the status of a victim.

Summary

1. Victims and their status in criminal procedure are topical and problematic issues in criminal proceedings at this time.
2. At a time when norms related to the criminal procedure rights allow the victim to choose whether or not to obtain the official status of a victim, the absolute majority of victims decide to accept the status of a victim in the criminal procedure.
3. The survey data show that the most important reason why victims wish to take part in criminal procedure is that they can receive material compensation and that they wish to ensure that the guilty party is punished. It is also true that if a victim receives a compensation during the process itself, it is less likely that he or she will be actively involved in the process from there onward.
4. Most of the surveyed judges and prosecutors confirmed that the active participation of the victim in criminal procedure could influence the process and the result, thus visibly proving that the victim's involvement in criminal procedure was tactically justified.
5. The KPL does not directly regulate the issue of whether a victim can reject the status of a victim, while, in practice, the desire of victims to reject the status is not recognised; this means that once a person has been declared to be a victim, he or she cannot reject the status.
6. When it comes to informing victims about their rights and obligations, it has to be said that the evaluation of the practical employees was not particularly positive, and the situation in Latvia must be described rather critically.
 - 6.1. In accordance with the requirements of the Directive and the KPL, as well as other norms which apply to the practices, the information about the relevant elements of the status of a victim can be evaluated as something which always must be provided.
 - 6.2. Still, there are no such instances. In no case when the respondents were asked to evaluate the provision of information about the specific element of the victim's status, did even 50% of respondents say that this information is always provided. There were unforgivably few cases in which the evaluation of "always" or "in most cases" reached a level of 75%.
 - 6.3. At the same time, there were 50% of respondents who said "in few cases," "hardly ever" and "never."
 - 6.4. The highest level of informing people about the elements of their status as victims was presented by prosecutors who comparatively seldom said that this happens "hardly ever" or "never."
 - 6.5. Attorneys were most critical, saying that this happens "always" in very few cases, instead often claiming that it happens "in few cases" or "hardly ever."
 - 6.6. Information about the elements of a victim's status is one of the weakest aspects in terms of the reviewed issues related to legal proceedings, and this requires rapid and essential improvements.

7. Latvia should more extensively evaluate and popularise the work of available organisations that offer support to victims. Although several organisations in this area are quite active and successful at this time, practical employees and victims lack information about them and do not have an understanding as to how this involvement is necessary. This means that support for “external procedures” is not at an adequate level.
8. In most cases, practical employees indicate that investigatory work is usually corresponding to the requirements. There are, however, improvements necessary when it comes to the initial interrogation of victims so that the process is carried out sufficiently responsibly and completely. This would eliminate or at least fundamentally reduce the need for victims to be interrogated more than once during pre-trial procedures.
9. Victims actively make use of the right to seek compensation, but the poor material condition of the guilty parties means that compensation is received very seldom.
10. Settlements have been known and practiced in Latvian criminal procedure for a long time, and practical employees support the process. Amendments to the KPL and KL that took effect on April 1, 2013, and had a comparatively substantial effect on settlements as exemption from criminal liability, have not had a particularly essential effect on ending criminal procedures in relation to Section 379.1.2 of the KPL.
11. Legal aid must be seen as the most essential guarantee for victims in relation to criminal procedure. Attorneys, prosecutors and judges all admit that the greatest benefit from the participation of an attorney in protecting the interests of a victim in criminal procedure relates to the amount of information that the victim has about his or her status, rights and obligations. In practice, respondents support the view that there are cases in which victims must receive legal aid on a mandatory basis.
12. When it comes to the most important issues of defending a victim, those defined in the survey indicate increasing the amount of state compensation, improving the effectiveness of the collection of compensation from guilty parties, facilitating the availability of legal aid, greater support for victims outside of criminal procedure as such, and ensuring the protection of victims and their interests.

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Ownership Claim

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The paper analyses the objective of an ownership claim – “to declare ownership rights.” According to the literal meaning of law, the claim can be brought by the present owner, still, in the court practice and in legal science this provision is interpreted broader, including a reference to the former owner. Due to this reason the borderline between an ownership and a restitution claim is lost, although in essence they are different.

The paper examines borrowings from the German and Swiss law and attempts to construct the so-called “claim on rectification of a land register record” in the Latvian law. Lately the court practice has gradually abandoned this idea by giving preference to protection of the acquirer in good faith, which excludes rectification of a land register record during the trial of an ownership claim. The legal science has also moved into this direction by proposing the respective amendments in the Civil Law.

The paper analyses a competition of claims. It is concluded that mostly such competition is only ephemeral. Claims on protection of possession, on execution of a contract and on unjust enrichment are independent claims. Each of them has different aims, and these claims cannot achieve the result that would be ensured by the ownership claim.

Keywords: *Actio in rem, rei vindicatio, restitution, Publiciana in rem actio, negatoria actio, rectification of a land register record, acquisition in good faith, condictio sine causa.*

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Introduction

Ownership claim cannot establish ownership rights that are not owned by the plaintiff when the action is brought to the court. According to Articles 1044-1066 of the Civil Law, it is not possible to raise ownership claim and in the same proceedings invalidate a transaction or transactions, and renew ownership rights. In legal science and case law, there has been a dominating view that in ownership action a person rather restores earlier ownership rights than protects the existing ones. Upon such circumstances ownership action shall end up with restitution of earlier rights instead of establishment or protection of existing rights.

The aim of this publication is to demonstrate that this idea, which is based on a wide interpretation of the Civil Law norms, has come to a deadlock.

The latest tendencies of literature and case law are gradually waiving this understanding and allocating a greater meaning to the principle of public credibility and stability of civil law.

1 Objective of the ownership claim

According to Article 1044 of the Civil Law of Latvia (CL) the objective of the ownership claim is “*declaration of ownership rights and in connection therewith, granting of possession.*” Ownership claim may be the so-called declaration claim where the claimant is a person who possesses rights, but the respondent – a person who denies, infringes these rights¹; or the execution claim where the claimant is a person who denies the rights of the respondent, but the respondent – a person who regards these rights as his/her own². If, similarly to *rei vindicatio* described in the Roman law, both parties are equally categorical in claiming that the disputed property is owned by the respective claimant or respondent³, such trial shall be qualified as a declaration claim according to V. Bukovsky. If, however, only the claimant states that the property is owned by him/her, but the respondent, without denying the claimant’s ownership rights, still refuses to return the property “*on the basis of some property right or such personal right as the claimant must recognise*” (Article 1061 of the CL), such trial shall be qualified as an execution claim according to V. Bukovsky. In both abovementioned cases the claim is grounded on the claimant’s assumption that the ownership rights, whose declaration is requested before the court, had existed already at the moment when the claim was brought.

According to the idea of law, within the framework of the ownership claim it is not possible to establish such ownership rights, which, at the moment when the action was brought, were not owned by the claimant, respectively – the ownership claim is not possible as the so-called constitutive or transformation claim, i.e., a claim which is aimed towards transformation of the legal relationship. In case of a constitutive claim it is exactly the court’s judgment that is the legal fact on the basis of which legal relations are established⁴ – the existing rights of the claimant are transformed into totally different rights during the trial.⁵

2 *Actio in rem* character of the ownership claim

If a claimant alleges that he/she has acquired the property through delivery or inheritance from another person, then he/she must also prove that his/her predecessor was the owner of it (Section 2 of Article 1060 of the CL). This is a type of proof which is called *probatio diabolica*⁶ due to its complexity, and the modern legal systems, except the CL of Latvia, have mostly abandoned it exactly due to this reason.

In practice there are also admitted proofs of ownership rights that do not comply with the provision under Section 2 of Article 1060 of the CL⁷.

According to the sense of the CL, it is not possible to bring an ownership action and within the same proceedings claim invalidation of a deed or deeds and renew the ownership rights by introducing amendments to the land register records about the owner of the disputed property, because in such circumstances the claimant will turn out to be a former owner instead of the actual owner, and the subject matter of the claim will not be a declaration of ownership rights but rather their establishment or restitution (the problem of a “formal” and “true” owner or “the problem of two owners”⁸).

Hitherto this issue has not left a remarkable influence upon development of the ownership claim. However, in the latest practice the question about delivery and prescription has become topical as being two mutually connected types to acquire property.⁹

By transforming the ownership action into the proceedings resulting into restoring of earlier ownership rights instead of protecting the present ones, the ownership action shall end then with restitution of the rights of earlier existence, instead of establishment and protection of the existing ones.¹⁰ In the modern legal systems there are different conditions and borderlines for application of restitution. Mostly the law permits the court’s discretion¹¹, the chance of restitution is not always available. In such claim the respondent acts as a contractor to the deed (Civil Code of France¹² (hereinafter CCF) Articles 1304-1314; BGB¹³ §§ 116-144; Italian Civil Code¹⁴ (hereinafter ICC) Articles 1425-1440) or a person who has directly gained benefit out of such deed although he/she has not participated in its concluding (§ 143, Section 4, BGB; ICC Article 1441). It is a personal action. The Civil Code of the Netherlands¹⁵ (hereinafter CCN), which separately regulates restitution in case of performance not due (CCN Articles 6, 4, 203-211) and unjust enrichment (CCN Articles 6, 4, 2012), provides that unjustly transferred property may be reclaimed from the recipient (CCN Articles 6, 4, 203), thus – as a personal action.

By joining the ownership claim of *actio in rem* character with the restitution claim having the character of a personal claim, the Latvian law created a system with no parallels in any of the existing legal systems. In practice, the outcome of an ownership action has become unpredictable. It can lead both to establishment and protection of the existing rights and to restitution of the rights of an earlier existence.

3 Claim on rectification of a land register record or “rectification claim”

There is a view that the rights of an owner recorded in land registers do not only depend on the record in the land register, but also on the activities of owner’s legal predecessors.¹⁶

According to this view, “*the true owner may simultaneously claim both invalidation of the mentioned alienation agreement and rectification of the wrong record of the property.*”¹⁷

To substantiate this view, the quoted authors refer to several rulings by the court.¹⁸ They explain that “*the mentioned claim is similarly understood also in the Swiss Civil Code ((Grundbuchberichtigungsklage), see Article 975¹⁹) and in the German law ((Grundbuchberichtigungsanspruch, see Article 894).*”²⁰ In the court practice the “rectification claim” is regarded as a type of the ownership claim.²¹

The CL does not provide a claim “to rectify a land register record”. Likewise, the norms on ownership claim do not provide that by filing such claim there are grounds to invalidate the deed whereof the ownership rights of the defendant arise. They also do not envisage a chance to “renew”, “construct”, “rectify” or in any other way amend those legal relations which existed at the moment when the claim was brought. If the court, having referred to these norms, has constituted the rights which had not existed when the claim was brought, it has acted against both the provisions arising literally from the law and contrary to the idea of the law.

This contrast between the literal meaning of the law and its interpretation is noteworthy at least as a bright illustration of the “judge-made law” development in Latvia.

According to the doctrine on the “judge-made law” or further development of law *contra legem*, an obligatory pre-condition which justifies such activities is that the existing regulation is either unfair or unreasonable.²² The court may prevent injustice, as a result of which the owner has lost his/her rights and may renew such rights despite the fact that these ownership rights cannot be proved.

References to “rectification” of records appear in the court judgments in the light of the theory by A. Grūtups and E. Kalniņš (SKC-32/2002²³). Alongside with “rectification” one can come across a number of judgments, where by reference to various infringements of law various persons, including subjects of public law, have raised claims in the interests of “former owners” to renew ownership rights and with satisfaction of such claims the courts have ruled on rectification of a number of land register records with respect to the persons who could not know about defects in the ownership rights of their legal predecessors. The reason for such behaviour could be both the mistake on adopting decision on denationalisation²⁴, privatisation²⁵, also infringement of the joint ownership rights (the so-called cases of mansards)²⁶, also inner defects of any deed or even a lawfully enforced judgment revoked later as unlawful²⁷. During this period of time an idea was developed that a record in a land register was not a fact of public credibility to be taken into account by any future acquirers of the immovable property, but rather a presumption which could be disproved by indicating any fact that was in conflict with it.²⁸ The attempt to seek similarity in the question about the three different legal systems of “rectification claims” has turned out to be methodologically erroneous and practically unenforceable. This proposal is methodologically wrong because not only the preconditions are different in the legal system into which this borrowing is transposed, namely, in Latvia, but also in the countries wherefrom they were intended to be borrowed. The German law is based on the principle of abstraction.²⁹ In Latvia one can trace elements of both causality³⁰ and – partially – those of abstraction.³¹ In Switzerland the delivery system is based on the principle of causality.³² Besides, neither the German nor the Swiss law provides that “rectification” of such record could be possible against the will of the person whose rights would be infringed through such “rectification”.

4 Ownership claim and the good faith of an acquirer

Almost 10 years after the idea about the “rectification claim” appeared,³³ a radical turn took place in the meaning of the objective of an ownership claim. “Rectification claim” gradually lost its attraction. The court started to turn its attention to the good faith of an acquirer as well as to the fact that actually the CL did not exclude the transfer of ownership rights in the circumstances when the alienator

had alienated the property to several acquirers simultaneously. Such conclusion was probably first made in the case SKC-5/2002³⁴. Thus, after lingering attempts for a better solution, the court practice returned to the earlier acknowledgment expressed already back in 1914, namely, the rights of an acquirer are in no way influenced by the activities of a seller.³⁵

During the period from 2002–2005, the judgments adopted almost at the same time contained acknowledgements both about unchangeability of the acquired ownership rights and about “rectification” of the existing record. One can see intensive attempts to justify the necessity for “rectification” of a record by the attitude of the acquirer against the deeds concluded earlier. The courts departed from the strictly observed provision in the pre-war literature and judicial practice that the sole criterion to dispute the good faith of an acquirer of the immovable property may be the defects that could be learned from the record in the land register.³⁶

In the cases when the court had doubts about the good faith of the acquirer, it ruled that it was possible to rectify the record (SKC-435/2001³⁷; SKC-91/2002³⁸; SKC-301/2003³⁹). Inconsistency characteristic to this period in applying the principle of good faith of the acquirer is also proved by the fact that in numerous cases the court has come to a totally opposite acknowledgment – that the immovable property may be reclaimed even if the acquirer was acting in good faith (SKC-47/2005⁴⁰; SKC-31/2003⁴¹; SKC-180/2003⁴²; SKC-531/2003⁴³; SKC-625/2005⁴⁴).⁴⁵

A proposal made by E.Kalniņš, one of the co-authors of the “rectification claim” theory, could be regarded as a turning point in the attitude towards the “rectification claim”, namely, to introduce amendments in the CL that would make ownership rights of the acquirer in good faith irrevocable⁴⁶ in order to eliminate the mess largely caused exactly due to the unsuccessful interpretation of the existing law in the manner of the “rectification claim”.

5 Claim to grant possession, *Publiciana in rem actio, rei vindicatio, negatoria (prohibitoria) actio*

The additional objective under Article 1044 of the CL – “to grant possession” – is interpreted, however, very narrowly both in the court practice and legal science by understanding “declaration of possession” as renewing of physical power over the property.⁴⁷

Mostly an ownership claim is connected with renewal of ownership rights and only rarely – with renewal of possession.

In disputes where the subject matter is an immovable property recorded in the land register, possession over the property has no practical meaning. After the alienated property is recorded in the name of an acquirer in the land register, the alienator has no right to vindication (ownership) claim⁴⁸, although he/she might still have personal claim against the acquirer, e.g. based on the fact that the alienation transaction is not valid.⁴⁹

Likewise, the modern court practice admits only the right to compensation of damages.⁵⁰

In consideration of complexity to prove the ownership rights of the claimant according to the CL, a question was discussed already in the pre-war period whether in the Latvian law there existed a separate institute of *Publiciana in rem actio*⁵¹ or a claim by a fictitious owner.⁵²

Having noted that *Publiciana* is not mentioned in the Codification of Local Laws, F. Konradi and A. Walter still draw an assumption that “*the practice of the courts of Riga recognises each justified acquisition as sufficient grounds for vindication*”⁵³. For some time there was an idea which dominated in the legal science and court practice that the factual transfer of immovable property should be preferred over the ownership rights to an immovable property recorded in the land register.⁵⁴ Elements of a claim by a fictitious owner may be found in several judgments adopted during 2000–2005.⁵⁵

The issue of granting possession to be the subject matter of an ownership claim is related to distinction between vindication (*rei vindicatio*) and negatory (*negatoria actio* or *prohibitoria actio*) claims.⁵⁶

Indeed, it arises out of references to the Roman law sources in the Codification of Local Laws⁵⁷ that the view that a negatory claim is regulated under Article 1039 of the CL, is grounded.

Distinction between *rei vindicatio* and *actio negatoria* had a meaning in the Latvian law of the pre-war period also because these claims were subject to hearing in different courts – unlike the vindication claim, the negatory claim was within the competence of a magistrate court.

There are no signs that after reinstatement of the CL, and especially since in 1999 the Civil Procedure Law (CPL) established that the cases dealing with ownership rights to immovable property are admissible to a regional court, any distinction would be made of admissibility corresponding to the previously mentioned elements of a vindication and a negatory claim.

6 Competition of claims

There are the following types of competition of claims:

- 1) competition between the ownership or petitory claim and the claim on protection of possession or the possessory claim;
- 2) competition of the ownership claim and the contract execution claim;
- 3) competition of the ownership claim and the claim of restitution (on unjust enrichment or *condictio sine causa*).

Literature presents an opinion that competition of claims “*means that the claim by an owner who is not in actual possession of the estate may simultaneously arise from different so-called norms on claims where the envisaged claims are similar as to their content*”.⁵⁸

6.1 Competition between the ownership or petitory claim and the claim on protection of possession or the possessory claim

Competition between the ownership claim and the claim on infringement or deprivation of possession is only apparent.⁵⁹ It is not possible to have a declaration of ownership rights through the claim on renewal of possession (Article 923 of the CL).

The outcome of a trial on protection of possession cannot serve as establishment of any rights altogether. Neither the judgment can fix any ownership rights of the claimant if the claim is satisfied, nor his/her scope of rights is narrowed somehow if the claimant loses in the trial. Irrespective of what would be the result of a trial on prevention of infringement of possession, the claimant still has the right to bring ownership claim for the same property. Likewise, the respondent cannot refer to such judgment as a proof of his/her ownership rights. Thus the court’s conclusion is

even more surprising in the case SKC-435/2001 that declaration of ownership rights may be reached through bringing a claim about renewal of possession.⁶⁰

Less surprising are the court's conclusions in the situations when the evidence about acquisition of property into possession is indicated as grounds for the fact that a party of the dispute (usually – claimant) has acquired ownership rights over the disputed property.

With regard to movable property, this kind of reasoning arises from the fact that the acquisition of property into possession mostly corresponds with the transfer of ownership rights to the acquirer of possession (Article 883 of CL). With regard to immovable property, acquisition into possession shall not be sufficient grounds to acquire property, even if the acquirer has concluded the respective deed with the owner of property. He/she only has a right to claim that such record is made (Articles 994, 1024, 1479 of CL). Thus, the fact that both movable and immovable property is in someone's possession may, in the best case, serve as one item of the evidence for ownership rights to a property, but shall not be recognised as an independent precondition to establish ownership rights. Still, the judicial practice in the ownership claims is controversial.⁶¹

6.2 Competition of the ownership claim and the contract execution claim

Competition of the ownership claim and the contract execution claim, unlike the matter discussed above, is encountered very rarely in the court practice. One cannot observe a tendency to mutually replace these two different types of claim. It also seems that in the major part of situations it would be impossible. Existence of any contract in principle excludes a chance that a party to a contract could prevent the breach of such contract, e.g., failure to transfer an alienated property or reclamation of an alienated property, by raising an ownership claim. Such claim would be dismissed because (in the first situation) the claimant is not yet, or (in the second situation) is no longer the owner of the property and thereof the claim, although grounded, should be dismissed exactly due to the fact that the claimant has wrongly indicated the grounds of the claim.⁶²

6.3 Competition of the ownership claim and the claim of restitution (on unjust enrichment or *condictio sine causa*)

If the property cannot be reclaimed through an ownership claim, and there are no contractual relations between the claimant and the person with whom the reclaimed property is located, the claim on unjust enrichment remains the sole legal instrument of protection. The scope to apply the claim on unjust enrichment and its legal regulation is very different in various countries.⁶³

However, *rei vindicatio* and *condictio* usually cannot be mutually interchangeable at will of a claimant.

According to the principle of causality – since, in the given case, a void transaction does not transfer ownership rights, it is possible to apply the principle of vindication – *ubi rem meam invenio, ibi vindico* (where I find my property, there I also reclaim it).⁶⁴ Still, in case there is a void deed within the basis of the transfer of ownership rights, the transferred property may not be reclaimed by the ownership action, but by the claim of unjust enrichment, most frequently *condictio indebiti* – a claim defined as reclaim of satisfaction of non-existent debt (Articles 2369-2383 of CL). *Condictio indebiti* is a personal claim in difference from *rei vindicatio*, which is *action in rem*. As this claim is of a personal character, a conclusion may be drawn

that the claimant has lost his/her ownership rights because otherwise the claimant would have brought *rei vindicatio*.⁶⁵

It must be concluded that there is no competition of claims in case of vindication and unjust enrichment actions. The owner, should he/she have a chance, always will prefer an ownership claim which allows reclaiming the property itself or if it is not possible – the value of the reclaimed property (Article 1057 of CL).

7 Liability for alienation of property during the time of trial

The legal norm provided under Article 1055 of CL (liability about alienation of property during the time of trial) which, according to its placement, refers to the mechanism for compensation of damages, is interpreted rather broadly in practice, i.e. as a restitution claim against the acquirer of property. In different cases of ownership actions, the idea of both the “time of trial” and “trial” is understood differently. Sometimes it is understood as events that took place before the beginning of trial⁶⁶ or it is recognised as a time period when the claim on division of property of spouses⁶⁷ was reviewed between the same parties instead of the ownership claim, or denationalisation claim.⁶⁸ The right interpretation should be the one which by the concept of the “time of trial” understands the period that continues from raising the ownership action until the judgment in the given case is enforced.

The different interpretations with regard to consequences of the norm mentioned above have a quite far-reaching effect – whether the liability described in the given norm only refers to the defendant’s improvement of the property and compensation of damages incurred due to the property (which would not be necessary in case the property itself is not returned), to the duty to compensate the value of property related to accidental destruction of the property, which in the given case would serve as a substitute (the narrower interpretation) of the claim on return of the property or to the bad faith of the defendant by selling the disputed property during the trial of the ownership claim would also influence the rights of the third person, who has acquired the property during such alienation, to keep this property, respectively – whether the alienation of property during the time of trial is a precondition to reclaim the property from a third person (the broad interpretation).

There are several arguments in favour of the narrower interpretation. Firstly, the second sentence of Article 1055 of CL: “*the plaintiff need not be satisfied only with recovery of the payment received for the property, but he/she may also claim recovery of the property itself and its appurtenances (Article 1052), or for compensation for the value of the property and its appurtenances, and for all loses and costs.*” The conjunction “or” clearly indicates that in case all damages related to alienation of property are compensated, the duty to return the property alienated in bad faith is lost. Article 1057 of CL also indicates to the same effect, providing consequences in the situation when “*the defendant does not return the property in compliance with a judgment of a court,*” which, in addition, clearly shows (again – contrary to the provisions of the CPL), that such behaviour is a “free” prerogative of a defendant.

Secondly, also the CL provisions on liability of a possessor in bad faith only refer to division of losses and costs instead of restitution.

Thirdly, by repeating norms on liability of a possessor in bad faith in general, the same consequences are specifically defined as a legal regulation of consequences for unintentional destruction of the reclaimed property within the framework of an ownership claim (Article 1054 of CL). If, according to this norm, the liability in a

form of the duty to compensate the value of the property enters due to unintentional destruction of the reclaimed property during the time of trial, there are no grounds to assume that the plaintiff would have a basis for reclaiming the property itself from a third person in case of its alienation.

8 Restrictions to the ownership claim

According to Article 1065 of CL, an ownership action may not be brought if the owner has, in good faith, entrusted a movable property to another person, delivering it pursuant to a lending contract, bailment, pledge or otherwise, and such person has given possession thereof to some third person. In this case, there may be allowed only an action *in personam* against the person to whom the owner has entrusted his/her property, but not against a third person who is a possessor of the property in good faith.

When commenting a prototype of this Article in the Codification of Local Laws (CLL dated 1864) – Article 923, V. Bukovsky has indicated, by reference to C. Erdmann⁶⁹, that this restriction only refers to the cases when the property was delivered into possession of another person instead of delivered into holding. Thus, according to this interpretation, the owner may vindicate the property if it was delivered for the lease.⁷⁰ This interpretation is also supported by the authors of the comments of 2002.⁷¹

F. Konradi and A. Walter have critically viewed interpretation of the norm mentioned above (Article 923 of CLL, dated 1864). They indicate that *“only in one situation the first owner of property may reclaim it and keep it despite that according to the rule of “Hand muss Hand Wahren” he has absolutely lost his ownership rights over this property. Such situation may be encountered when the property, through re-alienation, is again at the disposal of the unfaithful alienator. Although the latter has acquired the alienated property in full ownership, the first owner still may bring against him a personal contract claim on restitution of property and in this way again become a possessor of the property, despite that pursuant to Article 923 [of CLL dated 1864 – J. R.] he had lost ownership rights to this property and thus also the ownership claim”*.⁷²

This principle was similarly commented also earlier. F. Sauvigny, first stating that the aforementioned principle is understood in various ways in different legal systems, still maintains that the property delivered to the tenant may not be reclaimed through the ownership action in any situation.⁷³

Summary

Legal regulation of an ownership claim has changed several times since reinstatement of the CL. Its scope has been enlarged by including not only establishment of the existing ownership rights of a plaintiff, but also renewal of the lost ownership rights, thereby turning it into a claim resulting in “rectification” of the record about the current owner of an immovable property. A judgment of such “rectification” trial becomes a legal fact based on which a new record is made in the land register. To substantiate such a claim, it is stated that rectification of a record justifies absence of the good faith of the acquirer. Still, there is a number of judgments where a record has been “rectified” despite the fact that the immovable property has been acquired in good faith. Thus, the concept of a “rectification” claim, which is not based on the interpretation of law, but rather aimed at application of law *contra legem*, has not justified itself as it has not served to develop a uniform court practice.

The CL sets forth overly strict criteria to prove the plaintiff's ownership rights. The judicial practice mostly ignores them. Such approach corresponds to the modern development tendencies in other countries.

The difference between a vindication (*rei vindicatio*) and a negatory claim has a solely historical meaning, therefore the legal norms regulating ownership claim shall be attributed to both cases.

Although the legal literature expresses an opinion that the plaintiff may freely choose among several types of claims to protect his/her ownership rights, this competition is only ephemeral, because competitive actions on protection of possession and execution of a contract are aimed at a different objective and shall not be applicable for protection of ownership rights. Furthermore, an ownership claim and a claim on unjust enrichment are not competing with each other; still, the Latvian legal science has not developed clear criteria to separate them, as it is still disputable whether the CL provides the principle of causality or abstraction. In the legal systems where the principle of abstraction is provided, the claim on unjust enrichment is widely used to protect a person who has lost his/her property.

The idea expressed in the legal science that restrictions for reclaim of movable property under Article 1065 of CL should be interpreted narrowly, is wrong.

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The Exercise of Moral Rights by Non-Authors¹

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The concept of moral rights is as old as authors' rights (*droit d'auteur*) themselves. It was intended to protect the author's honour and reputation. The rights of attribution, integrity and disclosure constitute the core of the author's moral rights. During the 20th century, moral rights became a universal category of copyright law.

The problem is that the society and copyright system itself are not static. Copyright protection is not limited to artistic expression any more. It is extended to numerous objects including software and databases, as well as to certain type of investment. Several objects are created collectively and their utilization is enhanced by information communications technology. This raises the question whether it is time to adjust moral rights to the changed societal situation.

The authors analyse copyright laws of different countries and define good practices, which are compatible with the needs of contemporary society. The results of comparative analyses can be used for international, regional (EU) and national unification in this field.

Keywords: intellectual property, copyright, moral rights, personal rights, exercise of moral rights.

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Introduction

In the doctrine of the Continental European countries, copyright is often considered as an “extension of author’s personality”. This is explicit in the Continental copyright doctrine, which distinguishes between two categories of rights – moral rights (which in several jurisdictions and theory are named personal rights) and economic rights. While economic rights are freely assignable and licensable, the moral rights are not usually considered to be objects of transaction. There are several restrictions to the exercise of moral rights by third parties. Perhaps this was not so relevant when the scope of copyright protection was limited to artistic expressions and there were no signs of information and communications technology (ICT) or knowledge based economy. Today’s reality is that copyright protected works are regarded as business assets and products which may include substantial investment. ICT provides tremendous opportunities for various uses of works. Furthermore, works are often created and developed further collectively by a wide range of authors. As a result, it is crucial to adjust the concept of moral rights with the aim to facilitate economic, technological and cultural development.

The authors’ main argument is that in contemporary society we have to strike a fair balance between author’s moral rights and the need to enhance the utilization of copyright protected works by the society. The role of moral rights is to protect the author’s honour and reputation, not to interfere with and create barriers to exploitation of works. The law should not restrict the author’s freedom to allow making adaptations and changes to his works by third parties. This should be up to the author to decide. One method to enhance the exploitation of works is to limit the catalogue of moral rights so that if the author has transferred the rights to make adaptations to the work to a third party, he cannot object to any changes made to his work unless these changes are prejudicial to the author’s honour and reputation. Another key method is to allow transactions with moral rights so that the exercise of moral rights by non-authors is not restricted. It is, however, up to legal doctrine of a particular country whether these transactions are constructed as waivers, consents or licenses.

The article explores how different countries have dealt with barriers to the exploitation of works caused by moral rights. The authors use Estonia, France, Germany, the Nordic countries, the United States, the United Kingdom and Canada as examples. These countries can be divided into groups based on the strength of protection of moral rights. France as the homeland of *droit d’auteur* concept has the strongest protection for authors’ moral rights. In the Anglo-American copyright

tradition moral rights have, however, very limited scope of protection. The Nordic countries are somewhere in between.

Since the moral rights of the creator of a work belong to a broader system of personal rights in private law of Civil law countries, the authors first of all address the question how to categorize personal rights in private law and whether it is possible to exercise these rights by third parties. Thereafter, the authors analyse international instruments regulating author's moral rights and describe the extent of the catalogue of moral rights in different countries. Extensive catalogue of moral rights makes it necessary to regulate their exercise by non-authors. The authors explore whether there are any international restrictions in regulating the exercise of moral rights by third parties and analyse the regulations in several developed countries and in the Draft European Copyright Code.² In the conclusion the authors summarize research results and provide possible approaches to settlement of diverging interests of the parties concerned by legislative means.

1 System of personal rights in private law and their exercise by third parties

The concept of non-transferability of moral rights, as it is still common understanding in continental Europe, is based on the character of moral rights being those elements of copyright, which derive directly from the personality of the author. Being a subgroup of personal rights, moral rights refer to those means by which the human personality expresses itself towards its environment, *i.e.* any act of creativity. The question to what extent can moral rights be exercised by third parties is therefore preceded by the question whether personal rights in general can be object to this exercise or whether they may even be transferable.

In continental Europe, personal rights (in the meaning of German "*Allgemeines Persönlichkeitsrecht*") traditionally were seen as rights protecting non-material interests; the scope of protection did not include their economic exploitation.³ Due to their essentially personal character, the non-material right to the integrity of personal data – protecting interests such as privacy, reputation, dignity of deceased persons – have been categorically neither subject to third-party exercise nor transferable.

Defining the system of personal rights in private law generally is not an easy task. In countries of dualistic theory (for example, France) moral rights developed individually and separately from property (economic) rights, which means that in these countries the emphasis is placed on the natural personal rights of persons, rather than the property rights. In countries where intellectual work is a component of the author's 'sphere of personality,' the commercial aspects are not separated from the moral rights of the author. However, the core of the moral rights remains personal. Therefore one may conclude that the meaning of personal rights and moral rights can be different depending on the approach to the incorporeal rights of author over the work.⁴

Below we will follow the general division of legal protection of moral rights of authors into the right of paternity or attribution, *i.e.* the right to claim authorship of the work, and the right of integrity, which refer to the right to object to any distortion or modification or other derogatory action in relation to the work which may be detrimental to the author's honour or reputation.⁵ Moral rights are required to be independent from the economic rights and in some jurisdictions can be transferred

with economic rights. Here the German approach to the coexistence of moral rights with economic rights seems to be the most flexible concept in civil law countries. Coming to this point, one may conclude that even if the most important element of personal rights is their inalienability and non-transferability, moral rights can still be assigned in some countries under special conditions and in limited amount or there is a limited right to agree on waiver of these rights.⁶

Estonian private law in its legal acts does not use the term “moral right”. Instead of “moral rights” the terms “personality rights” and “personal rights” are used. However, here also the use of terminology is not consistent *vis-à-vis* personal rights. The Estonian Law of Obligations Act⁷ (LOA) uses the terms “*isikuõigus*” and “*isiklik õigus*”, which could be, with some reservation, translated into English as “personality right” and “personal right”. The uncertainty in this differentiation is deepened by the fact that the Supreme Court has not paid attention to the difference in the scope of those terms and has even used them interchangeably.⁸ The term “*isikuõigus*” is used in § 131 LOA, which refers to the obligation to compensate damage “*caused by unlawfully depriving a person of liberty, by defamation or by violation of any other personality right*”. Some legal scholars consider that this provision relates to the general personality right containing *inter alia* the free self-realisation and the related right to the inviolability of private and family life and inviolability of the home, freedom of conscience, religion and thought, etc.⁹ The term “*isikuõigus*” (personality right) is also used in § 1055 LOA, which permits the performance of damaging acts and lists “bodily injury, damage to health, violation of inviolability of personal life or any other personality rights” as examples. This, in turn, can be analysed in the context of the procedural rules regarding application of restraining orders. Here the law¹⁰ refers to such orders being in place “In order to protect the personal life of a person or other personality rights”.¹¹ This leads to a conclusion that the term “*isikuõigus*” includes the right to the protection against bodily injury and damage to health. In contrast, the term “*isiklik õigus*” (personal right) is contained in § 1045 LOA, which refers to unlawfulness of causing the damage if it is brought about by a “violation of a personal right of the victim”. This is supplemented by § 1046 LOA, which in this context directly refers to “*isiklik õigus*” in context of defamation, unjustified use of the name or image, breaching the inviolability of the private life, etc. Thus, one may conclude that although the term “*isiklik õigus*” (personal right) is closely related to the constitutional general personality right, it is indeed more limited in scope. Most likely it does not include deprivation of liberty, which is subject to separate regulation under § 1045 LOA nor to the protection against harm to health or bodily injury. In contrast, they are contained in the term “*isikuõigus*” (personality right).

Estonian approach to the moral rights of authors is not settled and similarities can be seen primarily with the German concept of “*allgemeine Persönlichkeitsrecht*”. Interpreting the Estonian approach to moral rights, which can be observed in the legislation and court practice, the German approach might be reasonable and pragmatic solution to the problems concerning exercise of author’s moral rights by third persons.

In Germany, during the last decade a trend has developed in case law¹² that the protection of commercial interests should at least be partly included in the scope of personal right protection since “personality merchandising” has become a major economic issue not only for celebrities, but also among the wider public (e.g. in social media).¹³ It can be explained by the monist approach of Otto von Gierke¹⁴ which

was adopted in Germany as a basis of author's rights. The legal issues arising from bringing in personal data¹⁵ as "consideration" within these private law contracts do refer much less to the providing contract partner's interest in the integrity of his personal data, than to their market value. It is therefore arguable whether the doctrine of non-transferability is still needed or even useful if the providing contract partner himself deliberately decides to commercialize his personal data by making them publically accessible against remuneration on a contractual base.¹⁶ The German discussion focuses within this context not only on the question in how far a person may effectively dispose over personal rights at all – personal rights traditionally were not even seen as a solely subjective right¹⁷ –, but also to which extent an eventual transfer would be achieved, making it somewhat parallel to the discussion on the assignability of moral rights.¹⁸

While the discussion in jurisprudence still continues, case law is in favour of the transferability of personal rights in the situation of an alleged infringement of the right in question. The German Supreme Court (BGH) held in its "Marlene Dietrich" decision that all economical rights arising from a name are unlimitedly transferable,¹⁹ arguing that the scope of protection can be guaranteed much more effectively if third parties are also entitled to claim damages for an eventual infringement.

There is no clear conceptual framework addressing the issue of exercise of personal rights by third parties. It is important to remember that private law is based on private autonomy. Freedom of contract is one of its manifestations. Therefore parties can agree on the exercise of personal rights by third party, unless it is *expressis verbis* restricted by law. Although European countries are rather conservative when it comes to transactions with personal rights, they still allow these transactions.

2 The extent of the catalogue of moral rights

The need to regulate the exercise of moral rights by non-authors depends much on the extent of the catalogue of moral rights. The more extensive the scope of moral rights is, the more relevant it is to have legal provisions on their exercise. There are, however, considerable differences in how different countries protect moral rights. Before we focus on individual countries, it is necessary to outline the international framework.

The Berne Convention for the Protection of Literary and Artistic Works²⁰ (the Berne Convention) sets an international standard for protection of authors' moral rights which is binding to all member states (including all countries referred to in this article). Article 6*bis* of the Berne Convention regulates moral rights as follows: "[i]ndependently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation". The minimum standard of the Berne Convention was established in 1928. Today it is considered to be a compromise solution in which a balance is struck between comprehensive protection of moral rights in *droit d'auteur* doctrine countries such as France and Germany and the countries which for a long time did not recognise these rights (e.g. the copyright doctrine countries such as UK and USA).²¹ The Berne Convention only sets minimum standards for the protection and member states are free to establish more comprehensive regulations. Several countries, including Estonia, have gone far beyond the Berne Article 6*bis*.

The WIPO Copyright Treaty²² does not establish any additional standards for the protection of moral rights. It just refers to the applicability of the Berne Convention.²³ The Agreement on Trade-Related Aspects of Intellectual Property Rights²⁴ (the TRIPS Agreement) also does not introduce any additional regulation on moral rights and refers to the Berne Convention, but makes an exception regarding Article 6bis by stating that “*Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.*”²⁵

Several other conventions also regulate moral rights to some extent. For instance, Article 5 (1) of the WIPO Performances and Phonograms Treaty provides “[i]ndependently of a performer’s economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation”.

Moral rights have not explicitly been regulated on the EU level. The issue of moral rights is tackled in Section VII of the Commission Green Paper Copyright and Related Rights in the Information Society.²⁶ It can be concluded from the ECJ case law that moral rights are in principle covered by the EC Treaty, as far as they have an impact on intra-Community trade. The existing Directives do not in any way harmonize the regulation of moral rights.²⁷ Some Directives even explicitly exclude moral rights from their scope of application.²⁸ It has been suggested that moral rights are not harmonized on the EU level since they do not have a sufficiently strong impact on the functioning of the Internal Market.²⁹ The main reason most likely lies in the conceptual differences of the *droit d’auteur* and the *copyright* doctrines followed in different Member States.

Harmonization of the regulation of moral rights on the EU level would probably entail finding a compromise in this matter by strengthening the moral rights protection in the countries of the copyright system and weakening them in other Member States following the *droit d’auteur* system.³⁰ This seems to be something that neither party concerned would be willing to do. Therefore the Berne Convention also remains the minimum standard for the EU Member States. One of the early principles for EU harmonisation in the field of copyright was formulated as follows: “*Community legislation should be restricted to what is needed to carry out the tasks of the Community. Many issues of copyright law, do not need to be subject of action at Community level. Since all Member States adhere to the Berne Convention for the protection of literary and artistic works and to the Universal Copyright Convention, a certain fundamental convergence of their laws has already been achieved.*”³¹

The authors of this article support the idea of at least minimum harmonization of moral rights at the EU level.

It is possible to categorize countries based on the extent of protection of moral rights. France, Germany and Estonia are among the countries protecting moral rights extensively. France is often called the birthplace of moral rights and the terms “author’s rights” (“*droit d’auteur*”) and “moral rights” (“*droit moral*”) originate from France. The regulation of moral rights in France as in Germany goes beyond the requirements of the Berne Convention. In legal literature³² it has been expressed that moral rights in the French Intellectual Property Code³³ are fourfold, encompassing the rights of respect for the name and capacity of the author, respect for the

work itself, right of disclosure or divulgence and the right of reconsideration and withdrawal.³⁴

Moral rights in Germany exceed the requirements of the Berne Convention but unlike the French provisions described below, the German provisions governing the moral rights are numerous and detailed.³⁵ In Germany there is a single author's right ("*Urheberrecht*") protecting the author in relation to, firstly, the author's intellectual and personal interests in the work and, secondly, the author's interests in the work's commercial exploitation. The unitary nature of the system means an intertwining of moral right (or moral interests) with exploitation rights, and the ultimate inseparability of the two sets of prerogatives.³⁶ The most important principal clause of the German Author's Rights Act³⁷ provides that "*the author's right protects the author with regard to his intellectual and personal connections with the work and the use of the work*".³⁸ One consequence of this nuance is that in Germany the duration of economic rights and moral rights are linked, so that in Germany moral rights' protection lasts only as long as copyright protection, whereas in France moral rights are protected in perpetuity.³⁹

The Estonian Copyright Act (1992)⁴⁰ has a very extensive catalogue of moral rights. Subsection 12 (1) of the Estonian Copyright Act provides the following catalogue moral rights: the right of authorship and author's name, the right of integrity of the work, the right of additions to the work, the right of protection of author's honour and reputation, the right of disclosure of the work, the right of supplementation of the work, the right to withdraw the work and right to request the removal of the author's name from the work. It is probably one of the longest lists of moral rights granted to the author in the world. Some moral rights such as the right of integrity of the work, the right of additions to the work and the right of supplementation of the work partly overlap with the right of alteration of the work which is an economic right. According to the Estonian Copyright Act "*[t]he authorship of a certain work, the name of the author and the honour and reputation of the author shall be protected without a term*".⁴¹

In order to facilitate the exploitation of copyright-protected works, the catalogue of moral rights is narrowed down in the draft of the Copyright and Related Rights Act (the draft Copyright Act).⁴² Section 12 of the draft Copyright Act provides a catalogue of moral rights which lists the right of authorship, the right of author's name, the right of protection of the author's honour and reputation, the right of disclosure of the work, the right to withdraw the work and the right to request the removal of the author's name from the work. All so called alteration and adaptation rights are foreseen to be moved into the catalogue of economic rights and, consequently, become transferable to third parties.

The Nordic countries more or less apply the minimum requirements of the Berne Convention. Finnish⁴³, Swedish⁴⁴ and Danish⁴⁵ Copyright Acts do not move very far from the Berne Convention and include basically two types of moral rights: the right of attribution and the right of integrity of the work. Since the wording of all the referred legal acts is similar, we hereby use the Finnish Act as an example. Section 3 of the Finnish Copyright Act has the following provisions on the moral rights: "*[w]hen copies of a work are made or when the work is made available to the public in whole or in part, the name of the author shall be stated in a manner required by proper usage*" and "*[a] work may not be altered in a manner which is prejudicial to the author's literary or artistic reputation, or to his individuality; nor may it be made*

available to the public in such a form or context as to prejudice the author in the manner stated”.

Countries of copyright doctrine such as the United States, the United Kingdom and Canada have limited protection of moral rights.

Under U.S. copyright law moral rights receive narrow protection. Only the author of a work of visual art enjoys moral rights.⁴⁶ According to US copyright law⁴⁷ (U.S.C.) a work of visual art is a painting, drawing, print or sculpture, a still photographic image produced for exhibition purposes only. A work of visual art does not include any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication, any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container and any work made for hire.⁴⁸ The author of a work of visual art has rights of attribution and integrity.⁴⁹

The British copyright system traditionally has manifested certain scepticism towards claims that authors deserve special protection in law.⁵⁰ Until the adoption of the Copyright, Designs and Patents Act (1988)⁵¹, the regulation of moral rights was quite insufficient. The current United Kingdom’s Copyright, Designs and Patents Act (1988) includes the following moral rights: the right to be identified as author or director, the right to object to derogatory treatment of work, the right not to be identified as the author of someone else’s work and the right to privacy.⁵²

The Canadian Copyright Act⁵³ includes two moral rights: the right to the integrity of the work and the right of attribution.⁵⁴ As suggested in the literature, the wording of the legislation would suggest that there are in fact three moral rights – of attribution, integrity and anonymity – but the right of anonymity is, as in European doctrine, usually subsumed under the “attribution” rubric by the commentators and courts.⁵⁵

3 Moral rights as objects of transactions

The commentary to the Berne Convention clarifies that “[w]hile article 6bis does not specifically rule out transfers of moral rights, their assignment would arguably be inconsistent with the very nature of these rights, which are inherently personal to the author. Moreover, it might seem absurd to accommodate the transfer of ‘mutilation right’, for example. But, in the language of the Convention, the author would not be transferring an affirmative right to mutilate, she would be conveying certain rights of action: to claim authorship, to object to any distortion, etc.”⁵⁶

Neither the text of the Berne Convention nor its commentaries explicitly preclude transactions with moral rights. This means that its member states are free to regulate the issue. Therefore it is necessary to analyse copyright laws of different countries and model laws to identify best practices.

Here again it is possible to group countries based on whether, under which conditions and to what extent they allow third parties to exercise the moral rights of authors.

France and Germany are rather restrictive. The French Intellectual Property Code provides the following regulation: “[a]n author shall enjoy the right to respect for his name, his authorship and his work. This right shall attach to his person. It shall be perpetual, inalienable and imprescriptible”.⁵⁷ It has been explained in the literature that the French Intellectual Property Code does not *expressis verbis* regulate

issues of transfer, renunciation, alienability or waiver of moral rights. Due to inalienability of moral rights they cannot be transferred *inter vivos*, pass to a creditor⁵⁸ and form a part of conjugal property⁵⁹. With a reference to case law, it is asserted that any contractual terms constituting a final irrevocable renunciation of moral rights is void. The moral rights can be temporarily renounced. Consent to an otherwise infringing act precludes infringement. It is crucial that the consent is given to the act itself⁶⁰ rather than to unspecified acts.⁶¹

In contrast to most other countries, Germany follows – together with e.g. Austria – the “monistic theory” based on the works by P. Allfeld,⁶² which means that both “*vermögenswerte Immaterialgüterrechte*” (*droit pécuniaire*, economic rights) as well as “*ideell ausgerichtete Urheberpersönlichkeitsrechte*” (*droit moral*, moral rights) are principally not separable, resulting in the general non-transferability of copyrights.⁶³ They can – regarding their economic aspects – only be subject to licenses. Moral rights themselves are not licensable.

Nevertheless, in many cases the existence of moral rights may obstruct the usability of economic rights. For instance, if a theatre acquired from the author a right to use a play in the theatre, it may be interested in being allowed to change parts of the content as well as adapt it to respective stage conditions, etc. In these cases – where the agreed use is only possible if parts of the author’s moral rights are adapted –, the restricted transfer of moral rights is exceptionally possible, see § 39 II UrhG.

Another question in case of copyright infringement is to what extent can these rights be enforced also by third parties. Generally, the right is not assignable, see sec. 399 par. 1⁶⁴ *Bürgerliches Gesetzbuch*, and cannot be merely enforced by third parties either. However, German legal practice recognizes a respective possibility, although the dogmatic structure remains unclear.⁶⁵

Dogmatically less controversial is the transfer of economically exploitable aspects of moral rights by succession,⁶⁶ since all moral rights are subject to succession and therefore automatically transferred to the heirs in the moment of the author’s death. They serve as a basis for damages if these rights have been infringed by third persons before or also after the death of the author just as by the author himself.

This is also the only constellation where the possibility to enforce moral rights by third parties is not disputed, as the heirs may have much less personal relation to the works created by the deceased author than his or her partners, performers or other closely affiliated persons,⁶⁷ if they can prove proper interest which deserves protection.⁶⁸ In these cases, it matches the assumed interest of the deceased author much better if eventually infringed moral right is exercised by these persons than by their heirs. However, the decision whether this exercise is transferred still is left to the successors themselves.

Estonia and the Nordic countries allow the exercise of moral rights by third parties. In Estonia it is a widespread legal practice that parties license moral rights exclusively or do not regulate the exercise of moral rights at all. There is a practical need to find a workable solution. For instance, writing speeches for the President, Prime Minister, ministers or other high officials is a widespread practice (this is called “ghost authorship”). A legal solution is required for drafting legal acts or other official documents or getting the whole package of rights from an artist who drafted a trademark, logo or other symbol for the organisation or official state symbols for a state body.

Some Estonian legal experts have raised the issue of how to distinguish between a general exclusive licence and the transfer of “authors’ personal rights” (moral rights). It has been argued that licensing moral rights *in corpore et in genere* is not admissible. It is necessary to agree on how every single moral right will be exercised.⁶⁹ Several Estonian copyright scholars support licensability of moral rights under the Estonian copyright system.⁷⁰ For example, according to H. Pisuke “*for the purposes of Estonian law, moral rights cannot be assigned. However, it is possible to issue an exclusive licence and a non-exclusive licence for exercising any moral right*”.⁷¹ This approach is to some extent supported by the wording of the Copyright Act in its parts concerning the catalogue of rights and exercise of rights.⁷² Waiver of rights is not regulated in the Copyright Act.

The situation is different where the exercise of moral rights is not regulated in a contract at all. There are some more general provisions such as § 370 (3) of the Estonian Law of Obligations Act, which states that “*if the right of use to which a licence agreement extends is not clearly specified in the agreement, the extent of the right of use shall be determined pursuant to the objective of the agreement*,” which according to some Estonian legal scholars also regulates the exercise of moral rights.⁷³ Finally, it might also constitute a violation of the principle of good faith if an author has granted a permission for a particular use and afterwards exercises his moral rights to forbid the use (the prohibition of *venire contra factum proprium*).⁷⁴

There is another aspect, which needs to be considered under the Estonian law. Hypothesizing that the exclusive license on moral rights is void, the issue arises whether the exercise of moral rights by a non-author who relied on the license constitutes an infringement of moral rights. In this context it is necessary to consider one of the key concepts of tort law enshrined in the Estonian Law of Obligation Act, which states that “*[t]he causing of damage is not unlawful if the victim consents to the damage being caused, except in the case where the grant of such consent is contrary to law or good morals*”.⁷⁵ In the field of copyright, the Supreme Court of Estonia has clarified that a person’s consent to otherwise tortious act makes the act lawful, while the consent does not have to comply with any specific form requirements.⁷⁶

Finnish, Swedish and Danish Copyright Acts all allow the author to waive the exercise of moral rights in a limited and specified way. Since the wording of all acts is similar, it may suffice to refer to subsection 3 (3) of the Finnish Act which has the following provision: “*[t]he right conferred to the author by this section may be waived by him with binding effect only in regard of use limited in character and extent*”.

The United States, the United Kingdom and Canada also allow the exercise of moral rights by non-authors.

Pursuant to U.S. copyright law moral rights pertaining to the author of a work of visual art “*may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified*”.⁷⁷

As a general principle, section 94 of the UK Copyright, Designs and Patents Act of 1988 (CDPA) provides that moral rights are not assignable. However, the exercise of moral rights can be based on consent or waiver of rights.

According to the CDPA, it is not an infringement of any moral right to do any act to which the person entitled to the right has consented. Any of those rights may be waived by instrument in writing signed by the person giving up the right. A waiver may relate to a specific work, to works of a specified description or to works

generally, and may relate to existing or future works, and may be conditional or unconditional and may be expressed to be subject to revocation. If a waiver is made in favour of the owner or prospective owner of the copyright in the work or works to which it relates, it shall be presumed to extend to his licensees and successors in title unless a contrary intention is expressed.⁷⁸ According to literature, the waiver is one of the key methods, which allows to control the effect of moral rights. The UK law also allows authorial consent to otherwise infringing action which can be oral or in writing.⁷⁹

Pursuant to Article 14.1 of the Copyright Act of Canada, moral rights may not be assigned, but may be waived in whole or in part. Where a waiver of any moral right is made in favour of an owner or a licensee of copyright, it may be invoked by any person authorized by the owner or licensee to use the work, unless there is an indication to the contrary in the waiver. According to legal commentators, a waiver does not require a written form. The waiver of moral rights is possible only after the creation of a work.⁸⁰

In addition to the waiver, it is essential not to ignore the concept of consent as well. Article 28.1 of the Copyright Act of Canada provides: “[a]ny act or omission that is contrary to any of the moral rights of the author of a work or of the performer of a performer’s performance is, in the absence of the author’s or performer’s consent, an infringement of those rights”. It has been emphasized by some scholars that consent is not an alternative to waiver. Its expression in law contemplates its availability to the author. Consent could be given expressly or implied.⁸¹

The draft European Copyright Code (ECC) aims to find a common ground for countries relying on *droit auteur* and copyright traditions. According to Article 3.5 of ECC “[t]he author can consent not to exercise his moral rights. Such consent must be limited in scope, unequivocal and informed”.

This approach has been challenged by J. Ginsburg. In her analysis of Article 3.5 of the draft European Copyright Code she marks that “[w]hile the text seeks to bar general waivers, it would permit specific renunciations of moral rights. ... The absence of a clear limitation to agreements *intuitu personae* leaves open the possibility that specific consent might extend to the whole world, for example, to any user of a website on which a work is posted”.⁸² J. Ginsburg has also raised the issue whether the consent is revocable. According to her argumentation “[t]he text does not address the question whether a specific consent must be revocable. While revocability would seem consonant with the concept and purpose of moral rights, the possible extension of permissible consent to website waivers may make revocation impossible”.⁸³

There are several methods to define and regulate the exercise of moral rights by non-authors. While the French model is restrictive, the other European countries and Anglo-American countries allow the exercise of moral rights by third parties. Non-authors exercising moral rights can rely on legal instruments such as license, waiver and consent. These instruments usually are limited in scope. In case a country does not have a very extensive catalogue of moral rights then this does not pose any significant problem. However, when changes and adoptions to a work interfere both with economic and moral rights, then it is necessary to have instruments allowing the exercise of moral rights by non-authors.

Summary

The general civil law approach is to divide authors' rights into two clearly distinguished groups: moral (or personal) rights and economic (or property) rights. These two groups of rights have evolved through different paths and have their specific features in national legal systems. As a rule, moral rights are not designed to be an object of transaction. Nevertheless, there is a need to find a workable solution to practical cases directly concerning moral rights (for instance "ghost authorship", in cases of drafting legal acts, trademarks, logos, state and official symbols, creation of ICT related works, etc.).

Copyright systems usually separate moral and economic rights (the dualistic approach). There are also exceptions. In the German copyright system moral and economic rights are inseparable (the monistic approach). In common law tradition author's honour and reputation are protected by other law institutes and therefore author's moral rights are not so relevant as in civil law countries. In civil law countries, moral rights have a direct connection with the personality of an author.

Although moral rights are protected, the scope of protection varies greatly in different countries. On the one hand, there are France, Germany, Estonia and other civil law countries, which have very extensive protection of moral rights, and on the other hand, there are countries of copyright tradition which recognize a very limited concept of moral rights with a short history.

The more extensive the protection of moral rights is, the more relevant it is to regulate the exercise of these rights by non-authors. The analysis, however, reveals that countries which very strongly protect moral rights are also rather restrictive in allowing third parties to exercise these rights.

With an exception of France, the analysed countries accept the exercise of moral rights by non-authors. The analysis shows that the exercise of moral rights is regulated through institutes of waiver and consent. Consent and waiver have to be limited in scope and clear.

The Estonian copyright law contains one of the longest lists of moral rights in the world. Therefore the exercise of such rights has special importance. The Estonian Copyright Act does not regulate author's consent and waiver concerning moral rights. Moral rights are usually licensed. In practice some copyright contracts have provisions which have resemblance to waiver and consent.

The Draft European Copyright Code can be considered a good practice for further harmonization of European copyright law. It also concerns the exercise of moral rights since the authors of the Code make an attempt to reconcile *droit d'auteur* and copyright doctrines. Nevertheless, the current wording could be developed to make the regulation of moral rights more understandable and compatible to national copyright systems. The authors of this article support the idea of at least minimum harmonization of moral rights at the EU level.

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- ⁷⁶ Clause 11 of the judgement of the Civil Chamber of the Estonian Supreme Court of 13 December 2006 No. 3-2-1-124-06.
- ⁷⁷ U.S.C § 106a.

⁷⁸ The CDPA § 87.

⁷⁹ *Adeney, E.* The Moral Rights of Authors and Performers. An International and Comparative Analysis. Oxford University Press, 2006, p. 422.

⁸⁰ *Ibid.*, p. 352.

⁸¹ *Ibid.*, p. 353.

⁸² *Ginsburg, J. C.* European Copyright Code – Back to First Principles (with Some Additional Detail) (January 2011). Auteurs et Medias (Belgium), 2011; Columbia Public Law Research Paper No. 11-261, p. 15. Available: SSRN: <http://ssrn.com/abstract=1747148> [last viewed 29.06.2014].

⁸³ *Ibid.*

The Procedure of the Constitutional Court: Issues to be Decided at the Stage of Initiation of a Case¹

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The article is dedicated to the analysis of the initial stage – initiation of a case – in the procedure before the Constitutional Court as one of the types of judicial proceedings, focusing in particular upon issues that until now had not been analysed in legal science. The article reveals the competence of the Panel and the assignments sitting of the Constitutional Court in the stage of initiating a case, as well as analyses the legal nature of a decision on initiating and refusing to initiate a case. In view of current events, issues that should be decided even before initiating a case at the Constitutional Court are examined.

Keywords: procedure of the Constitutional Court, Panel of the Constitutional Court, assignments sitting, decision on initiating a case, constitutionalism.

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Introduction

The development of contemporary democratic and State ruled by law is closely linked to level of development of a recent concept – constitutionalism.² I.e., the State of the 21st century has the task to ensure sustainability of constitutionalism, as a

system of values existing within the State, encompassing constitutional regulation, legal principles and fundamental human rights. Ensuring the development of constitutionalism is not only researchers' and scholars' whim.³ Ultimately, constitutionalism is the safeguard for societal development and the existence of the State itself.

In order for the existence and ensuring of constitutionalism not to turn solely into a political slogan and philosophical concept, effective mechanisms are necessary to ensure the existence and protection of this system of values. British philosopher and political theorist John Stuart Mill already in 1857 noted in his essay "On Liberty" that it had been possible to ensure civic or social liberty by establishing constitutional control⁴. Also nowadays scholars and practitioners of various countries have reached a consensus that constitutional courts should be recognised as being one of the most effective mechanisms for the development of constitutionalism⁵. Not in vain it has been noted that the role of constitutional court judges in the development of the constitutional law doctrine (which includes also constitutionalism) is increasing.⁶ In this sense Latvia is not an exception. The Constitutional Court of the Republic of Latvia (hereinafter – the Constitutional Court) undoubtedly is the safeguard for the existence of constitutionalism in Latvia, ensuring that the constitutional institutions were acting and the power of the State was exercised in conformity with the spirit and the letter of the *Satversme* [Constitution]. of the Republic of Latvia (hereinafter – *Satversme*)⁷.

The Constitutional Court in its actions has proven that it is the most significant constitutional institution in the State, because its exclusive function, the legal nature of its rulings and, in particular, its high authority determines the trends in dealing with issues of national importance and in development. The rulings by the Constitutional Court, beyond doubt, are binding, enforceable and unsurpassable⁸. During the period of existence of the Constitutional Court, in fact, no cases have been identified, where the legislator or the executive power had ignored rulings by the Constitutional Court.

Aivars Endziņš, the first President of the Constitutional Court, once noted that there were no significant and insignificant cases for the Constitutional Court, since the outcome of each case was significant for the applicant.⁹ And yet, which of the applications submitted to the Constitutional Court will become a case or constitutional judicial proceedings will be initiated is decided during the stage of initiating a case. The opinion that the submission of the application is the first stage in the process of constitutional control has been expressed in legal literature.¹⁰ At the Constitutional Court the first procedural stage, when the provisions of Constitutional Court Law¹¹ are applied is the stage of initiating a case. It is a decision-taking procedure, where the Constitutional Court examines the submitted application and decides on initiating a case or refusing to initiate a case.

The authors of this article have already provided an analysis of the regulation included in Section 20(5) and Section 20(6) of Constitutional Court Law, which define the cases when the Panel has the right to refuse initiating a case, in a separate publication¹². Therefore this article will focus upon other issues of the judicial proceedings before the Constitutional Court: singularities of the judicial proceedings, legal nature of the decisions adopted by the Panels of the Constitutional Court, as well as issues that are relevant in practice and until now have not been examined in legal science, concluding with conclusions on the characteristics of the decision favourable for the applicant – on initiating a case.

1 The procedure of the Constitutional Court – one of the types of judicial proceedings in Latvia

As envisaged by Article 85 of the *Satversme*, the Constitutional Court is an institution, which, within its jurisdiction as provided for by law, reviews cases concerning compliance of laws with the Constitution, i.e., in accordance with a certain procedural form or order. The initial intention of the legislator, considering what kind of procedure to envisage for cases at the Constitutional Court, was that the Constitutional Court could adopt its rulings by abiding by the general principles of administrative procedure and civil procedure¹³, however, finally decided that special judicial proceedings where needed that would examine cases in accordance with different procedural principles. In view of the fact that the Constitutional Court adjudicates disputes regarding the compliance of a legal norm with legal norms of higher legal force¹⁴, a special procedure for solving these disputes was established – the procedure – judicial proceedings before the Constitutional Court.¹⁵

It must be noted that the initial wording of Constitutional Court Law (Section 26) envisaged that the procedural order for hearing cases was defined by Constitutional Court Law and the Constitutional Court Procedure Law.¹⁶ Transitional Provisions of Constitutional Court Law envisaged that until coming into effect of the Constitutional Court Procedure Law the procedural order for hearing cases was regulated by this (i.e., the Constitutional Court) Law and the Rules of Procedure of the Constitutional Court. Namely, the Rules of Procedure of the Constitutional Court were intended as a procedural regulation for advancing cases, elaborated by the Constitutional Court itself, – as a temporary solution and “sound foundation” for the Constitutional Court Procedure Law to be drafted¹⁷. However, on 30 November 2000, the legislator, by adopting law “Amendments to Constitutional Court Law”, as a matter of principle, abandoned the idea to adopt the Constitutional Court Procedure Law and provided that the procedural order for adjudicating cases should be established by Constitutional Court Law and the Rules of Procedure of the Constitutional Court.¹⁸

Thus, regulation of the proceedings before the Constitutional Court, insofar it is not regulated by Constitutional Court Law, has been transferred into exclusive competence of the Constitutional Court itself and the proceedings before the Constitutional Court take place according to the procedural order adopted by an absolute majority vote of all Justices. However, this does not prohibit the legislator to regulate issues of judicial proceedings before the Constitutional Court and supplement this regulation within the framework of law. Whereas the Constitutional Court has the right to define its own structure and organisation of work in its Rules of Procedure (Constitutional Court Law, Section 14).

The way, in which the issues of judicial proceedings before the Constitutional Court are regulated, – sharing the competence between the legislator and the Constitutional Court, *inter alia*, determines the particularities of these judicial proceedings. Moreover, this shared competence to decide on the issues of judicial proceedings before the Constitutional Court leads to theoretical and practical reflections on the legal nature of the Rules of Procedure of the Constitutional Court.

The matters regulated by the Rules of Procedure of the Constitutional Court apply also to the applicants, since it specifies in greater detail the provisions of Constitutional Court Law. This leads to the following practical issue: are the Rules of Procedure of the Constitutional Court an external regulatory enactment? The

Constitutional Court itself has provided the following explanation – “*external regulatory enactments are binding upon an abstract circle of persons, they regulate legal relationship between, on the one hand, public law subject and, on the other hand, an individual or other law subjects*”.¹⁹ Moreover, the term “regulatory enactments”, included in Section 16(3) of Constitutional Court Law, includes both generally binding (external) and internal regulatory enactments.²⁰ Thus, the Constitutional Court could be asked to examine the compliance of legal norms included in its own Rules of Procedure of the Constitutional Court with norms of higher legal force. This “rant” is far from being only theoretical and concocted. Thus, for example, in April 2012 the Constitutional Court received a constitutional complaint, which, alongside various other claims, contained a request to assess also the compliance of a provision in the Rules of Procedure of the Constitutional Court (Para 67) with norms of higher legal force.²¹ If a case were initiated, discussions could start, whether the Constitutional Court is not a judge in its own case. At the same time it must be noted that the compliance of the regulation on the judicial proceedings before the Constitutional Court already has been examined.²² In accordance with Section 26(1) of Constitutional Court Law, the Constitutional Court decides on procedural issues that are not regulated in this law and the Rules of Procedure of the Constitutional Court. This regulation is a fundamental instrument of the judicial proceedings of the Constitutional Court, since it envisages discretion for the Constitutional Court in dealing with specific procedural issues. In view of the fact that the legislator, upon adopting Constitutional Court Law, has defined the limits of the Constitutional Court’s discretion in deciding on procedural issues, this regulation must be interpreted systemically, in interconnection with other provisions of Constitutional Court Law, the fundamental principles of the proceedings before the Constitutional Court, as well as the principle of proportionality.

It must be noted that the wording used in Section 26 of Constitutional Court Law – “other procedural issues” – cannot be any issue or issue of any kind, but only such, which is simultaneously unregulated and procedural. I.e., the respective norm is applicable only to such issues of procedural nature, which apply to hearing a case at the Constitutional Court and which have not been dealt with by the legislator in Constitutional Court Law. The content of the words “*other [...]. unregulated procedural issues*” has found an illustrative reflection in the case law of the Constitutional Court. The Constitutional Court has examined as unregulated procedural issues requests to apply such temporary measures, which are not envisaged by a regulatory enactment. For example, on 2 May 2007, after the Saeima [Parliament]. on 27 April 2007 had adopted a draft law, by which the Treaty on the State Border between Latvia and State was ratified in first reading, the Constitutional Court received an application from the members of the Saeima, requesting to stop ratification or corroboration of this treaty by the Saeima. The members of the Saeima, to substantiate their request, noted that “[s]ince the Saeima allegedly wants to corroborate the Border Treaty before the judgement by the Constitutional Court is pronounced, the Constitutional Court should adopt a decision on the possibility of applying temporary measures, which would make effective enforcement of the judgement possible”.²³ The Constitutional Court had to find an answer to the question, whether it had the right to stay the legislative process in the Saeima, taking into consideration the fact that “[n]either the Satversme, nor Constitutional Court Law regulates the issue of suspending the ratification of an international treaty signed or ratified by Latvia. Neither does the Rules of Procedure of the Constitutional Court establish such regulation”²⁴.

Comparatively recently, on 12 January 2012, the Constitutional Court received an application by members of the Saeima, requesting assessment of compliance of a provisions in the law on “Law on National Referendums and Initiation of Laws”, a decision by the President of the State and an opinion by the Presidium of the Saeima with the norms of the *Satversme*, as well as application of temporary measures and suspending the national referendum regarding the draft law “Amendments to the *Satversme* of the Republic of Latvia”²⁵. The Constitutional Court initiated a case on the basis of a concrete application and during the assignments sitting of 20 January 2012 adopted a decision regarding the possibility of suspending a national referendum as an unregulated procedural issue.²⁶

As noted in both decisions adopted by the assignments sitting, examining the aforementioned requests, the fundamental question is the jurisdiction of the Constitutional Court to apply temporary measures, which are not *expressis verbis* envisaged in law. The Constitutional Court should have discretion in deciding upon such issues, because they are closely connected with the enforcement of a judgement by the Constitutional Court. The Constitutional Court’s discretion to decide upon unregulated procedural issues, *inter alia*, to apply a temporary measure not directly indicated in law, is founded, since only the Constitutional Court has the responsibility to ensure that its rulings guarantee legal stability, clarity and peace in social reality²⁷. In analysing the jurisdiction of the Constitutional Court to apply temporary measures, not envisaged in law, the fact that the jurisdiction of the Constitutional Court follows directly from the *Satversme* should be taken into account. To explain concisely the jurisdiction of the Constitutional Court envisaged by the *Satversme*: the Constitutional Court has the constitutional duty to ensure the supremacy of the *Satversme* and safeguarding of constitutional values. The kind of measures a constitutional institution may use to exercise its jurisdiction follows exactly from the jurisdiction of constitutional institutions. Thus, application of Section 26 of Constitutional Court Law requires using methodologically complex findings and arguments. This allows asserting that legal science is important in the development of the judicial proceedings before the Constitutional Court, as the issues of judicial proceedings before the Constitutional Court that thus far have not been dealt with require scientific analysis and a developed doctrine.

The regulation of the proceedings before the Constitutional Court basically covers the procedure of application and hearing of cases or procedural stages.²⁸ Namely, the process of examining a case by the Constitutional Court can be divided into subsequent stages, and it starts with the initiation of a case, followed by preparing of the case, adjudication of the case, making of the judgement, enforcement of the judgement. Since judicial proceedings can start only after a case has been initiated, the initiation of a case is a mandatory element in the judicial proceedings before the Constitutional Court.

2 The jurisdiction of the Constitutional Court Panel and the Assignments Sitting during the stage of initiating a case

Since the Constitutional Court does not have the right to initiate a case *ex officio*, an application that complies with the requirements regarding the form and the content of it set out in Constitutional Court Law and submitted by a subject having the right to apply to the Constitutional Court is a pre-condition for constitutional judicial proceedings.

Even though Constitutional Court Law indicates the initiation of a case as the first stage, there are a number of earlier stages in the proceedings before the Constitutional Court, during which the compliance of the submissions received (perceived by applicants as an application) or documents with the requirements of Constitutional Court Law is assessed.

First of all the President of the Constitutional Court assesses the compliance of submitted documents with formal requirements. Pursuant to Para 67 of the Rules of Procedure of the Constitutional Court, a document submitted by a subject, which is not referred to in Section 17 of Constitutional Court Law, as well as a document, which is evidently incompatible with the requirements that the law sets for applications, is not to be examined as an application²⁹. Only if the application *prima facie* as to its form complies with the established requirements, the President of the Constitutional Court transfers it for examination by the Panel. Thus, all submitted documents are examined in something like pre-stage of initiating a case. Actually, only when the President of the Constitutional Court has transferred the submitted document for examination by the Panel, it can be considered that an application has been submitted to the Constitutional Court. Hence, not every document that is submitted to the Constitutional Court is an application. Only a document, which evidently meets the requirements of Constitutional Court Law, can be recognised as being an application. During this state the legal assessment of submitted documents is founded upon the content of the concept “evidently incompatible with requirements”. Essentially, the task of the President is to establish visual conformity of the application with formal requirements.

Even though Constitutional Court Law does not define concretely this pre-stage and the aforementioned rights of the President, Constitutional Court Law, nevertheless, regulates the examination of applications, i.e., examination as to merits only such documents, which comply with the requirements of Section 18 of Constitutional Court Law. Thus, it follows from Constitutional Court Law, that only documents of high legal quality are examined in the proceedings of the Constitutional Court. The meaning and aim of this provision is rooted in the principle of procedural effectiveness and economy; i.e., documents, which are evidently incompatible with the provisions of Constitutional Court Law, are not examined as to merit by the Panels, to avoid having to prepare decisions (procedural documents) having informative meaning. The authors are of the opinion that such a pre-stage in the proceedings of the Constitutional Court is admissible, only if all reasonable doubts regarding compatibility of the submitted document with the provisions of Constitutional Court Law are construed in favour of the applicant – so as to transfer the application to the Panel. This requirement follows from the nature of judicial proceedings before the Constitutional Court – to ensure exercise and safeguarding of human rights, as well as principles and values of a democratic and state ruled by law. Thus, if an application has been submitted, expressing doubts regarding respecting the fundamental human rights or the principles of a democratic and state ruled by law, then the Constitutional Court is obliged to assess the validity of these doubts.

In the case law of the Constitutional Court letters by persons requesting transferring a criminal case for adjudication *de novo*³⁰ or compensating for damage inflicted upon a person's health³¹ are the ones that are most frequently recognised as being evidently incompatible with the provisions of Constitutional Court Law. These issues, without doubt, do not fall within the jurisdiction of the Constitutional Court and therefore should not be examined in judicial proceedings before the

Constitutional Court. However, regulatory enactments envisage that the Constitutional Court has the obligation to answer also to such letters – to explain that the aforementioned issues do not fall within the jurisdiction of the Constitutional Court and the submission is evidently incompatible with the requirements defined in law for the application regarding an initiation of a case at the Constitutional Court.

The jurisdiction and the procedure of the Constitutional Court are continuously evolving, and to a large extent this development is defined by the insights gained in daily work.³² Also the stage of initiating a case might have significantly, even, one might say, crucially, changed since the adoption of Constitutional Court Law.

From the adoption of Constitutional Court Law on 5 June 1996 until 1 January 2001 or during the first stage of the Constitutional Court's activities³³ the decision on initiating a case or refusing to initiate was taken by one Justice as an individual decision. The applicants (at the time – only the subjects of abstract constitutional control) could appeal the decision to refuse initiation of a case to the Constitutional Court in the composition of three judges. This procedure for examining applications could exist only because the circle of subjects having the right to submit an application to the Constitutional Court was limited and the number of submitted applications – low (until 1 July 2001 in total 33 applications had been submitted to the Constitutional Court).³⁴

Of course, it must be admitted that this procedure for examining an application was slow and cumbersome. The legislator, thinking about expanding the jurisdiction of the Constitutional Court, or, to be more precise, introducing the constitutional complaint, which automatically meant a leap-like increase in the number of applications, had to consider also ways for making the stage in the procedure of the Constitutional Court, in which a decision is taken, whether a case should or should not be initiated on the grounds of the application, shorter and more effective. This was the reason why the legislator, in amending Constitutional Court Law³⁵, set out that applications, which comply with the requirements defined in law, should be examined and the decision on initiating a case should be taken a Panel composed of three Justices of the Constitutional Court.

A Panel is an organisational unit of the Justices of the Constitutional Court established for one year, which has been granted an exclusive function – to decide on initiating a case or refusal to initiate a case. The Panel has not been granted any other functions, because only the Constitutional Court has the right to assess compliance of the contested norm with legal norms of higher legal force. Thus, the Panel examines, whether the application as to its form and content complies with the provisions of Constitutional Court Law.³⁶ This assessment is reflected in the Panel's decision, which is the ground for initiating a case or refusing to initiate it. And yet, the Panel, in adopting a decision, has the right to express its considerations regarding the relevant issue, as well as to draw the applicant's attention to the findings expressed in the rulings by the Constitutional Court. For example, having examined an application submitted by a person, who was at the facility for deprivation of liberty, requesting to assess, whether fundamental rights were not violated by the fact that regulatory enactments did not set out regulation on ensuring daylight at the institutions for deprivation of liberty, the Panel in its decision not only assessed compliance of the application with Constitutional Court Law, but also noted: "*At the same time the Panel of the Constitutional Court recognizes that introduction of standards on the influx of daylight and on artificial light in regulatory enactments of Latvia would be desirable.*"³⁷ Whereas in another decision refusing to initiate a case the

Panel noted “*The provisions of the Satversme do not prohibit making deductions even from the minimum remuneration for work or other minimum revenue of a person*”.³⁸ However, the authors would like to underline that the considerations expressed in the Panel’s decisions may not apply to the assessment of the constitutionality of the contested legal norm.

The Panel adopts a decision at a closed sitting, usually attended only by the members of the Panel. However, Constitutional Court Law (Section 20(4)) envisages that the applicant, employees of the Constitutional Court, as well as other persons can be summoned to the sitting. As regards this regulation, it must be noted that in practice the possibility to invite the applicant to the Panel sitting is not used. The grounds for this position by the Panel can be found in the fact that the Constitutional Court has no *ex officio* rights. All facts of the case and legal substantiation must be included in the application. If the application does not contain them, it is incompatible with the provisions of Constitutional Court Law and an application like this cannot serve as the grounds for initiating a case.

The Rules of Procedure of the Constitutional Court (Para 75) envisage that the Panel (a Justice), while preparing the application for examination, if necessary, may 1) invite the applicant to provide additional explanations orally or in writing or to submit documents; 2) to request from the institution or official, who adopted the contested act, as well as from any State or local government institution, establishment or officials documents and information necessary to decide the issue of initiating a case or refusing to initiate it.³⁹ The aforementioned right of the Panel is to be exercised as an instrument for eliminating deficiencies in the application.

The analysis of the decisions adopted by the Panels of the Constitutional Court shows that in recent years the Panels have exercised their right to request additional documents or explanations only in a few cases. The exercise of this right could be essential in those cases, when the so-called fixed-term application has been submitted, since according to the case law of the Constitutional Court as missed term is not reinstated. However, it must be emphasized that the applicant cannot always expect that the Panel of the Constitutional Court, upon establishing ambiguities or deficiencies in the application, will request additional information. The purpose of this norm is not to give to the applicant a possibility to re-write the submitted application, but to give to the Panel the possibility to verify facts indicated in the application. For example, if a person has indicated in the application all available legal remedies have been exhausted, but has erroneously indicated the number of court ruling or has not appended to the application a copy of the final ruling, and accurate information cannot be obtained from the court information system, then the Panel may request that additional information is provided.

However, it must be admitted that it is not always clear, what kind of criteria are taken into consideration when deciding on the need to request additional explanations. Thus, for example, in the application – decision by the Department of Administrative Cases of the Supreme Court Senate (hereinafter – the Senate), which contested the provisions in the Law on Compensation for the Damages Caused by Institutions of Public Administration regarding the term, within which it was possible to claim a compensation from the State, the legal substantiation was not provided in accordance with the scheme adopted in the case law of the Constitutional Court⁴⁰. *Prima facie* one might conclude that pursuant to the practice of the Constitutional Court Panels a decision to refuse initiation of a case should be adopted. However, the case was initiated, because the Justice, before deciding on initiating or

not initiating it, exercised the right to request the Senate to provide additional information⁴¹ and *inter alia*, to abide by the general requirements regarding the presentation of the application and to substantiate compliance of the contested norm with the principle of proportionality.⁴²

This leads to the conclusion that summoning the applicant to the sitting of the Panel or asking to provide additional explanations in writing is necessary only if a fact of the case or a claim included in the application is not sufficiently clear to the Panel, or if it has identified obvious mistakes or contradictions in the application. A Panel's decision to request to make the application more accurate will always remain controversial, as it is difficult to draw the line between making an application more accurate and supplementing it. Adding a new legal substantiation to the application, different from the one included originally, is not admissible, since active involvement of the Constitutional Court in defining the substantiation would hinder its unbiased assessment of the conformity of the respective application with the provisions of Constitutional Court Law.

To ensure to the extent possible the applicant's right to a fair court and also to exclude doubts regarding the validity of the Panel's decisions, on 10 December 2009 Constitutional Court Law was amended by adding to Section 20 Part 7¹ which provides: *"If the Panel takes a decision to refuse to initiate a case and a judge – a member of the Panel – votes against such a decision by the Panel, moreover, he or she has reasoned objections, examination of the application and the taking of a decision shall be transferred to the assignments sitting with the full composition of the Court."*⁴³ The aim of this regulation is to ensure comprehensive and meticulous analysis of also such applications, with regard to compliance of which or parts thereof with the provisions of Constitutional Court Law doubts have arise. Thus, for example, if the arguments that the application under review create doubt about the existence of a violation of fundamental right, but one member of the Panel holds that the doubts are unfounded and that a case should be initiated, this Justice can request examination of the application at an assignments sitting of the Constitutional Court in full membership. Thus, in some cases the decision on initiating a case or refusal to initiate a case is adopted at an assignments sitting. The authors hold that this regulation is necessary, as it ensures the possibility to conduct particularly meticulous analysis of compliance of the application with the provisions of Constitutional Court Law.

Pursuant to Constitutional Court Law the decision on initiating a case or refusal to initiate it must be adopted within a month or – with regard to complex cases – within two months as of the date of receiving the application. The results of the study conducted by the authors show that in the majority of cases the decision on initiating a case or refusal to initiate a case is adopted within one month. In 2012 a decision on extending the term of application has been adopted only with regard to ten cases⁴⁴. Thus, there are also cases, when the Panel has to establish that *"[a]pplication is complicated. It contains a number of different claims, the jurisdiction of the Constitutional Court regarding these, as well as the legal substantiation requires in-depth analysis. In order to decide on the issue of initiating a case or refusal to initiate it the term for examining the application must be extended."*⁴⁵

Thus, a decision on initiating a case or refusal to initiate a case can be adopted by examining the application at the sitting of a Panel of the Constitutional Court and, in some cases, also at the assignments sitting. Even though Section 20(5) and Section 20(6) of Constitutional Court Law establishes the right of the Panel of the Constitutional Court to decide on initiation of a case or refusal to initiate it, this right,

undoubtedly, is vested in the whole of the Constitutional Court, which can examine the application at an assignments sitting. Whichever of the procedures is used to examine the application and to adopt the decision, in both cases the presumption that all reasonable doubts should be construed in favour for initiating a case should be followed, since the very fact that an application has been submitted is indicative of a possible violation of fundamental rights or the principles of a democratic and state ruled by law. The Constitutional Court itself has also recognised that all doubts should be construed in favour for initiating a case, since the dispute, undoubtedly, is solved both when the contested legal norm (act) is recognised as being incompatible and when it is recognised as being compatible with a norm of higher legal force.⁴⁶

3 The legal nature of the decision to initiate a case or refusal to initiate it

The decision to initiate a case or refusal to initiate it, which is adopted at the sitting of the Constitutional Court Panel or an assignments sitting, after examining the application, is a written procedural legal act, which provides legal assessment on compliance of the application with the provisions of Constitutional Court Law. The decisions adopted by the Panels of the Constitutional Court apply only to the addressees thereof, and the legal findings they comprise can serve only as means for interpreting fundamental rights and clarifying the content of the principles of state ruled by law.⁴⁷ I.e., the decision on initiating a case or refusal to initiate a case does not have *erga omnes* power⁴⁸, held by the judgements of the Constitutional Court and its decisions on terminating judicial proceedings.

One of the most important aspects that the applicant should take into consideration is the fact that the decision on initiating a case or refusal to initiate a case is not subject to appeal⁴⁹. Whereas the right to submit an application is limited only by procedural rules, for example, in some cases the term for submitting an application must be abided by. This means that an application to the Constitutional Court can be submitted a number of times. I.e., if a decision to refuse initiation of a case has been adopted, then the application, improved, can be submitted repeatedly. If an application has been submitted repeatedly, then the repeated decision by the Panel cannot substantially differ from the initial decision. Thus, for example, if it is noted in the decision that the fundamental rights of the person submitting the application (constitutional complaint) have been violated, but the legal substantiation of the fact of violation has not been provided and because of this initiation of the case has been refused, then a repeated examination of the application could not lead to the conclusion that the fundamental rights had not been violated. Of course, the possibility that erroneous conclusions had been made while examining the application cannot be excluded. If it is established that in the previous decision regarding a repeatedly submitted application an erroneous conclusion has been made, it must be rectified and an explanation, why the newly adopted decision differs from the previous one, must be provided.

The fact that the submitted applications are examined by several (different) Panels also should be taken into account. However, in accordance with the provisions of Constitutional Court Law practice should be uniform. The Panels cannot, having examined applications similar as to their content, reach different conclusions. Aivars Endziņš, the former President of the Constitutional Court, has highlighted the fact the decisions adopted by the Panels differ⁵⁰, thus causing doubts about the

validity of adopted decisions. Of course, adoption of identic decisions cannot be an absolute requirement in all cases, since different facts of the case might be identified in each application, the content of legal substantiation might also differ. And yet, the clause of fair court prohibits differential treatment of persons, who are under similar actual and legal circumstances⁵¹. In deciding upon initiation of a case or refusal to initiate the provisions regarding “fair court” must be abided by. This conclusion, undoubtedly, applies also to the stage of initiating a case at the Constitutional Court.

Constitutional Court Law (Para 4 of Section 20(9)) envisages that only information on those decisions, on the basis of which a concrete case is initiated, must be published. However, from the vantage point of research those decisions, on the basis of which initiation of a case is refused, are the most interesting. Insights on the elements in the content of application can be found in the decisions on refusing to initiate a case. These insights may help to understand, for example, the theory of fundamental right infringement, rules on the term for submitting an application and legal substantiation. If a subject of constitutional control exercises his or her right to turn to the Constitutional Court, it is important for him or her to know and understand the norms of Constitutional Court Law or the requirements applicable to the content of application. Unfortunately, decisions on refusal to initiate a case are not published, – as noted, *inter alia*, due to the need to ensure personal data protection.

4 Other issues to be decided upon in the stage of initiating a case and before initiation of a case

Section 19²(5) of Constitutional Court Law provides: “*Submission of a Constitutional complaint (application) shall not suspend the implementation of a court ruling except for cases when the Constitutional Court has decided otherwise.*”⁵² This norm, essentially, envisages the possibility of applying temporary measures in the case a constitutional complaint has been submitted. Even though Constitutional Court Law does not *expressis verbis* limit the cases, when the Constitutional Court may decide on suspending the enforcement of a court ruling, this norm must be interpreted systemically in interconnection with other norms of Constitutional Court Law, principles of judicial proceedings before the Constitutional Court, as well as general principles of law.

The insight that the Constitutional Court may suspend the enforcement of a ruling by general jurisdiction court only in exceptional or extraordinary cases has been expressed in the case law of the Constitutional Court, and the thesis has been emphasized: before it has been ruled otherwise, a ruling made by a general jurisdiction court must be presumed to be lawful⁵³. The temporary measure included in Constitutional Court Law envisages suspending the enforcement of a court ruling – both a decision and a judgement. It must be emphasized that Constitutional Court Law does not envisage suspending of judicial proceedings, but only suspending the enforcement of a ruling – the final result of a stage in the respective judicial proceedings.⁵⁴ Likewise, until now the Constitutional Court has decided on applying temporary measures only if a case was initiated, or, to put it differently, initiation of a case at the Constitutional Court was a mandatory pre-requisite for applying temporary measures. The conducted analysis of applications shows that usually applicants include the request to apply temporary measures in the application regarding initiation of a case.⁵⁵ Likewise, special requests to apply temporary measures have been submitted following the initiation of a case, for example, a request to suspend

judicial proceedings in a civil case regarding examination of an insolvency administrator's application on commencing bankruptcy procedure until the pronouncement of the judgement by the Constitutional Court⁵⁶.

In practice the Constitutional Court has applied temporary measures, if it serves in reaching important aims⁵⁷ under such extraordinary circumstances, when the enforcement of a ruling by a court of general jurisdiction before the coming into force of the judgement by the Constitutional Court might render the execution of this judgement impossible.⁵⁸ Likewise, the Constitutional Court has recognised that it may apply temporary measures, if the enforcement of a court's ruling would cause significant harm to the applicant.⁵⁹ In view of the above mentioned, it can be concluded that such request to apply temporary measures as, for example, a request to apply temporary measures in order to receive dietary supplements⁶⁰, or to suspend the activities of a sworn bailiff⁶¹, must be recognised as incompatible with the provisions of Constitutional Court Law.

As the practice of the Constitutional Court shows, a situation may also arise when the request regarding suspending the enforcement of a ruling by a general jurisdiction court must be decided immediately – even if the Panel has not yet adopted the decision on initiating a case or refusal to initiate. Thus, for example, in April 2013 the Constitutional Court received three applications requesting assessment of compatibility of the international treaty “Extradition Treaty between the United States of America and the Government of the Republic of Latvia”, the law “On Extradition Treaty between the United States of America and the Government of the Republic of Latvia”, as well as of two norms of Criminal Procedure Law – Section 701(2) and Section 707(2) with the norms of the *Satversme* of the Republic of Latvia and the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁶² Two of the submitted applications contained a request to suspend the enforcement of the decision No. IP-1 of 31 January 2013 by the Chamber of Criminal Cases of the Supreme Court of the Republic of Latvia or to suspend the applicant's extradition for being judicial proceedings abroad.⁶³ The applications express the opinion that immediate enforcement of the decision by a court of general jurisdiction on extradition of the applicant for judicial proceedings abroad might cause significant and irreversible infringement upon the applicant's fundamental rights enshrined in the *Satversme*.

As regards this concrete and until now – unique – example, it should be taken into consideration that the process of examining the application until the moment, when the decision on initiating a case or refusal to initiate a case is adopted can last a month or even two. However, in this particular case the Constitutional Court, on the basis of Section 89 of Constitutional Court Law, as well as in view of the need to implement measures for realising and safeguarding the applicant's fundamental rights, held that the request regarding enforcement of the court ruling should be decided upon immediately, without waiting for the Panel's decision. Therefore the Constitutional Court, responding not only to the information published in mass media⁶⁴, but also to the opinion expressed by the Ombudsman⁶⁵, convened an assignments sitting to adopt a decision regarding this request. I.e., this assignments sitting did not examine compatibility of the application with the provisions of Constitutional Court Law, but considered, whether the applicant's request to suspend the ruling by a court of general jurisdiction, had sufficient legal grounds. The reasoning of the decision adopted at this assignments sitting allows concluding: to ensure that a person's fundamental rights are not violated if the State has adopted

a decision on extraditing this person to a foreign state, a decision must be taken regarding temporary measures to ensure a standard of human rights protection, which follows both from national legal norms and international legal norms binding upon Latvia, until the moment the Constitutional Court adopts its final ruling. In this particular case the fact that the Cabinet of Ministers still had to decide on extraditing the respective person was essential. Thus, the assignments sitting of the Constitutional Court recognised that *“at present there are no grounds to suspend the enforcement of the Chamber’s decision, as there are other means for preventing significant harm to the applicant’s fundamental rights”*.⁶⁶ Apparently, “other means” for preventing significant harm to the applicant’s fundamental rights meant the Cabinet of Ministers, which has the final say on issue of extradition. Therefore, in view of the jurisdiction of the Constitutional Court and the principle of division of power, it must be admitted that the decision by the Constitutional Court was logical – *“[t]o propose to the Cabinet of Ministers suspending adoption of the decision regarding extradition of D[.]. Č[.] to the United States of America until the moment a Panel of the Constitutional Court has adopted a decision on initiating a case or refusal to initiate a case.”*⁶⁷

This precedent shows that with the framework of the proceedings before the Constitutional Court a need might arise to examine the issue of exercising and safeguarding the applicant’s fundamental rights and to adopt a decision on it, as well as to apply temporary measures before the decision on initiating a case or refusal to initiate it has been adopted. However, it must be noted that situations like these are to be considered exceptional or extraordinary cases. The fact that there are no other legal remedies that would ensure effective enforcement of the ruling by the Constitutional Court or avoiding significant harm to the applicant’s fundamental rights is of decisive significance in the application of temporary measures.

5 Decision on initiating a case

If a decision on initiating a case has been adopted, it can be concluded that the submitted application complies with the requirements of Constitutional Court Law. I.e., the claim included in the application falls within the jurisdiction of the Constitutional Court, the application contains facts of the case and provides legal substantiation for incompatibility of the contested norm with a norm of higher legal force, and the submitted application also complies with other provisions of Constitutional Court Law.

The analysis of the case law of the Constitutional Court leads to the conclusion: decisions on initiating a case are formal – they do not contain as well-considered analysis of the application’s content and form as in the decisions on refusing to initiate a case at the Constitutional Court. I.e., the decision on initiating a case reflects the requirements of Constitutional Court Law and establishes that the application complies with them⁶⁸. The authors have already noted that since 2009 the decisions by the Panel on refusal to initiate a case follow a uniform methodology for assessing an application⁶⁹, based upon the “mirror principle”: compliance with Section 20(5) of the Constitutional Court Law, which contains the provisions for refusal to initiate a case⁷⁰, is assessed, and in the case of a constitutional complaint applying also the provisions of Section 20(6) of Constitutional Court Law.⁷¹

The wording “complies with other provisions of Constitutional Court Law” is frequently used in decisions on initiating a case.⁷² I.e., the analysis of the case law of

the Constitutional Court shows: if a decision on initiating a case has been adopted, then this decision predominantly provides the assessment of legal substantiation (in the case of constitutional complaint – the existence of the infringement upon fundamental rights), but less attention is paid to other requirements of Constitutional Court Law. The authors hold that the explanation, why decisions on initiating a case are formal, must be sought in the need to abide by the principle of procedural economy. If it is concluded that a case should be initiated with regard to the submitted application, then all procedural activities for preparing this case for adjudication must be conducted as fast as possible.

If a decision is adopted to initiate a case only with regard to a concrete part of the application, i.e., it is concluded that a case is to be initiated only with regard to a part of the claim included in the application, then the respective decision also provides reasoning why the claim, in a certain part thereof, does not comply with the provisions of Constitutional Court Law. The analysis of the case law of the Constitutional Court allows concluding that usually the refusal to initiate a case with regard to part of the claim is connected with the absence of legal substantiation⁷³.

The authors in this article have already noted a principle of the judicial proceedings before the Constitutional Court, i.e., that any doubts should be construed in favour of the applicant. Thus, the Constitutional Court adopts the final decision on a procedural issue, which causes doubts, when making the ruling. For example, when dealing with the issue, whether compliance of a State budget sub-programme with the *Satversme* can be contested at the Constitutional Court, the Constitutional Court recognised that the compliance of the contested budget sub-programme with the *Satversme* can be examined only in interconnection with another legal norm⁷⁴. Moreover, this conclusion was made in a case, initiated on the basis of a constitutional complaint submitted by a private person. Considering the legal status of the State budget, the issue of the right of the subject of abstract control to contest at the Constitutional Court compliance of a particular sub-programme of the State budget with norms of higher legal force was examined in the course of preparing and examining the case⁷⁵. In accordance with the case law of the Constitutional Court, when doubts regarding the existence of a particular infringement exist, in the case of initiating a case these must be construed in favour for initiating a case⁷⁶. As explained in a judgement by the Constitutional Court, “*the issue, whether, indeed, the applicant’s, who has submitted a constitutional complaint, fundamental rights have been violated, must be decided by the Constitutional Court by examining the case on its merits.*”⁷⁷

Since the Constitutional Court does not hold *ex officio* rights, initiation of a case regarding a matter, which already has been directly or indirectly examined by the Constitutional Court would give it the possibility to specify the insights included in the ruling, as well as to provide repeated assessment of particular issues. Specifying of findings included in court rulings is nothing extraordinary or undesirable.

It has been noted in the legal science that significant changes in circumstances – circumstances of technical, economic or legal nature – lead to decreasing legal binding power of legal norms, as it is not clear, what kind of regulation the legislator would have chosen, had it been informed about the changing circumstances in future. In such cases courts have a legitimate tasks to “assist”, very carefully and in accordance with established legal values, the written legal norms with law-making performed by a court.⁷⁸ I.e., the new facts of the case require new or clearer legal substantiation in solving the case. In cases like these the court usually does not

amend the insights included in its previous rulings, but differentiates and develops them⁷⁹.

Undoubtedly, the Constitutional Court ensures contemporary understanding of the concise text of the *Satversme* or – that even though the “letter” of its norms has not changed, the “spirit” of the *Satversme* and the interpretation of its norms is evolving with time.⁸⁰ However, it should be taken into consideration that the Constitutional Court always makes its rulings here and now – assessing the facts of the case existing at a particular moment. A situation can arise, where, when hearing a particular case there was no need to examine extensively a certain issue, however, in the case that has been initiated anew, an issue, which once has been only outlined, must be specified. Former Chairman of the Lithuanian Constitutional Court Egidijus Kūris has provided a very apt explanation of such legal situation, noting that re-interpretation of the constitutional doctrine is not a revolution, but an evolution of the constitutional law, since through this the courts reiterate, refresh, explain and embed the insights defined in previous cases.⁸¹ And a situation may even arise, where the Constitutional Court has to respond concerning the justification of the findings expressed in a previous ruling by the Constitutional Court, which is contested by an application submitted to the Constitutional Court. This reality is reflected in one the most recent applications submitted by the Senate, essentially disagreeing to the findings expressed in a decision by the Constitutional Court to terminate judicial proceedings in Case No. 2012-01-03.⁸² In this particular case the Senate considers not only the norm, which defines the general jurisdiction of an administrative court to examine the legality of the decisions adopted by the Central Election Commission (hereinafter – CEC), but also the norm, which defines CEC competence to assess the content of a legislative initiative, being incompatible with the *Satversme*.⁸³ On the one hand, this application points to a dispute of jurisdictions, whereas, on the other hand, the reasoning included in this application reveals the need to specify or also re-examine the findings expressed in the decision by the Constitutional Court to terminate judicial proceedings in Case No. 2012-01-03. The Constitutional Court itself has noted that it has the obligation to abide by findings included in its rulings due to requirements regarding the stability of legal system, continuity, justice and equality. However, in those cases, where the contested norm does not comply with the actual social reality or collides with the legal relationships, which in the development of society have become dominant, the constitutionality of this norm can be re-examined⁸⁴. The particular application shows that a situation might be possible, where at the stage of initiating the case the possibility that in the examination of the concrete case the Constitutional Court might modify the findings included in previous ruling should be considered.

At the same time such an assessment during the stage of case initiation could be done only *prima facie*, i.e., if the smallest doubt exists regarding the applicability of the findings expressed in the rulings by the Constitutional Court to the particular case, then the case must be examined as to its merits and the assessment of constitutionality performed repeatedly.

Section 20(9) of Constitutional Court Law envisages: if a decision on initiating a case has been adopted than a true copy of the decision is sent to the participants of the case; and the institution or the official, which adopted the contested act, are required within the term set in the decisions, which is at least two months, to provide in writing explanation on the facts of the case and legal substantiation. If a case already has been initiated in the Constitutional Court with an identical claim to

the one included in the application under examination, moreover, if the application does not contain essentially different arguments regarding the incompatibility of the contested norms with the *Satversme*, then the Panel decides that it is not necessary to request the institution, which has adopted the contested norm, to provide a written reply, containing explanation of the facts of the case and providing legal substantiation⁸⁵. In fact, the Panel has discretion regarding this issue. However, it must be kept in mind, that this allows exercising the principle of procedural economy. Moreover, the decision on initiating a case is not published in the official journal, but only on the Internet homepage of the Constitutional Court. Information on initiation of a case, indicating the Panel, which initiated the case, the applicant and the title of the case are sent for publication in the official journal.

Since the decision on initiating a case is not subject to appeal, it should be regarded as the final decision⁸⁶ with regard to the submitted application. The decision on initiating a case concludes the first state of the judicial proceedings before the Constitutional Court and the next stage – preparing the case for adjudication – begins. I.e., the case is awarded a number and the President of the Constitutional Court charges one of the Judges with preparing the case for hearing.

Summary

The judicial procedure at the Constitutional Court has developed as a kind of judicial proceedings separated from the courts of the judicial system, where specific principles and presumptions, characteristic of only these proceedings, are implemented. The particularities and the unique regulation of the judicial proceedings of the Constitutional Court can be explained by the fact that the jurisdiction of the Constitutional Court follows directly from the *Satversme*. Concise explanation of the Constitutional Court's jurisdiction is set out in the *Satversme*: the constitutional duty of the Constitutional Court is to ensure the supremacy of the *Satversme* and safeguarding of constitutional values. The measures that the Constitutional Court can use for exercising its jurisdiction follow directly from the jurisdiction of constitutional institutions. Thus, the jurisdiction of the Constitutional Court is defined both by the norms and principles of the *Satversme* and Constitutional Court Law. At the same time, regulation of the judicial proceedings before the Constitutional Court, insofar it is not regulated by Constitutional Court Law, is transferred under exclusive jurisdiction of the Constitutional Court itself.

Initiation of a case at the Constitutional Court is a significant procedural stage, as the criteria for admissibility to constitutional judicial proceedings are examined and developed. During this stage of the judicial proceedings before the Constitutional Court the provisions of Constitutional Court Law are applied, excluding deciding on the merits of the case or assessment of the constitutionality of the contested norm (act).

The decision on initiating a case or refusal to initiate a case, which following examination of the application is adopted at a sitting of a Constitutional Court Panel or at the assignments sitting, is a written procedural legal act, which provides legal assessment on the compatibility of the application with the provisions of Constitutional Court Law. The decisions adopted by the Panels of the Constitutional Court are not subject to appeal and apply only to their addressee, and the findings included in them can serve only as means of interpretation and for clarifying the content of the principles of a state ruled by law. Even though the submitted applications are

examined by several (different) Panels, the case law should be uniform. The Panels may not, in examining applications similar as to their content, arrive at different conclusions. In deciding on initiation of a case or refusal to initiate a case, the requirements regarding a fair court must be abided by.

The analysis of the case law of the Constitutional Court shows that during the stage of initiating a case and even prior to initiating a case decisions regarding other issues may be required. For example, the issue on applying temporary measures. However, situations like these should be rather considered as exceptional or extraordinary cases. The absence of other legal remedies, which might ensure effective enforcement of the ruling by the Constitutional Court or prevent significant harm to the applicant's fundamental rights, is of decisive importance in the application of temporary measures before the decision on initiating a case or refusal to initiate it is adopted.

The initiation of a case at the Constitutional Court is a procedure for adopting a ruling, in which the Constitutional Court decides on the way to proceed with the submitted application. Simultaneously this stage in the judicial proceedings before the Constitutional Court is important for the development of constitutionalism, since, essentially, during this stage those issues, which will be dealt with within the framework of constitutional judicial proceedings, are decided.

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- ⁶¹ Pieteikums Nr. 177/2011; Satversmes tiesas 1. kolēģijas 2011. gada 21. decembra lēmums par atteikšanos ierosināt lietu pēc pieteikuma Nr. 177/2011. Nepublicēts, pieejams Satversmes tiesā [Application regarding Initiation of a Case No. 177/2011; Decision by 21 December 2011 by the 1st Panel of the Constitutional Court on Refusal to Initiate a Case having Regard to Application No. 177/2011. Unpublished, available at the Constitutional Court].
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Non-Recognition of Foreign Arbitral Awards Pursuant to Article V 1 d of the New York Convention

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This paper provides an analysis of the scope of Article V part 1 d of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the application of the relevant article by courts in Latvia and abroad. It is argued that although parties can freely agree on the arbitration process and the appointment of arbitrators, they cannot waive rights to due process or agree on arbitrators discriminating him/her based on religion, views, handicap, age or sexual orientation. Moreover, the author concluded that Section 497 of Latvia's Civil Procedure Law providing the requirements of professional qualifications for arbitrators cannot be seen as an imperative norm in international arbitration procedure and that this norm must not be applied to an international arbitration procedure unless the parties to the case have agreed otherwise.

Keywords: New York Convention, arbitration agreement, arbitration procedure, recognition and enforcement of a foreign arbitral award.

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Introduction

Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (further: *New York Convention or Convention*)¹ contains an exhaustive list of grounds for non-recognition of foreign arbitral awards. One reason is found in Article V part 1 d of the Convention, which states that the recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that first of all, arbitral tribunal or, secondly, that the arbitral procedure was not in accordance with

the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where arbitration took place (*lex arbitri*). The Convention ensures that the appointment of the arbitrators and conduct of the arbitral procedure in accordance with parties' agreement or applicable law are of a particular importance in a due process. Thus the purpose of this paper is to examine the content of this norm in the New York Convention and the specifics of its application in practice. The author has particularly focused on Section 497 of the Civil Procedure Law, which sets out detailed professional requirements for arbitrators in Latvia.

In Latvian court practice, Article V part 1 d) of the New York Convention has been applied in four cases. In two cases the court made reference to the article, but did not explain why it was applied.² In one case the respondent made a reference to the article, but the court did not apply or analyse it.³ In another case, Article V part 1 d) of the New York Convention served as a legal reason to refuse to recognise and enforce a foreign arbitral award.⁴ Because court practice in Latvia in this regard has been insufficient, the author will look at foreign cases in which the relevant norm of the New York Convention has been applied.

1 Basic prerequisites for the application of Article V of the New York Convention

Before taking a detailed look at the application of Article V part 1 d) of the New York Convention, the author would like to examine the scope of this article. The main prerequisite for the application of Article V of the Convention is that the respondent must bear the burden of proof, which means that it is not enough to object the recognition and enforcement of arbitral award. Instead, the respondent must submit the evidences that the reasons for the refusal have been justified. A court cannot refuse to recognise the arbitral award on its own initiative in accordance with Article V part 1. The words "a court may refuse" in the formulation of the article allow judges to decide whether or not to recognise a foreign arbitral award. The Convention does not specify what kind of procedural violation can lead to the non-recognition of a foreign arbitral award, but the author believes that the violation must be one which substantially influences the results of the case.

2 Arbitrators are not appointed in accordance with the arbitration agreement or with the law of the country where the arbitration took place

Article V part 1 d) of the New York Convention sets out a specific procedural framework and a chronological order for its application. When a respondent asks a court not to recognise the arbitral award, judge must evaluate the content of the arbitration agreement. If there is no specific agreement as to procedural rules and the rules of the arbitration institution, the court must refer to the law of the country where the arbitration took place.

The arbitration agreement is at a higher level of priority when it comes to rules of arbitral institution or international/national law. Namely, if the parties have agreed on the procedure in the arbitration agreement, the national law is not applied at all. This means that in practice courts very seldom have to apply national law on appointing the arbitral tribunal, because the parties usually agree on this in the arbitration agreement. If there is no such agreement, the rules of arbitral institution

are applied. One exception might be a case in which the parties have directly agreed that the arbitrators will be appointed in accordance with a national law, for example, with the Latvian Civil Procedure Law. In that case, the arbitrator and procedure must satisfy the criteria that are enshrined in Latvian law.

It has to be noted here that *lex arbitri* do not automatically become a part of an arbitration agreement between the parties in a direct or indirect way.⁵ If that were the case, a court would always have to evaluate national rules of the country where arbitration took place on every occasion, irrespective of the procedures to which the parties have agreed in their arbitration agreement. That, however, is not the intention of the New York Convention.

In most cases, the parties which agree on arbitration, add special rules in the arbitration agreement in relation to procedural issues such as the number, qualification and appointment of arbitrators. Moreover, the text in the Convention, stating that “*the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties*” indicates that of importance is not just the initial arbitration agreement, but also all other procedural agreements that have been agreed on during the arbitration procedure. These agreements can be in writing, expressed directly or indirectly, or based on conclusive actions.⁶ For instance, the parties can agree on a different international arbitration institution after the dispute has occurred. It may be that the initial agreement indicated that the dispute shall be settled in the Arbitration Institute of Stockholm Chamber of Commerce, but subsequently the claimant decided that the dispute should instead be heard in the German Arbitration Institute. If the respondent does not object to the jurisdiction of the German Arbitration Institute during arbitral proceedings, but then – in the recognition and enforcement procedure objects that the procedure has not been in line with the initial arbitration agreement, the court has every reason to rule that the parties have legally amended their agreement, and, consequently, there is no reason to refuse recognition of the relevant award.⁷

2.1 The number and appointment of arbitrators

In their arbitration agreement the parties can agree on the number of arbitrators and on their appointment. The agreement on the number of arbitrators may be based on practical reasons, because issues related to costs, speed and experience must be taken into account. The point is that a panel of three arbitrators usually costs three times more than a single arbitrator. At the same time, however, three arbitrators might be more competent and supplement one another's reasoning and this may be not the case when a single arbitrator shall be appointed.

The parties can choose various ways of appointing arbitrators, following the model clauses prepared by arbitration institution or special recommendations.⁸ In classical terms, if the parties choose sole arbitrator, that usually means that the arbitrator is appointed by parties, but if parties are unable to agree on arbitrator, he/she shall be appointed by the court or competent authority. In arbitration with three arbitrators, each party shall appoint one arbitrator, and then those two arbitrators shall appoint the third one. If the two arbitrators fail to agree on the third arbitrator, then upon request of a party, the appointment shall be made by a court or other institution.⁹

If procedure on appointing arbitrators is not provided in the arbitration agreement, then rules of arbitral institution shall be applied as when the parties agree on a specific arbitral institution, they usually reach direct or indirect agreement on the relevant rules. This means that the rules are of a legal nature, and so this source has priority

status in relation to national law, and usually it is fully self-sufficient in regulating the arbitration process. The importance of arbitration rules is also recognised in Article IV of the European Convention on International Commercial Arbitration Courts:¹⁰

“The parties to an arbitration agreement shall be free to submit their disputes to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution.”

This is also confirmed in Section 499 of the Civil Procedure Law stating that the procedure for appointing arbitrators shall be agreed by the parties (the first paragraph of the section) but if the parties have not agree on the procedure for appointing the arbitrators, then the arbitral tribunal is appointed in accordance with the rules of the particular arbitral institution, however, in all cases the equal rights of the parties shall be taken into account (the third paragraph of the section).

2.2 The individual and professional capabilities of arbitrators

The principle of parties' autonomy in a dispute makes it possible to agree also on other criteria in relation to arbitrators. For instance, in international arbitration agreement the parties may agree that the arbitrators are not of the same nationality as the parties themselves.¹¹ If the parties have agreed on the linguistic skills of arbitrator, it shall be take into account in appointing arbitrators. For example, if the arbitration agreement provides that the procedure must be in English, then a person who does not speak that language cannot be appointed as an arbitrator in the case.¹² It must be added here that if the rules of an arbitration institution state that if arbitrator does not speak the relevant language, then he/she can ask for a translator, that contradicts the principle that arbitrator must be competent and that the relevant arbitration institution must guarantee that competence, i.e., only arbitrator speaking relevant language can be appointed and no translator for arbitrator shall be used in such proceedings.

In international proceedings, the parties can also agree on the professional capabilities of arbitrator, because representatives of the relevant industry can particularly help in the arbitration process, for example, dealing with technical cases. An engineer, builder, doctor, etc., can be appointed as an arbitrator, and the parties can agree that the dispute will be resolved by non-lawyers.¹³ Nevertheless, in Latvia's context it is important to evaluate whether such agreement by the parties would not be in violation with the latest amendments to Section D of the Civil Procedure Law on qualifications of arbitrators.¹⁴ The one the main criteria set in Section 497 of Civil Procedure Law provides that the arbitrator must have qualification of lawyer. Therefor it is topical, if the parties have agreed on non-lawyer as their arbitrator in the arbitration procedure despite those latest amendments, will such appointment influence the recognition and enforcement of arbitral award rendered by Latvian arbitration institutions? This question arises also because Latvia's Civil Procedure Law does not differentiate between international and national arbitral procedure, and this creates the issue of how these rules on the qualifications of arbitrators may be applied in international proceedings. As noted above, the domestic law is only applied if the arbitration agreement does not include relevant procedural rules but it happens very seldom. Therefore it is important to reply whether Section 497 of the Civil Procedure Law is imperative in the international arbitral proceedings, i.e., whether the norm is one which neither party can waive.¹⁵

Initially, it must be noted that such requirements for arbitrators as provided in the Section 497 of Civil Procedure Law are not a common phenomenon in the

national law, and the author has not found any similar examples anywhere else in the world.¹⁶ On the contrary, national laws do not set out any limitations related to the qualifications of arbitrators, only stating that the parties are free to specify the way in which arbitrator are appointed.¹⁷ The author believes that such amendments to the Civil Procedure Law are in violation of the principle of autonomy, because *“to ensure that the intentions of the parties prevail, all restrictions on their freedom of choice must either be limited or removed entirely.”*¹⁸ The Latvian Constitutional Court has also ruled that *“some of advantages of an arbitration procedure are (...) the professional specialisation of arbitrators, the finality of the award, the ability to reach agreement on a procedure which differs from general jurisdiction courts, as well as confidentiality.”*¹⁹ Currently, there are unjustified limitations in terms of the choice of arbitrators in Latvia. What, for instance, happens to an arbitration agreement in which the parties have stated that one of the three arbitrators must be an expert in relation to coffee and must have the education of a food technologist? Do these requirements in the Civil Procedure Law also apply to foreign arbitrators? If not, then could an engineer from Estonia be appointed as an arbitrator in a national dispute? If that is not possible, would that not be in violation of Article 3 of the European Convention, which states that foreign citizens can be appointed as arbitrators? All that this means is that the legislature has been too rushed in adopting amendments to Section 497 of the Civil Procedure Law without thinking about the justification for all of the requirements contained therein.

Sheppard has argued that the imperative procedural norms in terms of arbitration are the ones which do not offer the parties any alternative choices, i.e., norms which do not include the statement *“unless parties have reached another agreement.”*²⁰ In the Civil Procedure Law, for instance, these may involve rules about the termination of arbitrator's mandate (Section 503.1), the equality of parties (Section 505), etc., because these norms do not allow the parties to select an alternative or to reject the rules. Section 497 part 4 of the Civil Procedure Law states that a person who does not satisfy the requirements of the second paragraph of that section cannot be appointed as an arbitrator,²¹ which means that during the national procedure, the parties cannot waive this rule in terms of putting opposing rules in their arbitration agreement. If an arbitrator does not satisfy the requirements of this section of the law, the court has the right to refuse to issue a writ of execution in accordance with Section 536 part 1 paragraph 6 of the Civil Procedure Law, which strictly states that *“a judge shall refuse to issue a writ of execution if the arbitrator does not satisfy the requirements of Section 497 part 2 of this law.”* Most importantly, that in the national process of compulsory execution of arbitral award the court can, at its own initiative, reject the issuance of writ of execution of arbitral award.

It is suggested by the author that in international arbitral process²² this norm of the Civil Procedure Law is not imperative. In international procedure, arbitrator has extensive freedom in terms of organising the arbitration process. First tribunal shall follow the parties' agreement and failing such agreement, the arbitral tribunal can conduct the arbitration in such manner as it considers appropriate. This includes the right to choose the most appropriate applicable procedural norms,²³ which means that an arbitrator can avoid the application of national procedural law and hear the case exclusively on the basis of the arbitration agreement or rules of arbitral institution. This is also confirmed by doctrine, which states that the authors of the New York Convention had intention that arbitration agreement prevails over any national rules, irrespective of whether or not those rules are imperative.²⁴ Article IV of the

European Convention also does not refer to the national law, thus facilitating the independence of the arbitral procedures from the national process. Consequently, it is not defence that, “*although the composition of the arbitral tribunal or the arbitral procedure was in accordance with the agreement of the parties, it was not in accordance with mandatory provisions of the law governing these matters.*”²⁵ For example, the respondent may argue that the arbitral award rendered by the Latvian arbitral institution should not be recognized and enforced in the foreign court because the parties’ agreement that the dispute shall be settled by arbitrator- engineer contradicts the mandatory rules of Latvian civil procedure. Nevertheless, such respondent’s position shall not be reason for non-recognition and non-enforcement of the arbitral award.

In some cases the failure to apply mandatory norms could be seen as a violation of international public order, however, as mentioned before, Section 497 of the Civil Procedure Law should not be treated as imperative in the international context. According to a recommendation from the International Law Association, international public policy includes fundamental principles to justice or morality, rules designed to serve the essential political, social or economic interests of the state and the duty of the state to respect its international obligations.²⁶ The violations of procedural public order in the recommendation include a lack of impartiality or corruption among arbitrators, as well as parties’ unequal footing in the appointment of tribunal, but the aforementioned definition and examples do not refer to the qualifications of arbitrators. In addition, the recommendation also provides that the failure to observe the imperative norms does not *per se* give a reason to refuse to recognise the arbitration award.²⁷

At the international level, it has been admitted that arbitrators, irrespective of their profession and education, must be able to make an enforceable arbitral award. Moreover, the examined Section 497 of the Civil Procedure Law cannot bind foreign arbitrator in an international arbitral process held in Latvia. It goes without saying that Section 497 of the Civil Procedure Law cannot be used as an excuse for a respondent’s objection against an arbitral award recognized and enforced in the foreign court.

2.3 The principle of equal rights in appointing arbitrators

The principle of equal rights as part of a due process is a very important element, and according to Article V part 1 b) of the New York Convention, if this principle is not foreseen during arbitral procedure, recognition and enforcement of the arbitral award may be refused.²⁸ It is demonstrated by some of the foreign court cases. For example, in the “Dutco” case there were three parties participating in arbitral proceedings but arbitration agreement provided that two parties had to appoint an arbitrator, then they would agree on the chairman.²⁹ Taking into consideration that initial arbitration clause was drafted with intention that in the dispute only two parties will participate, it was proposed to two respondents agrees on one arbitrator. The respondents objected, arguing that as the claimant, Dutco must submit separate claims against each respondent and that this order of appointment of arbitrator violated the principle of equal rights for the parties. The tribunal made partial award in the case, but it was set aside by the French cassation court, which argued that indeed the principle of a due process had been violated, because the equal rights of the parties and the award in question were in violation of public order.

In another arbitration agreement, the parties agreed that the arbitrator must be a “respected member of the community of Ishmaelites”, but after the dispute arised,

one of the parties appointed someone who was not a part of that community. The dispute over this procedural violation reached the Appeals Court of England and Wales.³⁰ After evaluating the arbitration agreement the court applied Council Directive 2000/78/EC (27 November 2000) defining a unified system in terms of equal attitudes toward employment and professions.³¹ The aim of the Directive is to combat discrimination on the grounds of religion, beliefs, handicap, age or sexual orientation (Article 1). It must be added, however, that the principle of an equal attitude only applies to those categories, but it does not apply to the person's competence, education and ability to do the job (Paragraph 17 of the preamble to the Directive).

The appeals court ruled that the arbitrator was an employee in the sense of the Directive, because it is to be applied to all types of employment in the broadest sense of the word. The court found that the arbitration clause violated the principle of equal rights as the Directive applies to the public and private sectors and those sectors shall implement the principle of equal treatment (Article 3). Accordingly, the court acknowledged the arbitration clause void.

Consequently if, an arbitration agreement states that the arbitrator must be a man (or state any other limitation that is in the scope of Directive No. 2000/78), and then the relevant arbitrator makes an award, then the court can, at its own initiative, refuse to recognise and enforce the arbitral award because it violated public order in Europe (Article V part 2 b of the New York Convention). The respondent cannot make a reference to Article V, part 1 d of the New York Convention, if a woman is appointed in place of a man, nor can the respondent use this argument to suggest that the arbitrator violated the rules of the relevant arbitration agreement.

This means that when a foreign arbitral award has been recognised and enforced, with the respondent making objections in relation to this part of the New York Convention, the court must judge whether the arbitration agreement includes rules about the appointment of the arbitrators, what are the rules and the issue of whether the agreement has been violated.³² The court must find whether the respondent has filed objections during the arbitration procedure in relation to this type of violation as the doctrine of "waiver" has been strengthened in the international and national arbitral procedure.³³ Namely, the foundation of this doctrine is the belief that if a party does not object against procedural violations, then it has lost all rights to file further objections. Objections must be filed within term provided in the rules of arbitral institution, and if the objections about the appointment of the arbitrator are not filed during the procedure, with the respondent being aware of the fact that the procedure was not in line with the rules, the court can recognise and enforce this particular arbitral award.³⁴

It is also true that if a party has not participated in the arbitral proceedings, it cannot later complain that the procedure did not occur in accordance with the agreement, provided that the violation has not fundamentally influenced due process. There was a case, for instance, in which the respondent did not appoint an arbitrator in accordance with the arbitration agreement, and so the arbitrator was instead appointed by the arbitration institution in accordance with the rules of the institution.³⁵ Thus the case was heard by two arbitrators. The court rejected the complaint of the respondent that the process was held in violation of the arbitration agreement, because the respondent did not take a part in the process. The respondent's reference to the Italian Code of Civil Procedure, which states that there must be an odd number of arbitrators, was also rejected, as the norm applies to national procedures and is not of significant in the recognition of foreign arbitral award.

3 The arbitration process was not in accordance with the arbitration agreement or the law of the country where the arbitration took place

A court may refuse to recognise or enforce a foreign arbitral award if the respondent submits evidence showing that the procedure was not in accordance with the agreement between the parties or, if there is no particular agreement regarding the conduct of arbitral procedure in the arbitration clause, in accordance with the law of the country where the arbitration took place. The concept of an “arbitration procedure” must be interpreted very broadly, including everything that happens from the moment when the request of arbitration is submitted in the arbitration and until the post-award procedures are completed.³⁶ The Convention does not, however, provide possibility to appeal all procedural decisions made by a foreign arbitration institution. The aim of this norm is not aimed at refusing to recognize or enforce an award if the court called upon is of a different legal view than the arbitrators, whether or to hear a witness, to allow re-cross examination or how many written submissions they would like to allow.³⁷

Pursuant Article V part 1 d of the New York Convention first the arbitration agreement shall be taken into account, then the rules of arbitral institution, and only then the law of the country where the arbitration took place should be applied. If, for instance, an international arbitration procedure takes place in Latvia, it is very possible that Section D “Arbitration” of the Civil Procedure Law will not apply. For example, an appeals court in Bremen rejected the respondent’s objections that an arbitral procedure took place in Turkey but it was not in accordance with Turkey’s Civil Procedure Law, because tribunal did not accept the respondent’s request for the hearing and new evidences. The court held that the tribunal handled the procedure in line with its arbitration rules and that the parties to the case had agreed on application of those rules.³⁸

There are fairly few examples in which arbitral awards have been refused to recognise and enforce in accordance with the Article V part d of the New York Convention as this norm is not categorical and it does not contain exhaustive list of the procedural violations making award non-recognizable. This, in turn, allows judges to apply the Convention in a very narrow way.

Nevertheless, there is one case in which the respondent has been successful thus it is worth a particular attention. When a dispute about a purchase agreement arose the parties agreed that the tribunal must render award within four months’ time after the date when the arbitrators were appointed.³⁹ In the case at hand, the tribunal made an award 22 days after the deadline and for that reason a court set aside the award, and a claimant sued arbitrator for compensation of damages. This case illustrates the principle enshrined in the Article V part 1 b of the New York Convention – that arbitration agreements are of the overriding importance. The parties provided a mandate for the arbitrators, and they were required to observe it precisely. Furthermore, it can be found that the deadline has been particularly important to the parties because of the specifics of the dispute. Yet, the question is whether those 22 days fundamentally influenced the outcome of the dispute and whether the tribunal would have handed down a different ruling 22 days earlier.

In another case, a court ruled that the fact that an arbitration hearing was not held in Shanghai, as had been agreed in the arbitration agreement, but instead in Beijing, was not of a decisive importance and did not have any effect on the legality

of the arbitral award.⁴⁰ There was a similar case in Latvia, in which the respondent claimed at the first-instance court, that the parties agreed to hold the arbitration hearing in Riga, Latvia, even though initially it had been agreed to do so in Stockholm and Stockholm was the place of arbitration as indicated in the arbitral agreement. The tribunal disregarded this fact, thus at the recognition procedure the respondent claimed there was violation of due process and the agreement between the parties. The respondent argued that because the arbitral process was not in accordance with the agreement between the parties, the recognition and enforcement of the award should be refused on the basis of Section V part 1 d of the New York Convention. The lower court ruled that the case file did not include any information about the fact that the parties amended the arbitration clause so as to determine a different place for the arbitration. Moreover, the arbitration rules provided the tribunal has the right to select a location of the hearing on its own after consultations with the parties. The lower court recognized the arbitral award.⁴¹

The appellate court disagreed, ruling that in accordance with Article 22 of the Swedish law on arbitration, the seat of an arbitration is determined by the parties or, if the parties cannot agree, by the tribunal. After examining the submissions, *“the Department of Civil Cases concluded that there was no evidence to suggest that the parties repealed their initial agreement on organising the arbitration hearing in Riga, instead agreeing that the session would be held in Stockholm. The Department of Civil Cases believed that the arbitrary initiative of the tribunal in ruling on procedural issues in a manner that was not based on the applicable legal norms or the agreed will of the parties can be qualified as a failure of the tribunal to observe the agreement between the parties. In accordance with Article V part 1 d of the New York Convention, the said circumstances create legal justification for a refusal to recognise and enforce the said award.”*⁴²

The above examples demonstrate that Latvian courts tend to take a more formal approach to these matters than the foreign courts do. The appellate court, for instance, ruled that the law of the country where arbitration took place was of a greater importance than the rules of arbitral institution. These considerations also indicate that courts must rule as to how essential a violation of procedure is and how it affects the arbitral award. As noted, the New York Convention is meant to facilitate the recognition of foreign arbitral awards to the greatest possible extent.

Summary

- The recognition of a foreign arbitral awards can be rejected only in exceptional cases and only if, in accordance with Article V part 1 of the New York Convention, the respondent has submitted evidence to show that there are obstacles to recognize award. The court has the right, not the obligation, to refuse to recognise a foreign arbitral award, and no court can refuse to recognise such an award at its own initiative in accordance with Article V part 1 of New York Convention.
- When applying the rules of Article V part 1 d of the New York Convention, the court initially evaluates the procedures to which the parties have agreed in the arbitration agreement. This agreement is of the overriding force. If there is no such agreement or if the agreement has procedural deficiencies, then the rules of the arbitration institution must be applied.
- National procedural norms can be applied only if the parties have not agreed in arbitration agreement or the arbitration rules does not provide for the appointment of arbitrators procedure thus the domestic procedural norms are seldom

directly applicable to international arbitration procedure. If the parties have not reached another agreement, the national procedural norms do not become a part of the arbitration agreement directly nor indirectly.

- The failure to observe imperative norms of domestic law does not *per se* mean that there is a reason to refuse recognition of an arbitral award. In this context, Section 497 of the Civil Procedure Law, which addresses the professional criteria of arbitrators, will not be seen as an imperative norm in an international arbitral procedure, and this norm does not have to be applied to such procedure unless the parties have reached a different agreement.
- Arbitrators and parties in an arbitration must observe the procedures on which the parties have agreed, because otherwise the arbitral award may be refused to recognize. The procedural violation, however, must be substantial – one that has an influence on the results of the dispute. There must also be an examination of whether during the arbitration procedure a party has objected against procedural violations, because if that does not happen, the party loses the right to raise objections about this issue when the award is set aside or recognised. This is the case unless the court finds that there has been a due process violation.
- In their agreement, the parties cannot waive the principles of a fair process. If fairness and equality are not observed in rendering an arbitral award, then the court has a reason to refuse to recognize the foreign arbitral award but the respondent shall prove that Article V part 1 b of the New York Convention has been violated. If the court itself finds that the process was in violation of the international public policy then on its own initiative it may refuse to recognize and enforce foreign arbitral award in accordance with Article V part 2 b. Thus, for instance, the parties cannot agree on discriminatory criteria in their agreement when it comes to the religion, beliefs, differing abilities, age or sexual orientation of the arbitrator.

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- Section 497. Arbitrators**
- (1) An arbitrator is a person who, in conformity with the provisions of an arbitration agreement and of this Law, is appointed to resolve a dispute.
- (2) Any person having the capacity to act may be appointed as an arbitrator, irrespective of his or her citizenship and place of residence, if such person has agreed in writing to be an arbitrator, has a faultless reputation, has completed a higher professional and academic education (except for a first-level professional education), has the qualifications of a lawyer, has at least three years of practical experience as an academic university specialist in the field of law or in another position related to the legal profession, and to whom rules referred to in the fourth paragraph of this section do not apply.
- (3) Arbitrators shall perform their duties in good faith, without being subject to any influence; they shall be objective and independent.
- (4) An arbitrator shall not be someone who:
- 1) Does not satisfy the requirements of the second paragraph of this section;
 - 2) Has been a suspect or defendant in criminal proceedings related to a voluntary criminal offence;
 - 3) Has been involved in criminal proceedings related to a voluntary criminal offence which have been ended on a non-rehabilitative basis;
 - 4) Has been sentenced for a voluntary criminal offence irrespective of whether the said sentence has been vacated or eliminated;
 - 5) Has previously committed a voluntary criminal offence but has been exempted from punishment because of an expiration of the statute of limitations, amnesty, or clemency.
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Significant Formal and Informal Agents of Socialisation and the Opportunities They Offer for Curbing Violence of Minors (Juveniles)

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Violence has become a part of our everyday life and it manifests itself in various forms, e.g. school and family (domestic) violence, abuse of children and animals, etc. As a rule, violence is defined as the behaviour of one person against another that may cause or causes physical injuries. However, it is also possible to define violence in a wider meaning involving bodily and mental injuries, failing to take care or ignoring somebody's needs.

Violence is not a feature of a safe society. Attitudes of members of society towards the violence characterise the level of their legal consciousness.¹ Legal consciousness is developing in the course of socialisation.² Admission and awareness of the problem of violence, especially among the youth, and looking for the means of decreasing it and finding those means contribute to the enhancement and improvement of society's safety.

A realistic and feasible possibility for society to participate in the active prevention of violence is through socialisation, i.e. the media and the population as a whole, and state as well as social institutions are important agents of socialisation.³ This article is focused on the violence related to minors and the possibilities of limiting and curbing it with the help of socialisation.

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Introduction

In Estonia, the necessity to address violence as a gender-specific social problem is widespread; the concept is mostly related to domestic violence. Until recently, domestic violence was considered from the point of view contending that women are victims and men are the perpetrators of violence. Although most of the victims are women, according to statistics, men and children can also be victims and women can be the perpetrators of violence.⁴

In 2011, all in all 1,939 violent crimes were registered that could be related to domestic violence. The majority of them (1,508) were cases of physical abuse, this being 200 cases more than in the previous year.⁵ The number of physical abuses has also increased reaching 5,311 in 2012.⁶ The number of registered cases of domestic violence has increased as the police and prosecutor's office have paid more attention to family violence than before.⁷

Recently the number of sexual crimes against minors, committed through the internet, has increased.⁸ In 2011, 63 sex-offenders were convicted, and most of the crimes were sexual crimes committed against children.⁹ In 2012, the number of sexual crimes committed against children increased, e.g. 5 cases of producing and accessing child pornography were registered. The corresponding figure in 2011 was 17.¹⁰

The data show that, in addition to adult victims, also the minors and young people experience violence daily. In 2009 the general rate of becoming a victim at the age of 15-19 was 33%; the rate of falling a victim at the age of 60 and older was remarkably lower – 18%. 24% of schoolchildren have suffered from school violence, i.e., 40% of 12-13 year old boys and 30% of 14 year old girls, correspondingly. Young people are more frequently victimised and this may at least partially be the result of their lifestyle and frequenting public places.¹¹

At the same time, we cannot treat minors as the only victims of the acts of violence. The analysis of criminal offences committed in the territory of Estonia by minors (recorded by the police) shows that there are no grounds for optimism. In 2011, the total of 1610 persons were identified as being 14-17 years old whilst committing a crime, compared with 2010, when the number of minor criminals (young offenders) was by 43 less, i.e., 2.6% less. In 2011, the police recorded 1,854 crimes committed by minors, and this being 4% more than in 2010. About half of the criminal offences committed by the minors were thefts and other offences against property, and one third were violent crimes. The majority of the acts of violence committed by minors were criminal offences of physical abuse (73%). During that year there was a remarkable decrease in the reported crimes of abuse of an important personal document (-89) and fraudulent conduct (-35) and an increase in physical abuse (+81) and thefts (+55) committed by minors.¹²

In the context of the present article it is a worrying circumstance that the cases of physical abuse committed by minors have become more frequent. This fact may be related to the increase of school violence in the recent years: *“In Estonia, school violence is more widespread when compared to the other new member states of the EU. There are also more Estonian children who have been bullied or threatened by their peers via the Internet.”*¹³

In 2011 the results of the civic education ICCS survey were published and one of the questions included was the behaviour of students at school and social issues at school. The results showed that Estonian teachers estimated the behaviour of schoolchildren to be a little lower than the international average, yet, in the opinion of teachers and students, social environment at school is trustworthy. Still, one tenth of the students felt excluded in school. The use of alcohol and drugs, bullying and violence, absence without a cause, vandalism, religious and racial intolerance and sexual harassment were identified in the research as social problems. Estonian teachers consider absence without a cause (51%) and bullying (33%) to be the major problems, violence (10%) and the use of alcohol (7%) are less important. In teachers' opinion bullying at school is a more serious problem (34%) than in the opinion of students (14%). Teachers in the schools where Estonian is a language of instruction mentioned bullying twice as often as teachers of the schools where Russian is the language of instruction. Bullying was mentioned as more of a problem in rural schools (opinion given by 40% of teachers) than by the teachers in town schools (31%).¹⁴

The data provided above indicates that directives of the state are insufficient when fighting violence and society needs to interfere to deal with the problems.

1 The state and its criminal policy of curbing youth violence

The most important formal agent of socialisation is the state that can offer and secure the increase of safety¹⁵ by taking the necessary measures through its legislative and political activity. Criminal policy is one of these measures.

In trying to delineate the criminal policy it is obvious that it may be defined in various ways, e.g., 1) *“Criminal policy means working out, improving and implementing social plans of action to obstruct the spread of offences, to lessen their seriousness and to reduce opportunities for the commission and harm caused by them; to influence people to refrain from committing offences; to protect legal order and improve the safety of society.”*¹⁶ 2) *“Criminal policy determines, which aims of fighting against crime are achieved with which criminal laws.”*¹⁷

The above definitions of criminal policy point out two different starting points for explaining the phenomenon: the first definition is a prevention-centred criminal policy with a stress on society; the second is a classical definition written for (criminal) law. The preventative approach means the reduction of the number of offences (i.e. infringement of any provisions of legal branches) that *presupposes involvement of all of society* in this activity, i.e. primarily, the creation of the corresponding institutions, including state institutions. In cases of the classical explanation of criminal policy, the focus is on the fight against crime where criminal law with all the included sanctions has the main role.

In the author's opinion, it is insufficient to rely solely on legislation in the fight against any type of law infringements. Guaranteeing enhancement and improvement of the society's safety is the task of the society itself as a whole. Therefore the action plans to restrict the spread of offences and to safeguard the social means of safety must be developed at the social level. Consequently, the preventative aspect of criminal policy seems to carry more weight.

There are different levels (social and circumstantial preventative measures, community-centred prevention, dealing with the consequences of offences) of the present day criminal policy, and all of these are independent activity programmes with the common aim – to decrease the number of offences and other law infringements and increase the safety of society.

It is important to know how safe the surrounding environment appears to the people and which measures are thought to be appropriate and efficient to increase the safety of society when a particular criminal policy is carried out. The Estonian parliament, *Riigikogu*, in its decision of October 21, 2003 stressed that *“the approved trends of development of criminal policy must be taken into account when the measures for fighting crime are designed and /.../ local governments, citizens' associations and individuals must be included into crime prevention to a greater extent”*.¹⁸ It has been pointed out that, in order to prevent youth crime, *“local governments have to work out a scheme of early identification of problems that occur in the surrounding environment. The Ministry of Social Affairs in cooperation with the local governments must develop the parental skills of parents and improve the cooperation of specialists in the given sphere.”*¹⁹ Fulfilment of this task is possible only if members of society recognise the existence and seriousness of the problem. Here the youngest members of our society should not be underestimated – children reflect the attitude, understanding and evaluation of the adults' world and determine how violent, criminal or, *vice versa*, law abiding will be our future society.

In 2005 the heads of the Estonian Ministry of Internal Affairs, Ministry of Justice, Police and Prosecutor's Office signed a declaration about shared aims and priorities of the action. One of the main aims was the fight against crime that has been committed by or against minors.

2 The role of more important informal agents of socialisation in decreasing violence of minors (youth violence)

The role of society in guaranteeing social safety is not as modest as it may seem at the first sight. One method that has to be taken into account is to improve the level of socialisation and through this guarantee the social integration of different social groups.

The importance of the development of children and youth in the process of socialisation must be particularly emphasised, since the development of one's personality starts at birth and the guidance that a child receives within the family will lay the foundation for his/her social behaviour in the future.

*“Guidance of the child’s social behaviour, reinforcement of praiseworthy behavioural patterns and elimination of non-praiseworthy behavioural patterns follow the main rule – to increase the allowed and reduce the illicit behaviour. /.../ One can say that the presumption of the child’s social behaviour develops under the influence of human relations in early childhood but behavioural patterns are formed in human relations during the next phase of age-wise development. An aggressive incident, occurring in the process of learning social behaviour, is not the manifestation of a deviated character but instead reveals how easily can disappointment result in aggressiveness. Due to that, the feedback the child gets with regard to his/her aggressive behaviour is of remarkable importance”.*²⁰

The level of legal consciousness directly depends on the feedback that a person receives regarding his/her behaviour, especially in childhood. Thus, the so-called free upbringing (allowing children too much freedom) could deprive them of an emotional relationship with their parents and other close persons. This cannot be considered right. Persons, who were deprived of emotional and estimation-based tuning and in childhood experienced unexpressed estimations, may have to pay a high price during their lifetime.

Leaving children alone (on their own) and the so-called free upbringing are the risk factors relevant to the offences committed by minors. *“According to research, the direct control by parents over minors plays a big role in law infringements by minors. Parents’ awareness of the type of friends that their child goes out with in the evenings decreases the probability of them committing an offence and the risk of problematic behaviour.”*²¹

Nowadays the family cannot perform all the traditional functions related to the upbringing of young people. Thus, the other agents of socialisation appear in addition to the family in order to teach the rules of behaviour operating in society and to introduce cultural values. School is a decisive institution in helping to fulfil the task of educating young people in accordance with the behavioural expectations that exist in the society. The functions of school transform together with the development and changes in society; the status of school changes in the eyes of youth. It depends on the latter how influential an agent of socialisation – the school – is at one or another stage of social development.

Home and school are closely related as agents of socialisation. A child's attitude toward learning depends on how much education and erudition are valued in his/her home. A child's attitude to schoolmates and teachers similarly depends on the guidelines he/she has received from the family.

Personal relations between the students in school surroundings play a significant role in the development of personality, i.e., there is no doubt that friendly and benevolent relations have a positive effect. Every young person wants to feel wholesome, wanted and popular. On the other hand, when the attitude is humiliating and taunting, a young person may have an inferiority complex that results in aggressiveness and a wish to take revenge "on the whole world". The latter may induce a minor to law infringement, including perpetrating violence at school.

There are various factors that complicate the relations among schoolmates, e.g. frequent change of a school and class; possible difference in ages; low status in the eyes of schoolmates caused by average academic progress and behavioural problems; inability to adapt to the standards existing in the group. Problematic relations with the schoolmates yield the basis for the development of negative attitude of a young person toward the school.

Coping of a young person in the society greatly depends on his/her self-esteem that may either motivate or discourage his/her activity and gives a direction to his/her behaviour. Self-esteem is a result of socialisation and it has developed on the basis of influence by the family, school, friends and social surroundings. Low self-esteem is often the catalyst of aggressive behaviour.

The next significant developer of personality are mass media, i.e. television, radio, printed press (the main types of mass communication), also the Internet. Information obtained through these channels must be true and reflect the attitude of society regarding an event that has taken place. Since mass communication is a very powerful and influential institution, one must focus on its quality in order for it to perform the (legal) function of the agent of socialisation successfully. However, unfortunately, not everything that reaches the addressees, i.e. members of society, is educational, esthetical or ethical. Moreover, the violence that is constantly propagated (especially through the films on television) encourages to follow that example. Death seen on television or in films does not create any horror or fear with regard to this phenomenon, it may rather seem like a joke to be practiced on others. It is especially true regarding young people who beat, strike or torture. In cases when the school violence has been made public, the peers neither sympathise with the victim nor imagine themselves in this role. They simply enjoy their superiority over the victim. Everything happens so easily, without a particular notice, "like in the movies".

At the same time, one cannot ignore two relevant aspects when dealing with this problem. Firstly, nowadays media has become a business which is expected to make a profit. Figuratively speaking, it has to sell goods that are bought. Information must sell well, i.e., must attract people to watch, read and listen. Secondly, the problems of media and violence are related to the era and the current society. Every period has its heroes, and the perception as to how good or bad the people are in a particular story or relationship, depends considerably on the media's interpretation. Two decades ago children's broadcasts promoted the idea that the good always triumphs over the evil, e.g., cartoons showing how one can make and keep friends when one is honest, helping and friendly, subsequently being successful in life. The contemporary heroes of cartoons are cyber beings who destroy planets and each

other; slyness, meanness, power and inventiveness are the characteristics valued when destroying “enemies”.

Mass media are a strong power, the so-called “fourth power” in addition to legislative, executive and judicial power. It plays a vital role in shaping a person’s legal consciousness via influencing its structural components.

In 2007 the Social and Market Research company *Saar Poll* conducted a survey among students of upper secondary schools and according to that, media have a significant role as the legal agent of socialisation for young people. The attitude of young people to Estonian courts is mostly shaped by the press (75%), then by laws (63%) and TV series (60%); and much less by friends (53%), school (52%) and family (45%), according to this research. Whilst a positive change towards attitudes may be created by school (63%) and laws (59%) and family members (45%), a negative change may be caused by the media (56%) and TV series (44%), feature films (42%) and friends (41%).²² The results of the omnibus research conducted by *Faktum & Ariko OÜ* among the Estonian population (ages 15-74) in 2007 show that, firstly, the media and then the laws have the substantial influence in shaping people’s attitude towards the courts. The media have both a positive (37%) and a negative (32%) influence. Any contacts with the law have changed the attitude towards the courts into a more positive one (38%).²³ The results of the research should make the media concerned that they are granting commercial effectiveness the superiority instead of being a positive agent of socialisation.

Summary

Pursuant to the statistical data, in recent years the increase in the number of violent crimes characterises the crime in general, including the crimes committed by minors. It is possible to draw a conclusion that the agents of socialisation, first of all, family, have not fulfilled their task well enough. The quality of values and norms that a person obtains from home to be carried on into his/her own life depends a lot on the relationship with the family. Tensions at home that have been caused by various reasons may manifest themselves in different forms of domestic violence. From the children’s point of view, family violence has a disastrous effect on the development of their personalities, causing permanent damage to the psyche of the child and leading the child to other forms of violence, e.g. school violence and development of general cruelty. The standpoint that violence creates more violence has been proved here: the child who witnesses hostility between parents or physical abuse at home grows up with the knowledge that such behaviour is normal (in its everyday sense, even traditional) and he/she is likely to practice it with peers or birds and animals; on the other hand, it may cause fear and frustration in the child and this, in turn, creates an actual possibility for him /her to become the “target” of violence. Consequently, the domestic violence must be dealt with primarily by the family itself. The issue is so serious that the Ministry of Justice has set this as a priority of action in its strategic plan. Plans have been made to reduce domestic violence through two spheres: enhancement of legal consciousness and dissemination of information concerning family violence; and harmonisation of judicial practice in cases of family violence. There is an aim set for 2012 to update textbooks of social education and prepare the teachers of social education for dealing with the topics that concern family violence, violence outside the family relations (including the gender-based violence) and possibilities to help the victims of violence. Regular surveys of court

proceedings are made by the department of analysis in the Ministry of Justice, the Police and the Border Guard Board. This enables possible regional differences and problems in proceedings to be identified and analysed. In addition to the analyses there are meetings of the police officers and prosecutors that enable the improvement and harmonisation of the practice. These roundtable meetings give an opportunity to agree on shared work principles or to work out additional guidelines to harmonise the practice. By analysing manslaughter and murder, statistics can show how many cases of these crimes have been related to preceding family violence.²⁴

In the author's opinion, it is really important that the issue is dealt with at the state level, however, even this would not bring about a rapid improvement of the situation. As a rule, family violence originates from the adults, i.e., parents. Thus, the solution should also start from the parents instead of the children (for example, if one would primarily talk about violence in the classes of social education). A more realistic solution could be the enhancement of the awareness of the population about violence as a serious problem. The increase in awareness could hypothetically motivate people to increasingly control their behaviour and in case of conflicts in family relationships find quick solutions and the possibilities of sparing children future problems. Efforts should be made to encourage future generations to be able to solve their conflicts in a civilised way and not by physical violence and mental abuse. An opportunity for that is created by knowingly shaping legal consciousness in the above-mentioned direction.

School certainly has a role to play here, since the contemporary young people spend a great part of their time outside the family circle. Influence of school experience is added to family experience and the relations of students with their peers and teachers have a particular importance. Rules of the game in legal consciousness are the same as in sport: elementary legal principles of fault, conscience, damages, when accidents or cases of violence occur between the students. Home and school should cooperate more than ever before in order to reduce violence. Ignoring the problem does not solve the problem. The issue of school violence has been under attention in the Estonian media now and again. School violence has two aspects – violence between students and violence between students and teachers. Taking the existing possibilities, e.g., the rights that teachers have at school, into account on both levels, it seems that there is no solution to the conflict. In the author's opinion, it would be reasonable for the schools to employ people who maintain order, which could be called patrolmen, who at least could intervene in conflicts between the students. The other axis of conflicts – teacher-student conflict – is more complicated and in cases where the basis for the conflict is a taunting attitude of a teacher towards a student, the school management should consider dismissal of the teacher after all the circumstances have been clarified. Hiding heads in the sand by school managers (principals) in reality means that the victims of violence cannot obtain and continue their education to find a job they like. Violence of students toward teachers is as serious if not a more serious problem than the violence among the students. A shocking example of the case of students taunting a teacher and physically attacking him was published in the Estonian press on January 29, 2013. (See: *Õpetajate leht*. The clip about taunting was put on the Internet on January 29, 2013.) In such cases the guilty students must not be excluded from the circle of social influence. These cases once more indicate that families have failed to shape the basic principles of a respectful attitude in their children.

The Ministry of Justice has planned to take some measures in the fight against school violence this year: *“In the framework of state supervision, the Ministry of Education and Research in cooperation with the Police and Border Guard Board will start exercising control over the application of rules for a safe learning environment provided in the Basic Schools and Upper Secondary Schools Act in order to improve safety at school. There is a plan to prepare a follow-up programme about Internet safety (online safety) and information materials for child victims of violent crimes. The Children and Youth at Risk programme submitted by the EEA Financial Mechanism was approved, and the implementation of a four year programme started in autumn 2012. There is also a plan to analyse the practice of treating convicted minors, and to continue with drafting a new Juvenile Sanctions Act and the Child Protection Act.”*²⁵

As mentioned above, the mass media have enormous opportunities at their disposal to shape the people’s mentality and system of values. Although their influence on the youth is stronger, more decisive and more noticeable, they still have an obligation to help adults acquire role models to be applied in the constantly changing social environment that requires adaptation. Media as an agent of socialisation could be more efficient by limiting the communication of materials propagating (promoting) violence. There is already enough violence in society, so perhaps the media should use its means to fill the consciousness of people with positive emotions.

The issue of violence must be treated seriously, because it is a phenomenon that harms society in all of its forms. The attitude of society towards violence and perpetrators of violent acts really matters. The awareness that violence as a phenomenon exists by itself is not sufficient. Society must react to every identified case of violence. The feedback given to the child about his/her aggressive behaviour is important.

The feeling of impunity must not be promoted amongst the perpetrators of offences and violent acts because impunity encourages offenders to continue their activity and select increasingly dangerous means. The institutions dealing with educating the youth should not delegate liability to each other and seek the guilty parties elsewhere. The above especially concerns the parents who think that the teachers should be responsible for the actions of their children as soon as the children enter the school in the morning. Teachers are not able to fill in the educational gap caused by poor parenting. At home children should be brought up to respect every person and all living beings. Respect for the older people in our society should be one of the basic principles, the so-called constitutional norm of behaviour. It depends on all of us as to how long it will take before we reach this elementary level.

In conclusion, the answer to the question, whether and to what extent we are able to curb the proliferation of any form of violence, is quite clear: it depends on all of us, since the result can be positive only when the society as a whole makes the effort.

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- ² Socialisation is a life-long process during which an individual acquires culture, learns to know oneself and one's social personality. (*Hess, B. B., Markson, E. W., Stein, P. J.* Sotsioloogia. (Sociology.) Tallinn: Külim, 2000, p. 288). (In Estonian.) ISBN 9985-850-71-8.
- ³ The agents of socialisation are persons, social groups and institutions which influence the development of the personality of a person, educate and guide him. The agents of socialisation are the

- channels of obtaining culture; each of them has its own mechanism how to mediate the culture of the given society and how to explain the relationship with the law. These mechanisms manifest themselves through functions that are performed by one or the other agent of socialisation. The quality of agents of socialisation is important, i.e. how well they perform their function in a given case. The level of (legal) socialisation of a person depends on just that.
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Estonian Employment Contracts Act: Cornerstone in Applying the Flexicurity in Estonia?

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Over the past ten years, the EU has been seeking ways to increase the adaptability of employees and enterprises, as well as the flexibility of labour markets. Since 2006, the keyword has been flexicurity, and the implementation of this concept is intended to achieve the desired changes in labour relations. Accordingly, Estonia has attempted to reform labour relations in the light of the idea of flexicurity and adopted the Employment Contracts Act in 2008. This law comprises several amendments, the aim of which is to make labour relations more flexible. This article focuses on some critical aspects of the reforms that have had the greatest impact on the functioning of labour relations in Estonia. The author analyses whether the implementation of the idea of flexicurity in Estonia has been successful.

Keywords: principle of flexicurity in European Union; new Estonian Employment Contracts Act and flexicurity; confusing rules in Estonian Employment Contracts Act.

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Introduction

Discussions about the flexicurity at the moment are modest. It can be admitted that the idea of flexicurity has already reached its limits. Although the European Union has published a series of documents on flexicurity and modernisation of labour law in the European Union and in Member States, the question about the limits of labour relations' flexibilisation and intensity of social security remains open. There are a number of Member States, where the level of labour relations' flexibilisation is quite high, but at the same time the necessary level of social security is modest or missing.¹ Estonia is one of these states. In Estonia the maximum level of flexibilisation in labour relations has been achieved, but the necessary level of (social) security is missing.

One of the aims mentioned in the concept 2020 for the European Union is “an agenda for new skills and jobs” to modernise labour markets and empower people by developing their skills throughout the lifecycle with a view to increase labour participation and better matched labour supply and demand, including through labour mobility.² It has also been stated that in order to raise the level of employment it is necessary to implement the flexicurity principle and to enable people to acquire new skills for adaptation to new conditions and potential career shifts. The EU also has set a goal to define and implement the second phase of the flexicurity agenda together with European social partners to identify the ways for improved management of economic transition, fighting unemployment and raising activities. In order to achieve the goals set by the EU, the Member States also will need to implement their national pathways to flexicurity, as agreed by the European Council, to reduce labour market segmentation and facilitate transitions as well as to facilitate the reconciliation of work and family life. Obviously, the idea of flexicurity is still important in order to achieve a higher level of employment and to find new approaches to addressing the elderly people with regard to the labour market.

Here the question could be raised whether there are or should be any connections between the labour law and the social security law in order to guarantee the flexicurity. At the first sight it is difficult to find any connections between the labour law and the social security law. These are different fields of law – the labour law is usually viewed as a part of the private law, on the other hand, the social security law is a part of the public law. Social security law does not guarantee flexible employment conditions, but it could partly help to finance “flexible labour conditions” or at least partly to cover the costs of terminating the employment relations (e.g. payment of compensation in case of redundancies). Furthermore, sometimes the training or retraining of the unemployed can be viewed as a part of social protection of unemployed and also as a part of social security law. This means that both fields of law can contribute to the effectiveness and usefulness of flexicurity.

Although the Estonian Employment Contracts Act (hereinafter ECA2008)³ was adopted in order to apply flexicurity in Estonia, it could be described as a failure in applying the flexicurity. Although it is true that the regulation of employment relationship has become more flexible, many questions remain without any solutions in the ECA and it is difficult for employers and employees to understand how they should behave in labour relations and to apply flexible labour relations.

In this paper some problematical aspects of the ECA2008 in the framework of flexicurity principle application will be discussed.

1 Concept of flexicurity and its components

As it is well-known in the European labour law, the concept of flexicurity consists of four parts: flexibilisation of labour relations; intensive social security protection for those who have lost their job; lifelong learning and active labour market measures for unemployed. In order to guarantee the realisation of flexicurity idea, it is desirable that all the four components should co-exist. There has been extensive research devoted to the topic of flexicurity,⁴ but at same time it can be admitted that there is no concrete idea or action plan, how this system should function and be implemented in the Member States. It has been stated, that an exemplary state for flexicurity is Denmark. In Denmark the idea of flexicurity is one of the best developed.⁵ In case of any other states, the concept is unclear.⁶ It is also noted that in

order to follow the development of flexicurity six possible country clusters can be distinguished: the Nordic system, the Anglo-Saxon system, the continental system, the Mediterranean system and Eastern Europe (with an addition of Italy).⁷ It has also been stated that the Baltic States especially lack the labour market security. Particularly, the spheres of income, employment and representation security are low in the Baltic States.⁸

Although the principle of flexicurity has been clarified and described in many ways, uncertainty still exists. Nobody is able to provide a solution, how to introduce and to develop the concept of flexicurity. It could be prognosed that also in the future there will be a difficulty to understand, how to implement the principle of flexicurity in labour law.

According to the literature: “Core of the flexicurity idea is that security is a precondition for flexibility, and flexibility a precondition for security”.⁹ It has also been stated that much depends on if and how the Member States take up the flexicurity ideas (if at all), the content of the policies and regulations they implement and the effects these measures have.¹⁰

It has been stated that the concept of flexicurity consists of four main parts:

- 1) flexible and reliable contractual arrangements;
- 2) efficient, active labour market policies to strengthen transition security;
- 3) systematic and responsive lifelong learning;
- 4) modern social security provisions that also contribute to good mobility in the labour market.

While these four components are the usual components of the flexicurity, sometimes the fifth component is also included – the development of supportive and productive social dialogue.¹¹

As one can see, all these measures are mainly intended to promote flexibility in the labour market, if a person changes the place of work, he or she could find a new job as soon as possible. It could also be described that the “free movement of persons inside of the state” will be encouraged.¹² The fifth component is not only a part of the flexicurity, but it is also a necessary part of employment relations as such.¹³

Situation in Estonia

In Estonia the intention was to introduce the idea of flexicurity and flexible labour relations via a reform of the individual employment law.¹⁴ Already in 2007 the preparations started in order to reform the Estonian individual employment law. The idea was simple – to make the individual employment contract similar to other civil law contracts, to reduce the level of different formalities (e.g. employment contract in a written form or in a verbal form, to compose the internal working rules and to approve them by labour inspectorate, etc.¹⁵) and to reduce the financial burden of employer in case of redundancy, to provide more possibilities for employer to amend the employment conditions (e.g., working time, overtime work) unilaterally. Although the preparations for drafting of the new Employment Contracts Act started in 2007, only in 2008 the reasoning behind the modification of the individual employment law included the idea of flexicurity based on the green paper of the European Commission on modernisation of European labour law.

The government of Estonia also tried to be one of the first Member States to introduce the concept of flexicurity in labour relations. With the new draft of the ECA 2008 some modification in system of protection of unemployed was also proposed, furthermore, the system of health insurance was reformed (sickness

insurance provided for the registered unemployed). In this situation it seemed that Estonia will seriously apply the methods and principles of flexicurity in order to fulfil the criteria set forth by the European Commission.

Before the date the new ECA 2008 would come into force, the social security protection was postponed. In the framework of the new ECA 2008, the unemployment insurance system was changed in the following aspects: 1) the coverage of insured persons was widened (e.g., when an employee will leave the job in his or her free will, the unemployment insurance benefit will be granted); 2) the amount of benefit would be increased.¹⁶ However, the system of unemployment insurance remained unchanged, and the necessary costs of the active labour market policy and lifelong learning were decreased. Although in 2008 it was clear that there would be a lack of resources for enabling an improved unemployment insurance protection, the Government was of an opinion that it was better to postpone the social security protection instead of stopping the flexibilisation of the employment relations.¹⁷

2 Flexible employment conditions – do we understand what this should mean?

One of the most important aspects (which may even be considered as the key aspect) regarding the concept of the flexicurity is the part of flexible employment conditions. At the same time, its exact meaning is unclear – what does it mean that the employment conditions are flexible? A further question arises – flexible for whom? If the Member States are free to choose, how are they going to implement the concept of the flexicurity? Should it not be clear, what kind of flexibility in employment conditions is to be applied? To address the flexibilisation of employment conditions from the perspective of an employee, it should mean the flexibility of fulfilling the employment tasks e.g. homework, telework or part-time work in order to improve combining of the employment tasks and the family life.¹⁸ This is a very important aspect in order to guarantee the flexibility from the perspective of an employee.

However, addressing the topic of flexibility in labour relations – the flexicurity – from the perspective of the employee is not popular. The main considerations state that an employer should have better opportunities for flexible employment conditions in order to avoid dismissal of an employee and to guarantee the continuity of an employment or to make it easier to dismiss an employee without any compensation or without any specific formalities. As a consequence, the idea of flexicurity is intended to protect and to help an employer, to guarantee a better opportunity for an employer to change the employment conditions unilaterally and to dismiss an employee without any obstacles or, at worst, without a good reason.¹⁹ At the same time the (social) security is a tool intended for the employee in order to be protected against the flexibilisation of employment conditions. This tool is usually missing or underdeveloped.

Situation in Estonia

According to the research, it is for the Member States to decide, how they will develop the idea of flexible employment conditions. Estonia has developed probably the most radical approach to flexibilisation of employment conditions. In Estonia the previous Employment Contracts Act (hereinafter ECA 1992) intensively protected the employees' rights (employment contract had to be concluded in a written form, there was a set list of circumstances for conclusion of a fixed term contract, a

strictly regulated disciplinary procedure for disciplinary punishments, exact rules in case of redundancies, especially regarding dismissing of the employees, etc.). There were complaints that ECA 1992 does not correspond to the contemporary situation and does not take into account the needs of small and medium enterprises. The service branch was not covered by the ECA 1992 regulation.

ECA 2008 changed the situation. For the most part, the law contained no direct instructions how to construct an employment relation. Predominantly, it was left to the discretion of the employer to decide whether something was reasonable and whether any consideration would take into account the interests of both sides. One example to illustrate the situation: by ordering the additional work, an employer is mostly free to do this, if this is reasonable and takes into account interests of both sides. However, it remains unclear, exactly how the interests of both sides will be taken into account. In everyday practice, the employer will order completion of additional work and the employee has to follow the employer's order. It is difficult for an employee to prove, if the reasonable interest have been taken into account.²⁰

According to ECA 2008 § 47 Section 4, arranging of the working time is an obligation of an employer. An employer can change the system and rules regulating the working time unilaterally, if there is a need to do that. There is no obligation to inform an employee about the changes in working time before these changes will take effect. The mandatory information and consultation system will be applied only if the number of employees is more than 30. If the number of employees is under that threshold, no information and consultation has been foreseen.

One could argue that the working time is an obligatory part of employment contract and it should be agreed in an employment contract. In line with ECA 2008 it is not the case. According to §5 of ECA 2008, an employer can issue a unilateral written statement, where the employment conditions are laid down. Furthermore, if there is no written employment contract, an employer has to inform an employee about the employment conditions in a written form. It should be done before an employee starts to work. If it has not been done before the commencement of employment, it could also be done at a later stage, but only in case when an employee demands such documents. Consequently, there is a possibility, where the employee does not know what kind of system of working time will be applied (a part-time or a full time, whether there are any shifts and if there are the shifts, how many hours the shifts will last).

Although one can see that there is a flexibility in organising the working time, this kind of flexibility introduces more uncertainty into the labour relations. If an employee does not know, how many hours he or she should work and for how many hours he or she will be paid, it is confusing for an employee in many aspects, for example, when he or she wants to combine working and private life.

Another problem concerns the conclusion of an employment contract. Regarding the question about the conclusion of an employment contract the ECA 2008 is somewhat confusing. In order to apply the principle of flexicurity, it is necessary to guarantee that the conclusion of an employment contract should be as simple as possible. According to § 4 of the ECA 2008, it has been foreseen, that an employment contract should be prepared and concluded in a written form. This means that both sides will sign a document in which both parties' rights and obligations will be stated. At the same time, § 4, Section 2 of ECA 2008 states that the written form of the employment contract is not mandatory, i.e. even if there is no written employment contract, the employment contract still does exist, if an employee has started

with his or her work. So far the rules on conclusion of employment contract are clear. The situation will be complicated by applying § 5 of the ECA 2008. The § 5 of the ECA 2008 contains a rule, according to which an employer might not conclude a written employment contract, but it is considered to be sufficient, if an employer gives an unilateral declaration about the applicable employment conditions. There are no time limits, within which an employer has to present this kind of declaration. Only one condition is clear – if an employee demands such a declaration, employer has to present it within 14 calendar days. Consequently, it is quite possible that an employee can be employed without knowing what the conditions of the employment contract are.

The ECA 2008 makes the situation even more complicated. According to § 5 of the ECA 2008, an employer can change the employment contract conditions unilaterally and according to the ECA, an employer has to inform an employee about the changes within one month starting from the day the changes have been made.

A question arises – what is the importance of the written employment contract (§ 4 of the ECA 2008), if it is possible to avoid a written contract and to work under the unilateral declaration of the employer? These two opportunities are confusing and do not contribute to the flexibilisation of employment relations. The legislative power has to take decision how the employment contract will be concluded. It would be desirable that Estonia retains a written employment contract and omits the opportunity for an unilateral declaration by an employer.²¹ Application of verbal employment contract will worsen the position of an employee in the employment relations.

Another example of applying the principle of flexicurity is the rules on conclusion of fixed term employment contracts.²² Fixed term employment contracts have been seen as a tool to create more flexible labour relations, to guarantee more jobs, to give people opportunity to return to work, if they have been unemployed for a long time. Usually, in order to conclude a fixed term employment contracts, there should be a good reason to do that.²³

According to the ECA 2008, § 9 an employer has a right to conclude a fixed term contract, if it is justified by good reasons arising from the temporary fixed-term nature of the work. In such regulation, there is nothing strange and it is up to the employer to decide, if there are possibilities to conclude the fixed term employment contracts. Still, the fixed term employment contracts are not very common in Estonia. The ECA 2008 makes the fixed term employment contracts unattractive for employers due to the extraordinary termination of a fixed term contract. In order to terminate this type of the employment contract, an employer has to have a good reason for that. If there is a need to dismiss a fixed-term employee due to the lack of work, an employer has to pay an employee a compensation to an extent that corresponds to the wages that the employee would have been entitled to until the expiry of the contract term. Additionally, an employer has to pay one month's salary as a further compensation in case of redundancy. Obviously, the ECA 2008 makes the fixed term contract unexpectedly expensive for an employer and understandably, as a result, the employers in Estonia do not want to conclude the fixed term employment contracts. Again, it is clear that in this respect the idea of flexicurity in ECA 2008 has failed. Although a fixed-term contract could be a tool for shortening the unemployment, in Estonia this is not the case – on the contrary, it is advisable for employers in Estonia to avoid concluding fixed term employment contract.

3 Limitations to flexibility in labour relations?

The Estonian situation described above raises the question, whether there are some limits for flexibilisation? There is no concrete answer to that question. It is argued that labour law is a field of law that should protect an employee against the mistreatment by the employer. After analysing the concept of flexicurity, it becomes obvious that the limits of flexibility will be established by the Member States. This means that throughout the EU Member States the level of flexibility will be different and the employment conditions will still vary. At the same time, it is clear that the required protection in employment relationship is decreased to give room for flexibility. The consequences are quite dramatic – the labour law does not offer any protection to the employees. Employment relationship is like any other relationship of private law, based on the mutual consent without any additional special protection rules. One may ask, whether there is still a need for specific regulations of labour relations or in the time of flexicurity the labour law is something useless?

Of course, amendment must be made here – according to the understanding of the European Union, the concept of flexible employment conditions should denote the flexibility in a broader sense. This involves different innovative forms of employment like tele-work, part-time work, etc. It is the responsibility of the Member States to introduce the concept of flexicurity and to choose the methods, how the flexibility of labour relations will be introduced and to what extent it will be applied.

According to OECD index, the protective measures in Estonian labour law were quite high.²⁴ The research that was implemented by the Estonian Employers Association has shown that the flexibility of labour relations is not very high. It is not common to use part-time work; tele-work is not very widespread. It was also indicated that the administrative obligations of the employers are too high (e.g., it was necessary to approve the internal rules of work with labour inspectorate, to get a consent before dismissing the employees' representative or a pregnant worker, to formulate the termination of employment contract in a written form). All those aspects were viewed as obstacles in a way of guaranteeing normal, flexible employment relations. Since 2008 Estonia has the new Employment Contracts Act whereby all these aspects are not any longer applied. One can say – at least on level of law there is the flexibilisation of employment relations, but in practice both employers and employees are careful and they do not rapidly adapt the new ways and methods that the new ECA 2008 could guarantee.

ECA 2008 also has changed the situation of termination of an employment contract to a certain extent. Although the dismissal of an employee due to the redundancy has been made easier for employer, there is an opportunity for wrong dismissal. While there are priority rules for dismissal and rules stipulating the period of notice, it is still possible for an employer to dismiss an employee wrongfully. According to ECA 2008 § 107, Section 2, in case of a dispute about wrongful termination of an employment contract, it is possible to terminate the employment contract by decision of court, if at least one of the parties intends to do so. This means that even in case of a wrongful dismissal an employee will lose his or her job in any case. Although there is an opportunity to obtain a compensation from employer, the amount of the compensation will be determined by the court. In order to avoid a dismissal due to the redundancy, employees often use an opportunity to be dismissed due to the cause that the employer has violated employment conditions or has discriminated an employee.²⁵ When resigning on this basis, an employee has to give a notice five days in advance and the employer has to pay a compensation

equalling three months' average salary. It means that the idea of flexicurity has brought about a situation, when the employees are giving up their job easier in order to receive a higher compensation from employer and to avoid "useless" dismissals due to the redundancy.

There could be a view that the employees have obtained new rights (too extensive flexibility), however, it could be questionable. The § 38 of the ECA 2008 could be provided as an example. According to this rule, an employee can leave his or her place of work temporarily due to personal reasons, and the employer has an obligation to pay the average wage for a reasonable period of time. In this case a particular emphasis should be placed on the fact that an employer is not allowed to inquire into the nature of the personal reasons, however, an employer has a right to decide, if he or she will pay the average salary and for what period of time.

Flexibility of employment conditions in ECA 2008 has a further negative side. It can be admitted that the level of pregnant workers' protection has decreased. According to the ECA 1992, an employer had to respect the prohibition to dismiss a pregnant employee. Even if the employer did not know about the pregnancy, still the termination of an employment contract was null and void. ECA 2008 does not forbid the redundancy of a pregnant worker. It is the task of a pregnant employee herself to take care of the protection against the dismissal. According to the § 93 of the ECA 2008, a pregnant employee is protected only if she presents a doctoral certification within 14 calendar days from the date when she has received the dismissal notification. If this is not the case, the redundancy is legal. There are some doubts, if such regulation is in conformity with European and international standards on protection of maternity, but so far the Estonian government is not in hurry to change the relevant legislation.

Summary

As the situation in Estonia demonstrates, the idea of flexicurity is misunderstood and it could also be the case that the flexicurity could be misused in order to introduce flexible employment conditions. Although Estonia attempted to be one of the first Member States to apply the principle of flexicurity, the principle of flexicurity has never been implemented in Estonia. Today it could be stated that Estonia is most probably the first Member State of the European Union that has abandoned the principle of flexicurity for ever. Estonia has applied only one component of flexicurity – flexible labour relations. It is obvious that the concept of flexicurity could be used for any reform of labour relations. At the same time, nobody uses the notion of flexicurity for amendments in social security law. According to the case of Estonia, it can be concluded that even the application of flexible labour relations could be confusing, because both parties to the employment contracts could lose the faith in legislation and in judicial procedure.

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- ³ Employment Contract Act – Riigi Teataja (State Gazette) 2009, 5, 35. English version available: <http://www.legaltext.ee> [last viewed 29.06.2014].
- ⁴ e.g. *Hendrickx, F.* (ed). Flexicurity and the Lisbon Agenda: a Cross-disciplinary Reflection. Intersentia 2008, ISBN 978-90-5095-803-5. Also important: *Rojot, J.* Security of Employment and Employability: in Blanpain, R. Collective Labour Law and Industrial Relations in Industrialized Market Economies, IX ed., Kluwer, 2007, pp. 439-461, ISBN 978-90-411-2612-2. Also Green Paper Modernising Labour Law to Meet the Challenges of the 21st Century. Available: http://ec.europa.eu/employment_social/labour_law/answers/documents/4_93_en.pdf [last viewed 29.06.2012].
- ⁵ *Ilsoe, A.* The Danish flexicurity model – a lesson for the US: in *Hendrickx, F.* (ed). Flexicurity and the Lisbon Agenda: a cross-disciplinary Reflection. Intersentia 2008, pp. 65-99, ISBN 978-90-5095-803-5.
- ⁶ In some cases it has been stated that also the Netherlands could be an example of flexicurity e.g. *Wilthagen, T. Bekker, S.* Flexicurity: is Europe right on track? *Hendrickx, F.* (ed). Flexicurity and the Lisbon Agenda: a cross-disciplinary Reflection. Intersentia 2008, pp. 33-47, ISBN 978-90-5095-803-5. See also Flexicurity: Actions at Company level. European Foundation for the Improvement of Living and Working Conditions, 2012, p. 7, ISBN 978-92-897-1069-5.
- ⁷ The second phase of flexicurity: an analysis of practices and policies in the Member States. European Foundation for the Improvement of Living and Working Conditions, 2012, p. 14-15, ISBN 978-92-897-1069-5.
- ⁸ Op. cit. pp. 14-15.
- ⁹ *Wilthagen, T. Bekker, S.* Flexicurity: is Europe right on track? *Hendrickx, F.* (ed). Flexicurity and the Lisbon Agenda: a cross-disciplinary Reflection. Intersentia 2008, pp. 33-47, ISBN 978-90-5095-803-5. This kind of explanation does not help to understand the idea of flexicurity. As one can see this kind of definition is more than a tautology.
- ¹⁰ *Ibid.*
- ¹¹ *Ibid.*
- ¹² The new strategy of EU 2020 dos not only deal with “inside of the sate free movement”, but also it has stressed, the flexicurity could help to encourage the inter-state movement. Europe 2020: A Strategy for smart, sustainable and inclusive growth. Communication from the Commission. Brussels 3.3.2012, COM (2010) 2020 final. P. 16.
- ¹³ As it has been shown by different studies, the employee representatives appear to have relatively little concrete involvement in applying the principle of flexicurity, especially when applying the measures for training elderly people and unemployed persons. *S.* Flexicurity: Actions at Company level. European Foundation for the Improvement of Living and Working Conditions, 2012, p. 69-71.
- ¹⁴ See also *Muda, M.* Estonian Labour Law Reform: The Successful Implementation of the Idea of Flexicurity? The International Journal of Comparative Labour Law and Industrial Relations 26, No 3, 2010, pp. 347-366. ISSN 0952-617 x.
- ¹⁵ *Anspal, S., Jürgenson, A.* Töölepingu seaduse halduskoormuse hindamine. Praxis, 2006 (The Analyses of administrative intensity in Employment Contracts Act). Available in Estonian: http://www.sm.ee/fileadmin/meedia/Dokumendid/Toovaldkond/uuringud/TLS_halduskoormus_uuring_2006.pdf [last viewed 30.06.2014].
- ¹⁶ According to the Unemployment Insurance Act it was foreseen, the unemployed will get 50% from his or her previous income during 1-100 days of unemployment and 40% since 101 day till 360 days. It was agreed to raise the level of benefits 75% form the previous earnings during the first 100 days of unemployment and 50 % since 101 day.
- ¹⁷ At the same time, trade unions had an opinion according to which it is not possible to implement ECA2008 without any changes in unemployment insurance. In April 2012 Parliament – *Riigikogu* – adopted a law which abolished all the planned amendments in unemployment insurance scheme. This means, that the idea of flexicurity has been forgotten in Estonia forever. It was only used in order to find a justification for intensive flexibilisation of labour relations in Estonia. See also Declaration of Estonian Confederation of Trade Unions, 17.05.2012 Available in Estonian: <http://www.eakl.ee/?pid=75&nid=476&lang=5> [last viewed, 29.06.2014].

- ¹⁸ See e.g. for Germany: *Preis, U. Innovative Arbeitsformen: Flexibilisierung von Arbeitszeit, Arbeit-sentgelt, Arbeitsorganisation*. Dr. Otto Schmidt, Köln, 2005, ISBN 3-504-42041-3.
- ¹⁹ About the dismissal protection, see *Rebhahn, R. Future Perspectives on Dismissal Protection in the European Union*. Presentation on Labour Law Research Network Conference 2013. Available: <http://www.upf.edu/gredtiss/en/LLRN/conference.html> [last viewed 30.06.2013].
- ²⁰ On 01.04.2013 the new Public Service Act in Estonia came into force. With this act Estonia tried to apply the principle of flexicurity also in public service. The idea was to regulate public service closer to the regulation of employment contract. This means that the reasonable interests should also be taken into account by officials if there is need to order the overtime work.
- ²¹ If one looks into everyday praxis of applying the ECA 2008, the one of the major problem is the non-written employment contracts. Neli aastat tööleppest: suurimaid probleeme tekitab suuline tööleping (Four Years of Employment Contract: Main Problems Connected with Verbal Agreement). Available in Estonian: <http://www.eakl.ee/?pid=75&nid=472&lang=5> [last viewed 29.06.2014].
- ²² See also *Muda, M. Turvaline paindlikkus uues töölepingu seaduses (Flexicurity in the New Contract of Employment Act)*. *Juridica* 2012, IV pp. 295-304, ISSN 1406-1074 (in Estonian).
- ²³ See eg.: *Dütz, W., Thüsing, G. Arbeitsrecht*. 16. Auflage, Beck, 2011, pp. 165-170, ISBN 978-3-406-62495-7.
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